OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 25 October 2007 [1]

1. The Belgian Conseil d'État (Council of State) asks whether a body hearing an appeal concerning the award of a public contract must protect the confidentiality of business secrets while remaining entitled to take account of evidence containing them.

2. The issue highlights the conflict between the right of one party to require production of and access to relevant evidence and that of another to maintain the confidentiality of certain evidence vis-à-vis a business competitor.

Community legislation

3. Article 1(1) of Directive 89/665 [2] requires Member States to ensure that, as regards procedures falling within the scope of the directives coordinating award procedures for public works, supply and service contracts, [3] decisions taken by contracting authorities can be reviewed effectively and as rapidly as possible in accordance with the conditions set out in the remainder of the directive, if it is alleged that Community public procurement law or national implementing rules have been infringed.

4. The directive then sets out conditions to be observed in such review procedures, with a view to ensuring a speedy and efficient

1 — Original language: English.

2 — Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

3 — The provision refers to Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), and Directive 92/50, cited in footnote 2. Directive 71/305 was however repealed and replaced by Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), and Directive 77/62 was repealed and replaced by Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1). Since the time of the award in the main proceedings, all the directives concerned have been repealed and replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

outcome in accordance with Community law. However, it is silent in respect of the treatment of confidential information contained in documents submitted or requested as evidence. Under Article 2(8), the review body must follow a 'procedure in which both sides are heard'.

5. Questions of confidentiality at the *award* stage in public supply contracts were dealt with, at the time of the award of the contract in the main proceedings, in Directive 93/36, [4] in particular by Article 15(2), which provided: 'The contracting authorities shall respect fully the confidential nature of any information furnished by the suppliers.' In addition, Articles 7(1) and 9(3) provided for notice to be given of the award, subject to the contracting authority's discretion to withhold certain information where its release, inter alia, 'would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers'.

6. Directive 93/36 was repealed and replaced with effect from 31 January 2006 by Directive 2004/18, [5] Article 6 of which provides:

'Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers …, and in accordance with the national law to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders.'

Belgian legislation

Confidentiality of tender documents

7. Article 32 of the Belgian Constitution [6] guarantees public access to administrative

4 — Cited in footnote 3, as amended in particular by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1).

5 — Cited in footnote 3.

6 — See http://www.senate.be/doc/const_fr.html.

documents as a general rule. Among exceptions to that rule is Article 6(1) of the Law of 11 April 1994 on administrative publicity, [7] which allows an authority to refuse access if the interest in granting it is outweighed by the interest in protecting, inter alia, business or manufacturing information of a confidential nature.

8. The requirement for a public contracting authority to respect the confidentiality of business secrets contained in documents submitted to it is embodied in various provisions of the Belgian legislation covering award procedures — in particular, at the time of the award in issue in the main proceedings, Articles 25(4), 51(4) and 80(4) of the Royal Decree of 8 January 1996 on public works, supply and service contracts and on public works concessions.

9. Since then, the Law of 15 June 2006 on public procurement and certain works, supply and service contracts has been enacted to transpose Directive 2004/18. The first two paragraphs of Article 11 read:

'Neither the contracting authority nor any person who, by reason of the duties or functions with which he is entrusted, has knowledge of confidential information relating to a contract or to the award or performance of the contract, communicated by candidates, tenderers, suppliers or service providers, shall divulge any such information. The information concerned shall include in particular technical or commercial secrets and confidential aspects of tenders.

In the event of a review procedure, the review body and the contracting authority shall take care to ensure the confidential nature of the information referred to in the preceding paragraph.'

10. However, like most of the other provisions of that law, Article 11 has not yet entered into force. [8]

7 — The search page on http://www.juridat.be/cgi_loi/legislation.pl may be used to consult this and all subsequent Belgian legislation referred to. Since 2003 the *Moniteur Belge* is no longer published in paper form.

8 — See Article 80, read in conjunction with the amending Law of 12 January 2007.

