JUDGMENT OF THE COURT (Sixth Chamber)

19 June 2003 *

In Case C-315/01,

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

Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT)

and

Österreichische Autobahnen und Schnellstraßen AG (ÖSAG),

on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), and of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1),

* Language of the case: German.

THE COURT (Sixth Chamber),

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

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT), by S. Korn, Universitätsassistent,

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

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

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 10 October 2002,

gives the following

Judgment

1 By order of 11 July 2001, received at the Court on 13 August 2001, the Bundesvergabeamt (Federal Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) ('Directive 89/665'), and of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

2 Those questions were raised in proceedings between Gesellschaft für Abfallentsorgungs-Technik GmbH ('GAT') and Österreichische Autobahnen und Schnellstraßen AG ('ÖSAG') concerning the award of a public supply contract for which GAT had tendered.

Legal context

Community provisions

Directive 89/665

3 Article 1 of Directive 89/665 provides:

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

...

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

4 Article 2 provides:

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

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

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

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

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

...

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

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

...

8. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [234] of [the Treaty] and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

Directive 93/36

5 Article 15(1) of Directive 93/36, which forms part of Chapter 1 (Common rules on participation) of Title IV, provides:

'Contracts shall be awarded on the basis of the criteria laid down in Chapter 3 of this Title, taking into account Article 16, after the suitability of the suppliers not excluded under Article 20 has been checked by the contracting authorities in accordance with the criteria of economic and financial standing and of technical capacity referred to in Articles 22, 23 and 24.'

6 Article 23, which forms part of Chapter 2 (Criteria for qualitative selection) of Title IV, provides:

'1. Evidence of the supplier's technical capacity may be furnished by one or more of the following means according to the nature, quantity and purpose of the products to be supplied:

(a) a list of the principal deliveries effected in the past three years, with the sums, dates and recipients, public or private, involved:

— where effected to public authorities, evidence to be in the form of certificates issued or countersigned by the competent authority;

— where effected to private purchasers, delivery to be certified by the purchaser or, failing this, simply declared by the supplier to have been effected;

...

(d) samples, descriptions and/or photographs of the products to be supplied, the authenticity of which must be certified if the contracting authority so requests;

...'.

7 Article 26, which forms part of Chapter 3 (Criteria for the award of contracts) of Title IV, states:

'1. The criteria on which the contracting authority shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when award is made to the most economically advantageous tender, various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

...'.

National legislation

8 Directives 89/665 and 93/36 were transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Public Procurement Law, BGBl. I, 1997/56, 'the BVergG').

9 Paragraph 113 of the BVergG sets out the powers of the Bundesvergabeamt. It provides:

'1. The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the following provisions.

2. To preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:

(1) to adopt interim measures and

(2) to set aside unlawful decisions of the contracting authority.

3. After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer....'

10 Paragraph 115(1) and (5) of the BVergG provides:

'1. Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement.

...

5. The application shall contain:

(1) an exact designation of the contract award procedure concerned and of the contested decision,

...'.

11 Under Paragraph 117(1) and (3) of the BVergG:

'1. The Bundesvergabeamt shall set aside, by way of administrative decision, taking into account the opinion of the Conciliation Committee in the case, any decision of the contracting authority in an award procedure where the decision in question:

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

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

...

3. After the award of the contract, the Bundesvergabeamt shall, in accordance with the conditions of subparagraph 1, determine only whether the alleged illegality exists or not.'

12 Paragraph 122(1) of the BVergG provides that 'in the event of a culpable breach of the Federal Law or its implementing rules by the organs of an awarding body, an unsuccessful candidate or tenderer may bring a claim against the contracting authority to which the conduct of the organs of the awarding body is attributable for reimbursement of the costs incurred in drawing up its bid and other costs borne as a result of its participation in the tendering procedure'.

13 Under Paragraph 125(2) of the BVergG a claim for damages, which must be brought before the civil courts, is admissible only if the Bundevergabeamt has made a declaration under Paragraph 113(3). The civil court called upon to hear the claim for damages, and the parties to the proceedings before the Bundesvergabeamt, are bound by that declaration.

