JUDGMENT OF THE COURT (Sixth Chamber)
28 October 1999 *

In Case C-81/98,

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

Alcatel Austria AG and Others,

Siemens AG Österreich,

Sag-Schrack Anlagentechnik AG

and

Bundesministerium für Wissenschaft und Verkehr

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

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn (Rapporteur), acting as President of the Chamber, G. Hirsch and H. Ragnemalm, Judges,

Advocate General: J. Mischo,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Alcatel Austria AG and Others, by S. Köck and M. Oder, Rechtsanwälte, Vienna,

— Siemens AG Österreich, by M. Breitenfeld, Rechtsanwalt, Vienna,

— Bundesministerium für Wissenschaft und Verkehr, by W. Peschorn, Oberkommissär in the Finanzprokuratur,

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

— the Commission of the European Communities, by M. Nolin and B. Brandtner, of its Legal Service, acting as Agents, with R. Roniger, of the Brussels Bar,

— the EFTA Surveillance Authority, by H. Óttarsdóttir, Officer, Legal and Executive Affairs, EFTA Surveillance Authority, and T. Thomassen, Senior Officer, Goods Directorate, EFTA Surveillance Authority, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Siemens AG Österreich, represented by M. Breitenfeld, of the Bundesministerium für Wissenschaft und Verkehr, represented by W. Peschorn, of the Austrian Government, represented by M. Fruhmann of the Federal Chancellor's Office, acting as Agent, of the German Government, represented by W.-D. Plessing, Ministerialrat in the Federal Ministry of Finance, acting as Agent, of the United Kingdom Government, represented by M. Hoskins, Barrister, and of the Commission, represented by R. Roniger, at the hearing on 28 April 1999,

after hearing the Opinion of the Advocate General at the sitting on 10 June 1999,

gives the following

Judgment

1 By order of 3 March 1998, received at the Court on 25 March 1998, the Bundesvergabeamt (Federal Procurement Office) referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

2 The questions arose in a dispute between Alcatel Austria AG and Others, Siemens AG Österreich and Sag-Schrack Anlagentechnik AG on the one hand and the

Bundesministerium für Wissenschaft und Verkehr (Federal Ministry of Science and Transport, 'the Bundesministerium') on the other concerning the award of a public supply and works contract.

Legal background

Community law

3 Article 1 of Directive 89/665 provides:

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

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

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any

person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

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

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

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

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

(c) ...'.

5 Article 2(6) of Directive 89/665 states:

'The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

Austrian law

6 In Austria public procurement is governed, with regard to the Federal State, by the Bundesvergabegesetz (Federal Procurement Law, BGBl. No 462/1993, 'the BVergG'), in the version prior to the 1997 amendments (BGBl. No 776/1996).

7 Paragraph 9, point 14, thereof defines the award as the declaration made to the tenderer, accepting his tender.

8 Under Paragraph 41(1), the contractual relationship between the authority and the tenderer comes into being, within the period allowed for making the award, when the tenderer receives notification of the acceptance of his offer.

9 Under Paragraph 91(2), the Bundesvergabeamt may, up to the time the award is made, adopt interim measures and set aside unlawful decisions of the awarding department of the contracting authority for the purpose of removing infringements of the BVergG and of the regulations made thereunder.

10 Paragraph 91(3) provides that, once the contract has been awarded, the Bundesvergabeamt has power to determine that as a result of an infringement of the BVergG or of the regulations made thereunder the award was not made to the tenderer making the best offer.

11 Paragraph 94 provides *inter alia*:

'1. The Bundesvergabeamt must set aside by way of a decision, taking into account the opinion of the Conciliation Committee in the case, any decision of the contracting authority in an award procedure which

(1) is contrary to the provisions of this Federal Law or its implementing regulations and

(2) significantly affects the outcome of the award procedure.

...'.

Facts

12 On 23 May 1996, the Bundesministerium published an invitation to tender for the supply, installation and demonstration of all the hardware and software components of an electronic system for automatic data transmission to be installed on Austrian motorways.

13 The invitation to tender was issued in accordance with the open procedure provided for in Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

14 On 5 September 1996 the contract in question was awarded to Kapsch AG and it was signed on the same day. The other tenderers, who learned of the contract through the press, applied between 10 and 22 September 1996 to the Bundesvergabeamt for review.

15 On 18 September 1996, the Bundesvergabeamt dismissed the applications for interim measures to suspend performance of the contract on the ground that, pursuant to Paragraph 91(2) of the BVergG, once an award is made it no longer has power to make interim orders. A complaint was lodged against that decision with the Verfassungsgerichtshof (Constitutional Court).