Proceedings before the Conseil d'État

11. Appeals against decisions in award procedures may be brought before the Conseil d'État. In matters of judicial review, procedure before that court is governed in particular by a Decree of the Regent of 23 August 1948 and by the Coordinated Laws of 12 January 1973.

12. Article 6 of the Decree of the Regent requires the defendant authority to lodge the administrative file with the registry within 60 days from service of the application. If the file is not in the possession of that authority, there is further provision for it to be required of the authority which does hold it.

13. Article 87 of the Decree of the Regent provides that parties and their lawyers may inspect the file at the registry, a right which is also affirmed in Article 19 of the Coordinated Laws.

14. Article 21 of the Coordinated Laws allows the applicant to request an order that the defendant authority lodge the administrative file. It further provides that, if the file is not lodged within the time-limit set, the facts alleged by the applicant are to be deemed proven unless they are manifestly inaccurate. The Conseil d'État states that the latter provision applies also when only part of the file has not been lodged.

15. It appears from the order for reference that the Conseil d'État has consistently held that neither the Law of 11 April 1994 nor the Royal Decree of 8 January 1996 [9] can be relied upon to prevent a court reviewing the validity of an administrative decision from examining documents which are essential for it to be able to assess whether an alleged ground for annulment is well founded. [10]

16. It appears also that no provision governing procedure before the Conseil d'État explicitly allows anything in the documents lodged to be treated as confidential vis-à-vis a party to the proceedings.

Facts and procedure

17. The main proceedings arise out of an invitation to tender for the supply of tank

9 — Cited above in points 7 and 8 respectively.

10 — Judgments of 14 December 1999 in Case 84.102, 23 December 1999 in Case 83.593, 21 March 2000 in Case 86.150 and 6 May 2003 in Case 119.018.

track links, issued by the Belgian Defence Ministry. Two bids were received, one from Varec SA ('Varec'), the other from Diehl Remscheid GmbH & Co ('Diehl'). On 28 May 2002, the contract was awarded to Diehl. The award decision listed a number of technical, administrative and legal grounds for excluding Varec's bid but concluded that Diehl satisfied all the selection criteria. That conclusion was based on, inter alia, certain plans and samples annexed to Diehl's bid. At Diehl's request, those items were returned to it after evaluation of the bids.

18. Varec, in its challenge before the Conseil d'État, asserts that Diehl's bid did not in fact comply with all the criteria for the award. In order to evaluate that claim, it considers, the plans and samples referred to in the preceding paragraph should be examined as evidence both by the reviewing court and by the party who has asked for that review to take place.

19. However, the file lodged by the defendant contracting authority does not contain the relevant items, because they were returned to Diehl. Diehl, which has intervened in the proceedings, objects to lodging them on the ground that they embody confidential information and business secrets to which it does not wish Varec to have access. The *auditeur*[11] considers that if the contracting authority does not lodge a complete file, thereby failing in its duty to assist in ensuring proper administration of justice and fair proceedings, there is no alternative but to annul the contested award.

20. In those circumstances, the Conseil d'État asks the Court:

'Must Article 1(1) of [Directive 89/665/EEC], read with Article 15(2) of [Directive 93/36/EEC], and Article 6 of [Directive 2004/18/EC], be interpreted as meaning that the authority responsible for the appeal procedures provided for in that article must ensure confidentiality and observance of the business secrets contained in the files communicated to it by the parties to the case, including the contracting authority, whilst at the same time being entitled to apprise itself of such information and take it into consideration?'

21. Written observations have been submitted by the Belgian and Austrian Governments and by the Commission. Varec

11 — An independent member of the Conseil d'État, some but not all of whose functions and duties correspond to those of an Advocate General in this Court.

has not submitted observations because, in its view, the answer to the question posed is not necessary in order to resolve the dispute before the Conseil d'État.