14 Pursuant to Paragraph 2(2)(c), point 40a, of the Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 1991 (Introductory Law to the Laws on Administrative Procedure, BGBl. 1991/50), the Allgemeines Verwaltungsverfahrensgesetz 1991 (General Law on Administrative Procedure, BGBl, 1991/51, hereinafter 'the AVG') applies to the administrative procedure adopted by the Bundesvergabeamt.

15 Paragraph 39(1) and (2) of the AVG, in the version applicable to the main proceedings, provides:

'1. The evaluation procedure shall be governed by the provisions of administrative law.

2. In so far as those provisions do not cover a matter, the authority shall proceed *ex proprio motu* and shall determine the procedure for the evaluation, subject to the provisions contained in this Part...'.

The main proceedings and the questions referred for a preliminary ruling

16 On 2 March 2000 ÖSAG, represented by the Autobahnmeisterei (the Motorway Authority) for Sankt Michael/Lungau, issued an invitation to tender for the supply of a 'special motor vehicle: new, ready-to-use and officially approved road sweeper for the A9 Phyrn motorway, delivery to the motorway authority for Kalwang', in an open European procedure.

17 The five tenders submitted were opened on 25 April 2000. GAT had submitted a tender at a price of ATS 3 547 020 excluding VAT. The tender submitted by the firm ÖAF & Steyr Nutzfahrzeuge OHG was ATS 4 174 290 net; that of another tenderer was ATS 4 168 690, excluding VAT.

18 As regards the evaluation of the tenders, Point B.1.13 of the invitation to tender provided:

'B.1.13 Tender evaluation

The determination of which tender is technically and economically the most advantageous shall be made in accordance with the best tenderer principle. It is a fundamental condition that the vehicles tendered satisfy the conditions in the invitation to tender.

The evaluation shall be carried out as follows:

Tenders shall be evaluated in each case by reference to the best tenderer and points shall be calculated relative to the best tenderer.

...

(2) Other criteria:

A maximum of 100 points shall be awarded for other criteria, and shall count for 20% of the overall evaluation.

2.1 Reference list of road sweeper vehicle customers in the geographical area comprising the part of the Alps within the European Union (references to be provided in German): weighting 20 points.

Evaluation formula

The highest number of customers divided by the next highest number and multiplied by 20 points.'

19 On 16 May 2000, ÖSAG eliminated GAT's tender on the ground that that tender did not comply with the conditions in the invitation to tender inasmuch as the pavement cleaning machine tendered could be operated only down to temperatures of 0 °C, whereas the invitation to tender had required a minimum operating temperature of -5 °C. In addition, despite a request by the contracting authority, the applicant had not arranged for the machine to be available for inspection within a 300 kilometre radius of the authority issuing the invitation to tender, as required therein. Furthermore, ÖSAG doubted that the price in GAT's tender was plausible. Finally, despite requests by the ÖSAG, GAT had not provided a sufficient explanation of the technical specifications concerning cleaning of the reflectors on the machine it had tendered.

20 In accordance with the award proposal of 31 July 2000, ÖAF & Steyr Nutzfahrzeuge OHG was awarded the contract by letter of 23 August 2000. By letter of 12 July 2000, the other tenderers were notified that a decision had been taken regarding the recipient of the award. GAT had been informed by letter of 17 July 2000 that its tender had been eliminated, and by letter of 5 October 2000 it was notified of the identity of the recipient of the award and the contract price.

21 On 17 November 2000 GAT sought a review by the Bundesvergabeamt and a declaration that the award in the contract award procedure had not been made to the best tenderer, claiming that its tender had been eliminated unlawfully. The technical description included in its tender of the reflector cleaning had been sufficient for an expert. In addition, it had invited ÖSAG to visit its supplier's factory. GAT also contended that the award condition consisting of 'the opportunity to inspect the subject of the invitation to tender within a 300 kilometre radius of the authority issuing the invitation to tender' contravened Community law because it constituted indirect discrimination. ÖSAG should have accepted any corresponding product in Europe. In addition, GAT argued, that criterion could be used only as an award criterion and not — as the contracting authority had subsequently wrongly used it — as a selection criterion. It was true that the basic version of the road sweeper GAT had tendered could be used only at temperatures down to 0 °C. However, ÖSAG had reserved the right to purchase an additional option. The additional option tendered by GAT could operate at -5 °C, as required in the invitation to tender.