16 Pursuant to Paragraph 91(3) of the BVergG, the Bundesvergabeamt determined, by decision of 4 April 1997, that various breaches of the BVergG had occurred and brought the review procedure to an end.

17 The decision of the Bundesvergabeamt of 18 September 1996 was set aside by the Verfassungsgerichtshof.

18 In view of that judgment, the Bundesvergabeamt reopened the procedure terminated on 4 April 1997 in order to examine the merits, and on 18 August 1997 made an order provisionally prohibiting the contracting authority from further performance of the contract concluded on 5 September 1996.

19 The Republic of Austria lodged a complaint against that order before the Verfassungsgerichtshof which, by order of 10 October 1997, gave suspensive effect to the complaint, with the result that the interim measure adopted by the Bundesvergabeamt on 18 August 1997 was provisionally inoperative.

20 In its order for reference, the Bundesvergabeamt states that the BVergG does not deal separately with the public law and private law aspects in the procedure for the award of contracts. Rather, the contracting authority participates in the procedure exclusively as a bearer of private rights, which means that the State as contracting authority employs the rules, forms and methods of civil law. Under Paragraph 41(1) of the BVergG, the contractual relationship between the authority and the tenderer comes into being, within the period allowed for making the award, when the tenderer receives notification of the acceptance of his offer.

21 Consequently, the national court states, the award and the conclusion of the contract in Austria do not as a rule formally occur at the same time. The decision of the contracting authority as to the party with whom it wishes to contract is normally made before it is incorporated in writing, and the decision on its own is not sufficient to create the contract, since the tenderer must at the very least receive notice of that decision; in practice, however, the contracting authority's decision as to whom to award the contract is one taken internally without, under Austrian law, any public manifestation thereof. Accordingly, from the outsider's

point of view the declaration of the award and the conclusion of the contract occur together, since, as a rule, the outsider does not have and cannot have, at any rate legally, any knowledge of the internal decision of the contracting authority. The award decision itself, that is to say the decision of the contracting authority as to the party with whom it wishes to contract, is not open to challenge. The point in time at which the award is made is of decisive importance for the review procedure before the Bundesvergabeamt.

22 The national court states that under Paragraph 91(2) of the BVergG the Bundesvergabeamt has power up to the time the award is made to adopt interim measures and to set aside unlawful decisions of the awarding department of the contracting authority for the purpose of removing infringements of the BVergG and of the regulations made thereunder. After the award has been made, it merely has power to determine that as a result of an infringement of the BVergG or of the regulations made thereunder the award was not made to the tenderer making the best offer. In the case of culpable infringement of the BVergG by agents of an awarding body, Paragraph 98(1) thereof provides that compensation is payable to the unsuccessful candidate or tenderer by the contracting authority to which the conduct of those agents is attributable.

23 Lastly, the national court notes that, under Paragraph 102(2) of the BVergG, a claim for compensation before the ordinary courts in such a case is admissible only if there has been a prior determination by the Bundesvergabeamt within the meaning of Paragraph 91(3). Irrespective of Paragraph 91(3), the courts and the parties to the procedure before the Bundesvergabeamt are bound by that determination. It is evident from the structure of the review procedure that, in respect of the area covered by the BVergG, the Austrian federal legislature has opted under Article 2(6) of Directive 89/665/EEC to limit the remedy to an award of damages.

Questions referred for a preliminary ruling

24 In those circumstances, the Bundesvergabeamt decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. When implementing Directive 89/665/EEC, are Member States required by Article 2(6) thereof to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which, in the light of the procedure's results, it will conclude the contract (i.e. the award decision) is in any event open to a procedure whereby an applicant may have that decision annulled if the relevant conditions are met, notwithstanding the possibility once the contract has been concluded of restricting the legal effects of the review procedure to an award of damages?

2. If Question 1 is answered in the affirmative:

Is the obligation described in Question 1 sufficiently clear and precise to confer on individuals the right to a review corresponding to the requirements of Article 1 of Directive 89/665/EEC, in which the national court must in any event be able to adopt interim measures within the meaning of Article 2(1)(a) and (b) of that directive and to annul the contracting authority's award decision, and the right to rely in proceedings on that obligation as against a Member State?