22. No hearing has been requested and none has been held.

23. It should be added that, by the same judgment, the Conseil d'État also asked the Belgian Constitutional Court for a preliminary ruling on the question:

'Do Articles 21 and 23 of the Coordinated Laws on the Council of State of 12 January 1973, interpreted as meaning that the confidential documents in the administration's file must be placed in the administrative file and must be communicated to the parties, infringe Article 22 of the Constitution, whether or not read with Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights, where they do not enable business secrets to be safeguarded?' [12]

24. The Constitutional Court delivered its ruling on 19 September 2007.

25. I had originally envisaged delivering this Opinion on 20 September 2007. However, when I learned of the date set for the Constitutional Court's judgment, I considered it preferable, in order best to assist this Court in reaching its decision, to allow myself the opportunity of consulting that judgment first, and consequently postponed the delivery of this Opinion.

26. In its judgment, the Constitutional Court held essentially that it would be contrary to Article 22 of the Constitution, read with Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights, to interpret the provisions in question as precluding a defendant authority from relying on the confidentiality of items in the administrative file in order to prevent

12 — The last three provisions cited all guarantee a right to respect for private and family life, widely interpreted as including the protection of confidentiality and as not necessarily excluding activities of a professional or business nature (see, for example, *Niemietz* v *Germany*, European Court of Human Rights judgment of 16 December 1992, Series A No 251-B, p. 33, § 29).

their communication to the parties and as precluding the Conseil d'État from assessing the alleged confidential nature of such items. However, it would be consistent with those higher norms to interpret the provisions as allowing the defendant authority to rely on confidentiality for such purposes and the Conseil d'État to assess the confidential nature of the items.

Assessment

Admissibility

27. Varec's view that the answer to the question posed is not necessary in order to resolve the dispute before the Conseil d'État — a somewhat surprising view, if Varec originally sought production of the disputed evidence — might be interpreted as implicitly casting doubt on the admissibility of the reference for a preliminary ruling.

28. However, the Court has consistently held that 'in principle it is for the national courts alone to determine, having regard to the particular features of each case, both the need to refer a question for a preliminary ruling and the relevance of that question'. [13]

29. I see nothing in the circumstances of the present case that would justify calling into question the Conseil d'État's assessment that an answer to the question posed is necessary to enable it to give judgment. If Varec's claim is that Diehl's tender did not meet all the criteria for the award of the contract, if it has not withdrawn that claim in respect of the content of the disputed plans and samples, and if Diehl continues to object to Varec's gaining access to those items, then, given the procedural rules applicable in the Conseil d'État, an answer to the question referred seems relevant to any decision as to the pursuit of the procedure before that court.

Applicable legislation

30. In view of the Court's case-law to the effect that procedural rules generally apply to all proceedings pending at the time when they enter into force, whereas substantive rules do not usually apply, in principle, to

13 — See for example Case C-213/04 *Burtscher* [2005] ECR I-10309, paragraph 34 and the case-law cited there; in respect of courts of last resort, such as the Conseil d'État, see for example Case 283/81 *CILFIT* [1982] ECR 3415, paragraphs 10 and 11.

situations existing before their entry into force, [14] it is necessary to consider whether the rules whose interpretation is sought are procedural or substantive.

31. I agree here with the Commission. A right to the protection of confidential information, although it has procedural ramifications, and even though the context in which it arises before the Conseil d'État is largely a procedural one, is in essence a substantive right. That right first crystallised, in the main proceedings, when Diehl submitted its tender in the original award procedure. What is at issue now is the ongoing protection of that continuing substantive right.

32. Consequently, the Community law which falls to be interpreted is that in force at the time of the award procedure in 2002, namely Directives 89/665 and 93/36, to the exclusion of Directive 2004/18. [15] It may be added that in any event Article 6 of the latter directive, although more elaborately worded than Article 15(2) of Directive 93/36, contains essentially the same substantive provision, so that the situation after its entry into force is no different.

The question referred

Transparency and effective review

33. Article 1(1) of Directive 89/665 requires Member States to ensure that award decisions can be reviewed effectively. Decisions cannot be reviewed effectively unless the reviewing body has at its disposal all the evidence relevant to assessing whether they were taken in accordance with all the applicable rules and conditions. Transparency, which is an important feature of public procurement procedures, must be guaranteed in order to 'ensure that public funds are spent honestly and efficiently, on the basis of a serious assessment and without any kind of favouritism or quid pro quo whether financial or political'. [16]

14 — See, for example, Case C-201/04 *Molenbergnatie* [2006] ECR I-2049, paragraph 31 and the case-law cited there.