Finally, the price of GAT's tender was certainly not implausible. On the contrary, GAT was able to give ÖSAG an adequate explanation as to why its price was so favourable.

22 As the Bundesvergabeamt considered that an interpretation of several provisions of Community law was required in order to enable it to give a decision in the case before it, it decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1 (a) Is Article 2(8) of Directive 89/665, or any other provision of that directive or any other provision of Community law, to be interpreted as meaning that an authority responsible for carrying out review procedures within the meaning of Article 1(1) of that directive, including the exercise of the powers referred to in Article 2(1)(c) thereof, is precluded from taking into account, of its own motion and independently of the submissions of the parties to the review procedure, those circumstances relevant under the law governing contract award procedures which the authority responsible for carrying out review procedures considers material to its decision in a review procedure?

(b) Is Article 2(1)(c) of Directive 89/665, if necessary considered in conjunction with other principles of Community law, to be interpreted as meaning that an authority responsible for carrying out review procedures within the meaning of Article 1(1) of that directive, including the exercise of the powers referred to in Article 2(1)(c) thereof, is precluded from dismissing an application by a tenderer that is indirectly aimed at obtaining damages, where the contract award procedure is already vitiated by a substantive legal defect attributable to a decision taken by the contracting authority, other than the decision being contested by that tenderer, on the ground that if the contested decision had not been taken the tenderer would none the less have been harmed for other reasons?

2 If Question 1(a) is answered in the negative: Is Directive 93/36, in particular Articles 15 to 26 thereof, to be interpreted as prohibiting a public contracting authority conducting contract award procedures from taking account of references relating to the products offered by tenderers not as proof of the tenderers' suitability but to satisfy an award criterion, such that the fact that those references are given a negative evaluation would not exclude the tenderer from the contract award procedure but would merely result in the tender receiving a lower evaluation, for example under a points system in which poor evaluation of references might be offset by a lower price?

3 If Questions 1(a) and 2 are answered in the negative: Is it compatible with the relevant provisions of Community law, including Article 26 of Directive 93/36, the principle of equal treatment and the obligations of the Communities under public international law for an award criterion to provide that product references are to be evaluated on the basis of the number of references alone, there being no substantive examination as to whether contracting authorities' experiences of the product have been good or bad, and, moreover, that only references from the geographical area comprising the part of the Alps within the European Union are to be taken into account?

4 Is it compatible with Community law, in particular the principle of equal treatment, for an award criterion to permit opportunities to inspect examples of the subject of the invitation to tender to receive a positive evaluation only if available within a 300 kilometre radius of the authority issuing the invitation to tender?

5 If Question 2 is answered in the affirmative, or Question 3 or 4 in the negative: Is Article 2(1)(c) of Directive 89/665, if necessary considered in conjunction with other principles of Community law, to be interpreted as meaning that if the breach committed by the contracting authority consists in

imposing an unlawful award criterion, the tenderer will be entitled to damages only if he can actually prove that, but for the unlawful award criterion, he would have submitted the best tender?'

23 The national court has also asked the Court to apply an accelerated preliminary ruling procedure under Article 104a of the Rules of Procedure, claiming that the first question arises in almost half of the review procedures brought before it and that the Verfassungsgerichtshof (Constitutional Court) has already set aside several of the Bundesvergabeamt's decisions specifically on the ground that it had raised *ex proprio motu* the unlawfulness of certain aspects of the award procedures at issue.

24 However, by decision of 13 September 2001, that request was denied by the President of the Court, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, on the ground that the circumstances referred to by the national court did not establish that a ruling on the questions referred to the Court was a matter of exceptional urgency.