3. If Question 2 is answered in the affirmative:

Is the obligation described under Question 1 also sufficiently clear and precise to mean that in such a procedure the national court must disregard contrary provisions of national law which would prevent the court from fulfilling that obligation, and must fulfil that obligation directly as part of Community law even if national law lacks any basis on which to act?'

Admissibility

25 The Bundesministerium and the Austrian Government contend that, in so far as the contract has already been performed in its entirety, there is in reality no longer a dispute in the main proceedings. The answer to the questions raised will therefore be irrelevant, since the applicants in the main proceedings can only obtain damages at this stage, the award of which is in any case provided for under the BVergG.

26 Although the Commission has expressed doubts as to the admissibility of the questions referred to the Court, it considers that a ruling by the Court could have an effect on subsequent developments in the main case, in particular because the level of any damages payable to the applicants in the main proceedings could be affected by the answer to the questions raised, and that the answer to the first question could mean that the contract or the award decision must be set aside, which would then make it necessary to deal with the second and third questions.

27 In the order for reference, the national court stated that, under domestic law, the question arose whether it was entitled or even required under Community law to set aside its decision of 4 April 1997 terminating the first award procedure on the ground that the contract had not been awarded to the tenderer which had made the best offer. In the light of that procedural issue, the questions referred to the Court for a preliminary ruling would remain pertinent even if the award procedure in question had in the meantime been settled.

28 In the circumstances, it must be held that as the answer to the questions raised may affect the outcome of the dispute in the main proceedings the questions are admissible.

First question

29 By its first question, the national court is asking essentially whether the combined provisions of Article 2(1)(a) and (b) and the second subparagraph of Article 2(6) of Directive 89/665 must be interpreted as meaning that the Member States are required to ensure that the contracting authority's decision, prior to the conclusion of the contract, as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, regardless of the possibility, once the contract has been concluded, of obtaining an award of damages.

30 Article 2(1) of Directive 89/665 lists the measures to be taken concerning the review procedures which the Member States must make available in national law. According to Article 2(1)(a), they must include provision for the adoption of interim measures by way of interlocutory procedures. Article 2(1)(b) refers to the possibility of setting aside or ensuring the setting aside of decisions taken unlawfully, and Article 2(1)(c) concerns the award of damages.

31 It is common ground that Article 2(1)(b) of Directive 89/665 does not define the decisions taken unlawfully which a party may ask to have set aside. The Community legislature confined itself to stating that such decisions include those containing discriminatory technical, economic or financial specifications in the documents relating to the contract award procedure in question.

32 Nothing in Article 2(1)(b) of Directive 89/665 indicates that an unlawful decision awarding a public contract does not fall within the category of decisions taken unlawfully in respect of which application may be made to have them set aside.

33 As is clear from the first and second recitals in the preamble to Directive 89/665, the directive reinforces existing arrangements at both national and Community level for ensuring effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified (Case C-433/93 *Commission* v *Germany* [1995] ECR I-2303, paragraph 23).

34 In that regard, Article 1(1) of Directive 89/665 requires the Member States to establish effective review procedures that are as rapid as possible to ensure compliance with Community directives on public procurement.

35 It is clear from that provision that the subject-matter of those review procedures will be decisions taken by the contracting authorities, on the ground that they infringe Community law on public procurement or the national rules transposing it; the provision does not, however, lay down any restriction with regard to the nature and content of those decisions.

36 The Bundesministerium and the Austrian Government contend, essentially, that the organisation of the procedure before the Bundesvergabeamt, whereby once a contract has been concluded the decision of a contracting authority may be challenged only in so far as the unlawful nature of the decision has resulted in damage to the party seeking review in national proceedings, and whereby the procedure is to be limited to easing the conditions for the award of damages by the ordinary courts, complies with Article 2(6) of Directive 89/665.

37 As the Advocate General observed in points 36 and 37 of his Opinion, it is clear from the actual wording of Article 2(6) of Directive 89/665 that the limitation of review procedures provided for therein applies only after the conclusion of the contract following the awarding decision. Directive 89/665 thus draws a distinction between the stage prior to the conclusion of the contract, to which Article 2(1) applies, and the stage subsequent to its conclusion, in respect of which a Member State may, according to the second subparagraph of Article 2(6), provide that the powers of the body responsible for the review procedures are to be limited to awarding damages to any person harmed by an infringement.

38 Moreover, the interpretation proposed by the Bundesministerium and the Austrian Government might lead to the systematic removal of the most important decision of the contracting authority, that is to say the award of the contract, from the purview of the measures which, under Article 2(1) of Directive 89/665, must be taken concerning the review procedures referred to in Article 1, thereby undermining the purpose of Directive 89/665 which, as noted in paragraph 34 of this judgment, is to establish effective and rapid procedures to review unlawful decisions of the contracting authority at a stage where infringements may still be rectified.