15 — See footnote 3 above.

16 — Opinion of Advocate General Jacobs in Case C-19/00 *SIAC Construction* [2001] ECR I-7725, point 33.

34. Consequently, if it is alleged before a review body acting pursuant to Directive 89/665 that a contract was awarded irregularly, and that information taken into account by the contracting authority provides evidence of the irregularity, then the review body can carry out its duty of effective review to the full extent only if it has that information at its disposal.

The right to a fair hearing

35. As this Court has held, it would infringe a fundamental principle of law to base a judicial decision on facts or documents of which the parties, or one of them, have not been able to take cognisance and in relation to which they have not therefore been able to state their views. [17]

36. The European Court of Human Rights has also held that a fundamental aspect of the right to a fair hearing in all civil or criminal proceedings is that both parties must be heard and enjoy equality of arms, so that each party must be able to take cognisance of observations or evidence submitted by the other party — or by an independent judicial official, by an administration or by the court whose judgment is appealed against — and to comment on them. [18]

37. Consequently, where a review body takes information into account in its decision, at least the substance of that information, in so far as it affects that decision, should in principle be available also to all the principal parties to the proceedings [19] in order to respect their right to a fair hearing.

38. However, it may be thought that a party's right to a fair hearing is in no way impaired if he is denied access to evidence which is not taken into account to his detriment and which could not have been taken into account in his favour. Such evidence could thus legitimately be withheld from him in order to protect, for example, business secrets, on the basis of a reasonable and duly substantiated application for confidential treatment.

17 — Joined Cases 42/59 and 49/59 *SNUPAT* v *High Authority* [1961] ECR 53, at p. 84; Case C-480/99 P *Plant and Others* v *Commission* [2002] ECR I-265, paragraph 24.

18 — See *Aksoy (Eroğlu)* v *Turkey*, No 59741/00, § 21, 31 October 2006, and the case-law cited there. With respect specifically to failure to allow an applicant for judicial review the opportunity to consult evidence in the case-file, see *Feldbrugge* v *the Netherlands*, judgment of 29 May 1986, Series A No 99, p. 16, § 44.

19 — The position as regards interveners, and the public at large, may legitimately differ. Since the request for a preliminary ruling does not concern those aspects, I shall not address them.

39. Under the European Convention on Human Rights and under the Charter of Fundamental Rights, [20] the right to a fair hearing is an unqualified right. However, it does not follow that the entitlement to disclosure of relevant evidence is likewise an absolute right. The European Court of Human Rights has indeed consistently held, even in the context of criminal proceedings, that evidence may be withheld where that is necessary to preserve the fundamental rights of another individual or to safeguard an important public interest.

40. However, such measures restricting the rights of the defence are permissible only when they are strictly necessary, and any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities. [21]

The right to protection of business secrets

41. Directive 93/36, governing *award* procedures, explicitly requires contracting authorities to protect tenderers' business secrets, in particular vis-à-vis other tenderers. Directive 89/665, governing *review* procedures, does not explicitly extend that requirement to review bodies.

42. All the observations submitted [22] express the view that there is none the less an implicit requirement for such bodies to protect business secrets, and I agree. A right to such protection is recognised in principle in Community law.

43. Under Article 41 of the Charter of Fundamental Rights, the right to good administration includes 'the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy'. A general obligation to respect business secrecy is imposed on the Community institutions by Article 287 EC, and confirmed in a number of legislative provisions, particularly in the field of competition. That obligation, admittedly, is thus binding only on the Community institutions but, in *SEP*, [23] the

20 — Solemnly proclaimed at Nice in December 2000 by the Parliament, the Council and the Commission (OJ 2000 C 364, p. 1).

21 — See, for example, *V.* v *Finland*, No 40412/98, § 75, 24 April 2007, and the case-law cited there.