The jurisdiction of the Court

25 On the basis of the order for reference made by the Bundesvergabeamt on 11 July 2001 in another case concerning public procurement, registered at the Court Registry under number C-314/01 and currently pending before the Court, the Commission expresses doubts as to the judicial nature of the body making the reference on the ground that it acknowledged in the order that its decisions 'do not contain binding, enforceable directions addressed to the contracting authority'. In those circumstances, the Commission has doubts as to the admissibility of the questions referred for a preliminary ruling by the Bundesver-

gabeamt in the present proceedings in the light of the case-law of the Court, in particular Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14, and Case C-178/99 *Salzmann* [2001] ECR I-4421, paragraph 14, according to which a national court or tribunal may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

26 It should be noted in that regard, first, that after the award of the contract the Bundesvergabeamt is competent, under Paragraph 113(3) of the BVergG, to determine whether as a result of an infringement of the relevant national legislation the contract has not been awarded to the best tenderer.

27 Secondly, it is apparent from the express wording of Paragraph 125(2) of the BVergG that a declaration made by the Bundesvergabeamt under Paragraph 113(3) of that Law not only constitutes a condition for admissibility of any claim for damages brought before the civil courts by reason of a culpable breach of that legislation but also binds the parties to the proceedings before the Bundesvergabeamt and the civil court hearing the case.

28 In those circumstances, neither the binding nature of a decision taken by the Bundevergabeamt under Paragraph 113(3) of the BVergG nor, accordingly, the judicial nature of the latter can reasonably be called into question.

29 It follows that the Court has jurisdiction to reply to the questions raised by the Bundesvergabeamt.

The admissibility of the questions referred

30 The Austrian Government claims that Question 1(a) and Question 5 are not admissible because they were raised in proceedings brought under Paragraph 113(3) of the BVergG, which is not a review procedure within the meaning of Directive 89/665 but merely an application for a declaration.

31 It states that the Austrian legislature exercised the option offered by the second subparagraph of Article 2(6) of Directive 89/665 to provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures are to be limited to awarding damages to any person harmed by an infringement. However, in Austrian law the power to award such damages, for which Article 2(1)(c) of Directive 89/665 requires the Member States to make provision, was not conferred on the Bundesvergabeamt but, as is clear from Paragraphs 122 and 125 of the BVergG, on the civil courts.

32 The Austrian Government considers that in those circumstances a reply to Question 1(a) and to Question 5 is not necessary to a solution of the main proceedings.

33 The Court observes, first, that a division of the power provided for in Article 2(1)(c) of Directive 89/665 between several courts is not contrary to the directive, since Article 2(2) expressly allows the Member States to confer the powers specified in paragraph 1 of that provision on separate bodies responsible for different aspects of the review procedure.

34 Secondly, although after the award of the contract the Bundesvergabeamt is not competent to award damages to the person harmed by the infringement of Community law on public procurement or the national rules implementing that law, but only to find that as a result of that infringement the contract has not been awarded to the best tenderer, that finding, as is clear from paragraph 27 of this judgment, not only constitutes a condition for admissibility of any claim for damages brought before the civil courts by reason of a culpable infringement of that legislation but also binds the parties to the proceedings before the Bundesvergabeamt and the civil court hearing the case.

35 In those circumstances, it must be concluded that the Bundesvergabeamt, even if it is hearing a case brought under Paragraph 113(3) of the BVergG, conducts a review procedure as required by Directive 89/665 and, as has already been seen in paragraph 28 of this judgment, is called upon to adopt a binding decision.

36 Furthermore, as is confirmed by Paragraph 117(3) of the BVergG, in proceedings brought under Paragraph 113(3) of that Law the Bundesvergabeamt is competent to determine the existence of the alleged infringement. It is possible that, in the exercise of that competence, it may consider it necessary to refer questions to the Court for a preliminary ruling.

37 Where such questions, which the Bundesvergabeamt considers necessary to enable it to determine the existence of illegality, concern the interpretation of Community law they cannot be declared inadmissible (see to this effect, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38, and Case C-153/00 *Der Weduwe* [2002] ECR I-11319, paragraph 31).