39 The Austrian Government also contends that if Directive 89/665 must be interpreted as drawing a distinction between the decision awarding a contract

and the conclusion of that contract, the directive fails to specify in any way what time should elapse between the two stages. The United Kingdom Government indicated at the hearing that no time should be fixed since there are different types of award procedure.

40 The argument based on the lack of an intervening period between the decision awarding a contract and the conclusion of the contract is irrelevant. The fact that there is no express provision in that connection cannot justify interpreting Directive 89/665 in such a way as to remove decisions awarding public contracts systematically from the purview of the measures which, according to Article 2(1) of Directive 89/665, must be taken concerning the review procedures referred to in Article 1.

41 With regard to the time which must elapse between the decision awarding a contract and its conclusion, the United Kingdom Government also states that no such time is specified in Directive 93/36 and that the directive's provisions, as Articles 7, 9 and 10 thereof show, are exhaustive.

42 All that need be stated in that regard, as the Advocate General noted in points 70 and 71 of his Opinion, is that those provisions correspond to the equivalent provisions in the directives which preceded Directive 89/665, the first recital in the preamble to which states that they 'do not contain any specific provision ensuring their effective application'.

43 It follows from those considerations that the combined provisions of Article 2(1)(a) and (b) and the second subparagraph of Article 2(6) of Directive 89/665 are to be interpreted as meaning that the Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the

possibility, once the contract has been concluded, of obtaining an award of damages.

Second and third questions

44 By its second and third questions, which may be examined together, the national court is asking essentially whether Article 2(1)(a) and (b) of Directive 89/665 must be interpreted to the effect that, where that provision has not been fully transposed into national law, the bodies in the Member States having power to review public procurement procedures may also hear applications under the conditions laid down in that provision.

45 Paragraph 91(2) of the BVergG provides that the Bundesvergabeamt may examine the legality of award procedures and decisions within the ambit of the BVergG; the national legislature has thereby fulfilled its obligation to make provision for review, as the Advocate General observed at point 90 of his Opinion.

46 However, as the national court indicated in its order (see paragraphs 20 to 22 of this judgment), the contracting authority's decision as to whom to award the contract is one taken internally without, under Austrian law, any public manifestation thereof.

47 The explanations given in the order for reference show that the State, as contracting authority, employs the rules, forms and methods of civil law in the award procedure, so that the award of a public contract is effected by the conclusion of a contract between that authority and the tenderer.

48 Since the announcement of the award of a contract and its conclusion in practice occur together, in such a system there is no administrative law measure of which the persons concerned can acquire knowledge and which may be the subject of an application to have it set aside as provided for in Article 2(1)(b).

49 In such circumstances, where it is doubtful that the national court is in a position to give effect to the right of individuals to obtain review in matters concerning public procurement under the conditions set out in Directive 89/665, in particular Article 2(1)(a) and (b), it is useful to recall that, if national provisions cannot be interpreted in a manner consistent with Directive 89/665, those concerned may seek compensation, under the appropriate procedures in national law, for the damage suffered by reason of the failure to transpose a directive within the prescribed period (see, in particular, Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845).

50 Consequently, the answer to the second and third questions must be that Article 2(1)(a) and (b) of Directive 89/665 cannot be interpreted to the effect that, even where there is no award decision which may be the subject of an application to have it set aside, the bodies in the Member States having power to review public procurement procedures may hear applications under the conditions laid down in that provision.

Costs

51 The costs incurred by the Austrian, German and United Kingdom Governments, by the Commission of the European Communities and by the EFTA Surveillance Authority, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 3 March 1998, hereby rules:

1. **The combined provisions of Article 2(1)(a) and (b) and the second subparagraph of Article 2(6) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts must be interpreted as meaning that the Member States are required to ensure that the contracting authority's**

decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages.

2. Article 2(1)(a) and (b) of Directive 89/665 cannot be interpreted to the effect that, even where there is no award decision which may be the subject of an application to have it set aside, the bodies in the Member States having power to review public procurement procedures may hear applications under the conditions laid down in that provision.

Kapteyn Hirsch Ragnemalm

Delivered in open court in Luxembourg on 28 October 1999.

R. Grass — Registrar

J.C. Moitinho de Almeida — President of the Sixth Chamber