22 — And it will be recalled that Varec has submitted no observations to this Court.

23 — Case C-36/92P *SEP* v *Commission* [1994] ECR I-1911, paragraph 36; my emphasis.

Court made specific reference to the existence of a '*general* principle of the right of undertakings to the protection of their business secrets', of which the Treaty article and subordinate provisions were an expression.

44. Moreover, where confidentiality is protected at the award stage of a procurement procedure, that protection would be liable to lose all value if it were not ensured equally at any subsequent review stage.

45. To adapt the words of the Court in *AKZO Chemie*, [24] a failure to protect information submitted as confidential at the award stage of such a procedure would lead to the unacceptable consequence that an unsuccessful tenderer might be inspired to challenge an award — or even to submit a tender manifestly doomed to rejection, with a view to being entitled to challenge the award — solely in order to gain access to a competitor's business secrets.

46. However, as with the entitlement to disclosure of relevant evidence, the right to confidential treatment of information is not absolute. For example, the rights conferred by Article 8(1) of the European Convention on Human Rights, which include the confidentiality of private, and in some circumstances business, correspondence, [25] may pursuant to Article 8(2) be restricted, where necessary and in accordance with the law, in order, inter alia, to protect the rights of others.

Reconciling the conflicting interests

47. It is evident that conflicts are likely to arise between the right to confidential treatment of business secrets, the need for transparency in the field of public procurement, the duty of review bodies to ensure effective review and the right of all parties to a fair hearing.

48. To the extent possible, those interests should obviously be reconciled, although it will not always be feasible to reconcile them fully. In particular, it will in some cases be necessary to restrict one party's right — to require confidential treatment of business secrets or to have access to all the evidence

24 — Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 28.

25 — See footnote 12 above.

in the file — in order to ensure that the very substance or essence of the other party's right, or the court's power and duty of effective review, is not impaired. However, any restriction must not go beyond what is necessary for that purpose, and a fair balance must be struck between the conflicting rights. [26]

49. Where rights are not absolute, [27] they must be considered in relation to their function. Restrictions may be imposed, provided that they meet objectives of general interest and do not constitute a disproportionate and intolerable interference impairing the very substance of the rights. [28]

50. In award review proceedings of the kind in issue in the present case, the review body could first examine any disputed evidence itself and then place on the file accessible to all the principal parties only such evidence as it judges relevant to deciding the case before it. Evidence which is not placed on the file should not be taken into account. Some evidence might however be placed on the file in a masked, truncated or otherwise edited form in order to protect business secrets, if the court or tribunal concerned considered that full disclosure of the evidence in question would genuinely be detrimental to the legitimate interests of a party which had made an application requesting confidentiality of that information.

51. A reasonable and pragmatic solution could be for the review body to request the party holding the evidence to provide an edited version which could be made available to the other party or parties — subject to the review body's own supervision in order to ensure that only genuinely confidential elements which do not appear decisive to the resolution of the dispute are edited out. In that case, even if the review body has seen evidence concealed from certain parties, it should endeavour not to use that evidence in any way which could infringe those parties' rights to a fair hearing and to equality of arms.

An illustration

52. An example of that type of approach may be seen in the '*Steel Beams*' cases before

26 — See, for example, in the context of a clash between different rights, Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraphs 77 to 81.

27 — See points 39 and 46 above.

28 — See, for example, again in the context of different rights, Joined Cases C-20/00 and C 64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paragraph 68, Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 126, and the case-law cited in both.

the Court of First Instance. [29] In March and April 1994, 11 undertakings brought actions for the annulment of a Commission decision under the ECSC Treaty concerning concerted practices by producers of steel beams. The actions were dealt with together and, for part of the procedure, joined.

53. Article 23 of the ECSC Statute of the Court of Justice provided: 'Where proceedings are instituted against a decision of one of the institutions of the Community, that institution shall transmit to the Court all the documents relating to the case before the Court.'