38 On the other hand, the Bundesvergabeamt, which is not directly competent to award damages to persons harmed by unlawfulness, is not entitled to refer to the Court for a preliminary ruling questions relating to the award of damages or the conditions for awarding them.

39 It is thus clear that all the questions referred for a preliminary ruling in this case by the Bundesvergabeamt are admissible except Question 5, which specifically seeks to know under what conditions a tenderer who claims to have been harmed by the adoption of an unlawful award criterion is entitled to damages.

Questions 1(a) and 1(b)

40 In its order for reference, the Bundesvergabeamt states that it is clear from Paragraphs 113(3) and 115(1) of the BVergG that in a review procedure following the award of a contract it must examine the contested award decision as to its lawfulness, but can grant the application only if it is the contested unlawful decision that has caused the contract not to be awarded to the best tenderer within the meaning of that Law. Therefore, if the award procedure is already fundamentally unlawful because of another (possibly earlier) decision by the contracting authority, as a result of which the applicant is not in any event the best tenderer within the meaning of the Law, and the applicant has not contested that other decision of the contracting authority in the review procedure, an application for review cannot be granted. In such a case, the applicant has not been 'harmed' by the contested infringement within the meaning of Article 2(1)(c) of Directive 89/665 because the harm, which may take the form of wasted tender costs, was caused by another infringement by the contracting authority.

41 The Bundesvergabeamt also points out that under Paragraph 39(2) of the AVG it must determine the relevant facts *ex proprio motu* and therefore consider *ex proprio motu* whether in the main proceedings award criteria other than that of the 'inspection opportunity' contested by the applicant are lawful. It also points out that according to a judgment of the Austrian Verfassungsgerichtshof of 8 March 2001 (B 707/00) the question as to the applicability of rules of procedure characterised by the *ex proprio motu* principle — which enable the review body to take account of facts that are material under the law relating to contract award procedures, irrespective of the submissions of the parties — is likely to raise, in the light of the principle laid down in the second subparagraph of Article 2(8) of Directive 89/665 that both parties must be heard in the review procedure, certain problems of Community law, making a reference to the Court under the third paragraph of Article 234 EC mandatory.

42 The Bundesvergabeamt states that it is that precedent of the Verfassungsgerichtshof which has induced it to refer Question 1(a) and (b), even though it is itself fully aware that the requirement that both sides be heard in the procedure — which stems not from the second subparagraph of Article 2(8) of Directive 89/665, which applies only to 'independent review bodies', but from the requirements imposed on a court within the meaning of Article 234 EC — is not inconsistent with the *ex proprio motu* rule applicable in administrative procedures, and that the Court has already implicitly found that the Bundesvergabeamt conducts a procedure in which both sides are heard, since it has recognised its right to refer questions for preliminary rulings.

43 It follows from the foregoing considerations, and from the legislation of which they form part, that by Questions 1(a) and (b) the national court is asking in essence whether Directive 89/665 precludes the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer. On the other hand, the directive does preclude the court from dismissing an application by a

tenderer on the ground that, owing to the unlawfulness raised of its own motion, the award procedure was, in any event, unlawful and that the harm the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

44 In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in the preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community levels, to ensure the effective application of Community directives relating to public procurement, in particular at a stage when infringements can still be remedied. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (see, in particular, Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraphs 33 and 34, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 74).

45 However, Directive 89/665 lays down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of Community law concerning public contracts (see, in particular, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 47).

46 If there is no specific provision governing the matter, it is therefore for the domestic law of each Member State to determine whether, and in what circumstances, a court responsible for review procedures may raise *ex proprio motu* unlawfulness which has not been raised by the parties to the case brought before it.

47 Neither the aims of Directive 89/665 nor the requirement it lays down that both parties be heard in review procedures precludes the introduction of that possibility in the domestic law of a Member State.

48 Firstly, it cannot be inconsistent with the objective of that directive, which is to ensure compliance with the requirements of Community law on public procurement by means of effective and swift review procedures, for the court responsible for the review procedures to raise *ex proprio motu* unlawfulness affecting an award procedure, without waiting for one of the parties to do so.