54. The Commission did not however lodge all the documents until requested to do so by the Court of First Instance. In its covering letter, it stated that some of the documents might contain business secrets or that they fell under the obligation of confidentiality in Article 47 of the ECSC Treaty, [30] so that not all of them should be accessible in their entirety to all the parties. Some of the applicants, however, sought to have access to the whole file.

55. At that time, the Rules of Procedure of the Court of First Instance dealt with confidentiality only in Article 116(2), which allowed confidential documents to be omitted from the case-file communicated to an intervener. Under Article 5(3) of the Instructions to the Registrar, however, parties' lawyers or agents, or persons authorised by them, were entitled to inspect the original case-file, including administrative files produced before the Court, and to request copies or extracts of documents.

56. The Court of First Instance was thus faced with problems very similar to those now facing the Conseil d'État.

57. In the first of its three orders addressing those problems, that Court rejected the argument that Article 23 of the ECSC Statute, together with the principle *audi alteram*

29 — Case T-134/94 *NMH Stahlwerke* v *Commission* [1999] ECR II-239; Case T-136/94 *Eurofer* v *Commission* [1999] ECR II-263; Case T-137/94 *ARBED* v *Commission* [1999] ECR II-303; Case T-138/94 *Cockerill-Sambre* v *Commission* [1999] ECR II-333; Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347; Case T-145/94 *Unimétal* v *Commission* [1999] ECR II-585; Case T-147/94 *Krupp Hoesch* v *Commission* [1999] ECR II-603; Case T-148/94 *Preussag Stahl* v *Commission* [1999] ECR II-613; Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629; Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645; and Case T-157/94 *Ensidesa* v *Commission* [1999] ECR II-707.

30 — The second paragraph of which prohibited the Commission from disclosing 'information of the kind covered by the obligation of professional secrecy, in particular about undertakings, their business relations or their cost components'.

partem, meant that all parties should have unconditional, unlimited access to the file forwarded by the Commission. It noted that Article 47 of the ECSC Treaty guaranteed the confidentiality of professional, in particular business, secrets in order to protect the legitimate interests of undertakings, and decided that the only way to balance the requirements of Article 23 of the Statute and the adversarial nature of judicial proceedings against the protection of the business secrets of individual undertakings was to examine the specific situation of the undertakings concerned. On that basis, it removed one document from the file, restricted full access to certain documents to one applicant only (the others being entitled to consult a non-confidential version), and reserved a decision on documents classified by the Commission as internal until it had received further information. [31]

58. In a second order made after receiving that information and hearing further argument, the Court of First Instance made it clear that the purpose of Article 23 of the Statute was to 'enable the Court to exercise its power of review of the legality of the contested decision, having regard to the rights of the defence', and *not* to 'guarantee all the parties unconditional and unrestricted access to the administrative file' or to 'enable the applicants to peruse the files of the institution concerned as they see fit'. [32] It also distinguished the documents transmitted pursuant to Article 23 of the Statute from the case-file constituted in accordance with the Instructions to the Registrar. The parties had access only to the latter, which contained the documents to be taken into consideration in deciding the case. Documents transmitted to the Court but not placed in the case-file remained 'wholly extraneous to the proceedings' and would not be taken into consideration by the Court in deciding the case. [33] On that basis, it examined the documents in question in the light of the submissions and decided that some were relevant and should be placed on the case-file and communicated to the parties. In a third and final order, it examined two further documents and decided that one of them should be placed on the file. [34]

59. Thus, in a situation of possible conflict between a need to consider all the relevant evidence, a need to allow all parties access to that evidence and a need to protect the confi-

31 — Order in Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1996] ECR II-537, especially at paragraphs 12 to 15 and the operative part.

32 — Order in Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1997] ECR II-2293, paragraphs 32 and 37.

33 — Ibid., paragraph 33.

34 — Order of 16 February 1998 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission*, not published in the ECR.

dentiality of some of it, the approach taken by the Court of First Instance was (a) to screen the evidence itself at a preliminary stage, (b) to include only the relevant evidence in the case-file, (c) to make all that evidence available to all the parties, subject to the 'masking' of certain details of certain documents vis-à-vis certain parties, and (d) to take into consideration only the evidence in the case-file to which the parties had access.

60. That solution was adopted, pragmatically and with due regard to each of the interests at stake, in a regulatory context similar to that facing the Conseil d'État in the main proceedings. It was subsequently enshrined in the Rules of Procedure of the Court of First Instance. [35]

Conclusions to be drawn

61. Although neither that pragmatic solution nor, a fortiori, the rule laid down in those Rules of Procedure can constitute any binding precedent for a national court, I consider that they provide helpful, practical guidance as to the approach to be taken, which must conform with the rules applicable to that court, in so far as they do not conflict with any higher norm.

62. As regards review bodies functioning in conformity with Directive 89/665, such higher norms include those which flow from that directive and from Directive 93/36 (or now Directive 2004/18), both as interpreted in the light of the right to the protection of business secrets and the right to a fair hearing. The principles to be applied are the following: (a) a party may not refuse to communicate evidence to the review body on the ground of business secrecy; (b) a party communicating evidence to the review body may ask for it to be treated as confidential, in whole or in part, vis-à-vis another party; (c) all principal parties should have access to all evidence relevant to the outcome of the review, in a form adequate to enable them to comment on it; (d) the review body should take care not to use any evidence withheld from one or more principal parties in any way which could infringe those parties' rights to a fair hearing and to equality of arms.

63. The assessment can only be on a case-by-case basis, and must seek to assure the

35 — Article 67(3), added on 19 December 2000 (OJ 2000 L 322, p. 4).

greatest protection of each interest — confidentiality of business secrecy and the right to a fair hearing — which is achievable without impairing the substance of the other, and to strike as fair a balance as is possible between the two.

Final remarks

64. As regards the specific situation confronting the Conseil d'État, I would make three final remarks.

65. First, it seems clear that when Article 11 of the Law of 15 June 2006 [36] enters into force, the obligation to protect the confidentiality of business secrets in review proceedings will be explicit in Belgium.

66. Second, I note that, in a case referred to by the Belgian Government in its observations, [37] the Conseil d'État appears to have already taken an approach consistent with that which I have outlined above. The case concerned an undertaking's challenge to a decision granting registration of a competitor's medicinal product. The administrative authority lodged two versions of its file with the Conseil d'État — a version containing confidential documents relating to the medicinal product and a non-confidential version. The *auditeur* in his report examined the issue and concluded that the confidential documents should not be available to the applicant. The court decided that it was not necessary to rule on that question, since the application could be conclusively dismissed on a ground which did not involve examination of those documents.

67. Furthermore, the approach taken by the Constitutional Court in its judgment of 19 September 2007 is also largely consistent with the approach set out above. After considering the general principles of the right to a fair hearing in adversarial proceedings, and the right to protection of confidentiality of business secrets, that court concluded that the Conseil d'État should be able to assess the confidential nature of the information, in order to strike a balance between those two rights.

36 — See point 9 above.

37 — Case 137.993; report of Auditeur Stevens of 22 October 2004, point 3; judgment of the Conseil d'État (or Raad van State, since it was a Dutch-language case) of 3 December 2004, point 1.2.

68. Finally, it appears from the order for reference that Varec may in fact already have had access to at least some of the disputed elements of the file, apparently outside the strict context of the award or review proceedings. If that is so, it might, depending on the actual circumstances, be a factor to be taken into account when deciding whether and to what extent to accord confidential treatment.

Conclusion

69. In the light of all the above considerations, I am of the opinion that the Court should give the following reply to the question raised by the Conseil d'État:

Article 1(1) of Council Directive 89/665, read in conjunction with the provisions of Council Directive 93/36 relating to the protection of confidential information, requires a review body

(a) to take cognisance of the whole of the administrative file and other evidence on which the contracting authority based its award and

(b) to accord confidential information the same protection as is accorded to it at the award stage.

Those obligations must be carried out subject to the right to a fair hearing and to equality of arms, which implies in particular that the review body should take care not to use any evidence withheld from one or more principal parties in any way which could infringe those rights.