49 Secondly, the requirement that both parties be heard in review procedures does not preclude the court responsible for those procedures from being able to raise *ex proprio motu* unlawfulness which it is the first to find, but simply means that before giving its ruling the court must observe the right of the parties to be heard on the unlawfulness raised *ex proprio motu*.

50 It follows that Directive 89/665 does not preclude the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer.

51 However, it does not necessarily follow that the court may dismiss an application by a tenderer on the ground that, by reason of the unlawfulness raised of its own motion, the award procedure was in any event unlawful and that the harm the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

52 Firstly, as is apparent from the case-law of the Court, Article 1(1) of Directive 89/665 applies to all decisions taken by contracting authorities which are subject to the rules of Community law on public procurement (see inter alia Case C-92/00 *HI* [2002] ECR I-5553, paragraph 37, and Case C-57/01 *Makedoniko Metro and Michaniki* [2003] ECR I-1091, paragraph 68) and makes no provision for any limitation as regards the nature and content of those decisions (see inter alia the judgments cited above in *Alcatel Austria*, paragraph 35, and *HI*, paragraph 49).

53 Secondly, among the review procedures which Directive 89/665 requires the Member States to introduce for the purposes of ensuring that the unlawful decisions of contracting authorities may be the subject of review procedures which are effective and as swift as possible is the procedure enabling damages to be granted to the person harmed by an infringement, which is expressly stated in Article 2(1)(c).

54 Therefore, a tenderer harmed by a decision to award a public contract, the lawfulness of which he is contesting, cannot be denied the right to claim damages for the harm caused by that decision on the ground that the award procedure was in any event defective owing to the unlawfulness, raised *ex proprio motu*, of another (possibly previous) decision of the contracting authority.

55 That conclusion is all the more obvious if a Member State has exercised the power conferred on Member States by the second subparagraph of Article 2(6) of Directive 89/665 to limit, after the conclusion of the contract following the award, the powers of the court responsible for the review procedures to award damages. In such cases, the unlawfulness alleged by the tenderer cannot be subject to any of the penalties provided for under Directive 89/665.

56 In the light of all the foregoing considerations, the reply to be given to Question 1 is that Directive 89/665 does not preclude the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer. However, the directive does preclude the court from dismissing an application by a tenderer on the ground that, owing to the unlawfulness raised of its own motion, the award procedure was in any event unlawful and that the harm which the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

Question 2

57 It is clear from paragraph 18 of this judgment, and from the wording of Question 3, that the call for tenders at issue in the main proceedings specified that in order to evaluate the tenders so as to determine which offer was the most economically advantageous the contracting authority had to take account of the number of references relating to the product offered by the tenderers to other customers, without considering whether the customers' experiences of the products purchased had been good or bad.

58 In those circumstances, Question 2 should be understood as seeking to ascertain whether Directive 93/36 precludes the contracting authority, in a procedure to award a public supply contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract.

59 According to the scheme of Directive 93/36, in particular Title IV, the examination of the suitability of contractors to deliver the products which are the subject of the contract to be awarded and the awarding of the contract are two different operations in the procedure for the award of a public works contract. Article 15(1) of Directive 93/36 provides that the contract is to be awarded after the supplier's suitability has been checked (see to this effect, regarding public works contracts, Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 15).

60 Even though Directive 93/36, which, according to the fifth and sixth recitals, is intended to achieve the coordination of national procedures for the award of public supply contracts while taking into account, as far as possible, the procedures and administrative practices in force in each Member State, does not rule out the possibility that examination of the tenderer's suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules (see to this effect *Beentjes*, cited above, paragraph 16).

61 Article 15(1) of the directive provides that the suitability of tenderers is to be checked by the contracting authority in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 22, 23 and 24 of the directive. The purpose of these articles is not to delimit the power of the Member States to fix the level of financial and economic standing and technical knowledge required in order to take part in procedures for the award of public works contracts, but to determine the references or evidence which may be furnished in order to establish the suppliers' financial or economic standing and technical knowledge or ability (see to this effect *Beentjes*, cited above, paragraph 17).

62 As far as the criteria which may be used for the award of a public contract are concerned, Article 26(1) of Directive 93/36 provides that the authorities awarding contracts must base their decision either on the lowest price only or, when the award is made to the most economically advantageous tender, on

various criteria according to the contract involved, such as price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

63 As is apparent from the wording of that provision, in particular the use of the expression 'e.g.', the criteria which may be accepted as criteria for the award of a public contract to what is the most economically advantageous tender are not listed exhaustively (see to this effect, regarding public works contracts, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 35, and, regarding public service contracts, Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 54).

64 However, although Article 26(1) of Directive 93/36 leaves it to the contracting authority to choose the criteria on which it intends to base its award of the contract, that choice may relate only to criteria aimed at identifying the offer which is the most economically advantageous (see to this effect *Beentjes*, paragraph 19, *SIAC Construction*, paragraph 36, and *Concordia Bus Finland*, paragraph 59).

65 However, the fact remains that the submission of a list of the principal deliveries effected in the past three years, stating the sums, dates and recipients, public or private, involved is expressly included among the references or evidence which, under Article 23(1)(a) of Directive 93/36, may be required to establish the suppliers' technical capacity.

66 Furthermore, a simple list of references, such as that called for in the invitation to tender at issue in the main proceedings, which contains only the names and number of the suppliers' previous customers without other details relating to the

deliveries effected to those customers cannot provide any information to identify the offer which is the most economically advantageous within the meaning of Article 26(1)(b) of Directive 93/36, and therefore cannot in any event constitute an award criterion within the meaning of that provision.

67 In the light of the foregoing considerations, the reply to be given to the second question is that Directive 93/36 precludes the contracting authority, in a procedure to award a public supply contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract.

Question 3

68 Since this question was predicated upon a negative reply to the second question, it need not be answered.

Question 4

69 By its fourth question, the national court is asking, in essence, whether Community law, in particular the principle of equal treatment, precludes a criterion for the award of a public supply contract according to which a tenderer's offer may be favourably assessed only if the product which is the subject of the offer is available for inspection by the contracting authority within a radius of 300 km of the authority.

70 The reply must be that such a criterion cannot constitute a criterion for the award of the contract.

71 Firstly, it is apparent from Article 23(1)(d) of Directive 93/36 that for public supply contracts the contracting authorities may require the submission of samples, descriptions and/or photographs of the products to be supplied as references or evidence of the suppliers' technical capacity to carry out the contract concerned.

72 Secondly, a criterion such as that which is the subject of Question 4 cannot serve to identify the most economically advantageous offer within the meaning of Article 26(1)(b) of Directive 93/36 and therefore cannot, in any event, constitute an award criterion within the meaning of that provision.

73 In those circumstances, it is not necessary to consider whether that criterion is also contrary to the principle of equal treatment, which, as the Court has repeatedly held, underlies the directives on procedures for the award of public contracts (see, inter alia, the judgments in *HI*, paragraph 45, and *Universale-Bau*, paragraph 91).

74 In the light of the foregoing considerations, the reply to be given to Question 4 is that Directive 93/36 precludes, in a procedure to award a public supply contract, the requirement that the products which are the subject of the tenders be available for inspection by the contracting authority within a radius of 300 km of the authority as a criterion for the award of the contract.

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 11 July 2001, hereby rules:

1. Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, does not preclude the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from

raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer. On the other hand, the directive does preclude the court from dismissing an application by a tenderer on the ground that, owing to the unlawfulness raised of its own motion, the award procedure was in any event unlawful and that the harm which the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

2. Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts precludes the contracting authority, in a procedure to award a public supply contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract.

3. Directive 93/36/EEC precludes, in a procedure to award a public supply contract, the requirement that the products which are the subject of the tenders be available for inspection by the contracting authority within a radius of 300 km of the authority as a criterion for the award of the contract.

Puissochet Schintgen Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 19 June 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber