

JUDGMENT OF THE COURT
17 September 1997 *

In Case C-54/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Vergabeüberwachungsausschuß des Bundes (Germany) for a preliminary ruling in the proceedings pending before that body between

Dorsch Consult Ingenieurgesellschaft mbH

and

Bundesbaugesellschaft Berlin mbH

on the interpretation of 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),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. C. Moitinho de Almeida, J. L. Murray and L. Sevón (Presidents of Chambers), C. N. Kakouris, P. J. G. Kapteyn, C. Gulmann, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann (Rapporteur), H. Ragnemalm, M. Wathelet and R. Schintgen, Judges,

* Language of the case: German.

Advocate General: G. Tesauro,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Dorsch Consult Ingenieurgesellschaft mbH, by Franz Günter Siebeck, Rechtsanwalt, Munich,
- the German Government, by Ernst Röder, Ministerialrat at the Federal Ministry for Economic Affairs, and Bernd Kloke, Oberregierungsrat at the same ministry, acting as Agents,
- the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, and Claudia Schmidt, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Dorsch Consult Ingenieurgesellschaft mbH, of the German Government and of the Commission at the hearing on 28 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 15 May 1997,

gives the following

Judgment

- 1 By order of 5 February 1996, received at the Court on 21 February 1996, the Vergabeüberwachungsausschuß des Bundes (Federal Public Procurement Awards

Supervisory Board, hereinafter 'the Federal Supervisory Board') referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of 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).

- 2 The question has been raised in proceedings between Dorsch Consult Ingenieurgesellschaft mbH (hereinafter 'Dorsch Consult') and Bundesbaugesellschaft Berlin mbH (hereinafter 'the awarding authority') concerning a procedure for the award of a service contract.
- 3 On 28 June 1995 the awarding authority published in the *Official Journal of the European Communities* a notice advertising the award of a contract for architectural and construction engineering services. On 25 August 1995 Dorsch Consult submitted its tender to the awarding authority. In all, 18 tenders were received, of which seven, including that of Dorsch Consult, were chosen for further consideration. On 30 November 1995, two companies, together with an architect, were chosen to form a working party to perform the services which were the subject of the contract. The contract itself was signed on 12 January 1996. Dorsch Consult was informed on 25 January 1996 that its tender was not the most advantageous economically.
- 4 Having learned that the awarding authority had not chosen it for the contract but before its tender was formally rejected, Dorsch Consult had applied, on 14 December 1995, to the Bundesministerium für Raumordnung, Bauwesen und Städtebau (Federal Ministry for Regional Planning, Building and Urban Planning), as the body responsible for reviewing public procurement awards (Vergabepflichtstelle), seeking to have the contract-awarding procedure stopped and the contract awarded to it. It considered that, in concluding the contract with another undertaking, the awarding authority had acted in breach of both Directive 92/50 and Paragraph 57a(1) of the Haushaltsgrundsätzegesetz (Budget Principles Law, hereinafter 'the HGrG'). By decision of 20 December 1995, the review body held that it had no competence in the matter on the ground that, under Paragraphs 57a and 57b of the HGrG, it had no power to review the award of contracts when they related to services.

- 5 In those circumstances, on 27 December 1995 Dorsch Consult lodged an application for a determination by the Federal Supervisory Board on the ground that the review body had wrongly declined jurisdiction. It stated that, in so far as 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) had not been transposed, it was directly applicable and had to be complied with by the review bodies.

- 6 The Federal Supervisory Board found that the Federal Republic of Germany had not yet transposed Directive 92/50. Although a circular had been issued by the Federal Ministry for Economic Affairs on 11 June 1993 stating that the directive was directly applicable and that it had to be applied by the administration, it could not be regarded as a proper transposition of the directive. According to the Federal Supervisory Board, where public service contracts are concerned, German domestic law does not empower a review body to determine whether the provisions governing public procurement have been complied with. It is quite possible that the provisions of Directive 92/50 have direct effect. Finally, the Federal Supervisory Board is unsure whether, by virtue of Article 41 of Directive 92/50, the competence of existing review bodies also applies directly to the award of public service contracts.

- 7 The Federal Supervisory Board therefore suspended proceedings and referred the following question to the Court of Justice:

‘Is Article 41 of Council Directive 92/50/EEC of 18 June 1992 to be interpreted to the effect that, after 30 June 1993, the bodies set up by the Member States which, under Council Directive 89/665/EEC of 21 December 1989, are competent to review procedures for the award of public contracts falling within the scope of Directives 71/305/EEC and 77/62/EEC are also competent to review procedures for the award of public service contracts within the meaning of Directive

92/50/EEC in order to determine whether alleged infringements of Community public procurement law or of domestic rules enacted in implementation of that law have taken place?’

Legal background

- 8 The purpose of Directive 92/50 is to regulate the award of public service contracts. It applies to contracts having a value above a certain limit. As far as the matter of legal protection is concerned, Article 41 provides:

‘Article 1(1) of Council Directive 89/665/EEC ... shall be replaced by the following:

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

- 9 In accordance with Article 44(1), Directive 92/50 had to be transposed by the Member States before 1 June 1993.

10 Article 2(8) of Directive 89/665 provides:

‘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 177 of the EEC 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.’

11 Directive 89/665 was transposed into German law by a Law of 26 November 1993 (BGBl. I, p. 1928), which supplemented the HGrG by adding Paragraphs 57a to 57c.

12 Paragraph 57a(1) of the HGrG provides:

‘In order to meet obligations arising from directives of the European Communities, the Federal Government shall regulate, by means of regulations, with the assent of the Bundesrat, the award of public supply contracts, public works contracts and public service contracts and the procedures for awarding public service contracts ...’

- 13 Paragraph 57b(1) of the HGrG makes provision for the procedures for awarding public supply contracts, public works contracts and public service contracts mentioned in Paragraph 57a(1) to be reviewed by review bodies. Under Paragraph 57b(2), the Federal Government is to adopt, in the form of regulations, with the assent of the Bundesrat, the provisions governing the competence of those review bodies. According to subparagraph (3), a review body must initiate a review procedure if there is evidence of a breach of procurement rules applicable under a regulation adopted pursuant to Paragraph 57a. In particular, it must initiate that procedure where a person who has, or had, an interest in a particular contract claims that the aforementioned provisions were contravened.
- 14 According to Paragraph 57b(4) of the HGrG, the review body must determine whether the provisions adopted pursuant to Paragraph 57a have been complied with. It may compel the awarding authority to annul unlawful measures or decisions or to take lawful measures or decisions. It may also provisionally suspend a procedure for the award of a contract. Under Paragraph 57b(5), a review body may require the awarding authority to provide the information necessary for it to carry out its task. Subparagraph (6) provides that actions for damages in the event of breach of the provisions applicable in relation to the award of contracts are to be brought before the ordinary courts.
- 15 Paragraph 57c(1) of the HGrG provides that the Federation and the *Länder* must each establish a supervisory board, performing its functions independently and on its own responsibility, to supervise procedures for the award of contracts in the fields concerning them. According to subparagraphs (2), (3) and (4) of that provision, each supervisory board is to sit in chambers composed of a chairman, an official assessor and a lay assessor, who are to be independent and subject only to observance of the law. The chairman and one of the assessors must be public officials. As regards annulment or withdrawal of their appointment and their independence and dismissal, various provisions of the Richtergesetz (Law on the Judiciary) apply by analogy. As regards the annulment or withdrawal of a lay member's appointment, certain provisions of the Richtergesetz also apply by analogy. Where

a lay member commits a serious breach of his duties, his appointment must be annulled. The term of office of a supervisory board's lay members is five years.

- 16 Under subparagraph (5), the supervisory board is to determine the legality of determinations made by review bodies but it does not review the way in which they ascertain the facts. Where a determination is found to be unlawful, the supervisory board directs the review body to make a fresh determination taking account of its own legal findings. Paragraph 57c(6) of the HGrG provides that any person claiming that the provisions governing the award of public contracts have been infringed may make application to the supervisory board within a period of four weeks following the relevant determination of the review body.
- 17 Paragraph 57c(7) of the HGrG establishes a Federal Supervisory Board (Vergabeüberwachungsausschuß des Bundes). Its official members are the chairman and assessors from the decision-making departments of the Bundeskartellamt (Federal Cartel Office). The president of the Bundeskartellamt decides on the composition of the Federal Supervisory Board and the formation and composition of its chambers. He appoints lay assessors and their deputies on a proposal from the leading public-law trade boards. He also exercises administrative supervisory control on behalf of the Federal Government. The Federal Supervisory Board adopts its own internal rules of procedure.
- 18 Pursuant to Paragraph 57a of the HGrG the Federal Government adopted a regulation on the award of contracts. This regulation is, however, applicable only to supply contracts and works contracts and not to contracts for services. Directive 92/50 has not yet been transposed by the Federal Republic of Germany.

- 19 Pursuant to Paragraphs 57b and 57c of the HGrG, the Federal Government has adopted a regulation on the procedure for review of public procurement awards (Verordnung über das Nachprüfungsverfahren für öffentliche Verträge, BGBl. I 1994, p. 324). Paragraph 2(3) of the regulation provides:

‘The review body’s determination regarding the awarding authority shall be given in writing, contain a statement of reasons and be notified without delay. The review body shall send without delay to the person claiming that there has been a breach of public procurement provisions the text of its determination, shall draw attention to the possibility of making application for a determination by the supervisory board within a period of four weeks and shall name the competent supervisory board.’

- 20 Paragraph 3 provides:

‘(1) Procedure before the Public Procurement Awards Supervisory Board shall be governed by Paragraph 57c of the Haushaltsgrundsatzgesetz and by this regulation according to the rules of procedure which the board shall adopt.

(2) The Public Procurement Awards Supervisory Board shall be obliged, under Article 177 of the Treaty establishing the European Community, to make a reference to the Court of Justice of the European Communities when it considers that a preliminary ruling on a question relating to the interpretation of that Treaty or to the validity and interpretation of a legal act adopted on that basis is necessary in order to enable it to make its determination.

(3) Before a chamber makes any determination, the parties to the procedure before the procurement review body shall be heard.

- (4) A chamber shall not be empowered to suspend a procedure for the award of a contract or to give other directions concerning a procedure for the award of a contract.
- (5) A chamber shall reach its determination by an absolute majority of votes. Determinations shall be in writing, contain a statement of reasons and shall be sent to the parties without delay.⁷
- 21 The rules of procedure of the Federal Supervisory Board regulate the organization and allocation of cases and the conduct of procedure, which consists of a hearing to which the persons concerned are called, and the conditions governing determinations of the Federal Supervisory Board.

Admissibility

- 22 Before the question submitted by the national court is addressed, it is necessary to examine whether the Federal Supervisory Board, in the procedure which led to this reference for a preliminary ruling, is to be regarded as a court or tribunal within the meaning of Article 177 of the Treaty. That question must be distinguished from the question whether the Federal Supervisory Board fulfils the conditions laid down in Article 2(8) of Directive 89/665, which is not in point in this case.
- 23 In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, in particular, the judgments in Case 61/65 *Vaassen (née Göbbels)* [1966] ECR 261; Case 14/86 *Pretoire di Salò v Persons*

unknown [1987] ECR 2545, paragraph 7; Case 109/88 *Danfoss* [1989] ECR 3199, paragraphs 7 and 8; Case C-393/92 *Almelo and Others* [1994] ECR I-1477; and Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9).

- 24 As regards the question of establishment by law, the Commission states that the HGrG is a framework budgetary law which does not give rise to rights or obligations for citizens as legal persons. It points out that the Federal Supervisory Board's action is confined to reviewing determinations made by review bodies. However, in the field of public service contracts, there is, as yet, no competent review body. The Commission therefore concludes that in such matters the Federal Supervisory Board has no basis in law on which it can act.
- 25 It is sufficient to note in this regard that the Federal Supervisory Board was established by Paragraph 57c(7) of the HGrG. Its establishment by law cannot therefore be disputed. In determining establishment by law, it is immaterial that domestic legislation has not conferred on the Federal Supervisory Board powers in the specific area of public service contracts.
- 26 Nor is there any doubt about the permanent existence of the Federal Supervisory Board.
- 27 The Commission also submits that the Federal Supervisory Board does not have compulsory jurisdiction, a condition which, in its view, may mean two things: either that the parties must be required to apply to the relevant review body for settlement of their dispute or that determinations of that body are to be binding. The Commission, adopting the second interpretation, concludes that German legislation does not provide for the determinations made by the Federal Supervisory Board to be enforceable.

- 28 It must be stated first of all that Paragraph 57c of the HGrG establishes the supervisory board as the only body for reviewing the legality of determinations made by review bodies. In order to establish a breach of the provisions governing public procurement, application must be made to the supervisory board.
- 29 Secondly, under Paragraph 57c(5) of the HGrG, when the supervisory board finds that determinations made by a review body are unlawful, it directs that body to make a fresh determination, in conformity with the supervisory board's findings on points of law. It follows that determinations of the supervisory board are binding.
- 30 The Commission also submits that since, according to the Federal Supervisory Board's own evidence, procedure before that body is not *inter partes*, it cannot be regarded as a court or tribunal within the meaning of Article 177 of the Treaty.
- 31 It must be reiterated that the requirement that the procedure before the hearing body concerned must be *inter partes* is not an absolute criterion. Besides, under Paragraph 3(3) of the Verordnung über das Nachprüfungsverfahren für öffentliche Aufträge, the parties to the procedure before the procurement review body must be heard before any determination is made by the chamber concerned.
- 32 According to the Commission, the criterion relating to the application of rules of law is not met either, because, under Paragraph 57c of the HGrG and Paragraph 3(1) of the Verordnung über das Nachprüfungsverfahren für öffentliche Aufträge, procedure before the Federal Supervisory Board is governed by rules of procedure which it itself adopts, which do not take effect in relation to third parties and which are not published.

- 33 It is, however, undisputed that the Federal Supervisory Board is required to apply provisions governing the award of public contracts which are laid down in Community directives and in domestic regulations adopted to transpose them. Furthermore, general procedural requirements, such as the duty to hear the parties, to make determinations by an absolute majority of votes and to give reasons for them are laid down in Paragraph 3 of the *Verordnung über das Nachprüfungsverfahren für öffentliche Aufträge*, which is published in the *Bundesgesetzblatt*. Consequently, the Federal Supervisory Board applies rules of law.
- 34 Finally, both Dorsch Consult and the Commission consider that the Federal Supervisory Board is not independent. They point out that it is linked to the organizational structure of the *Bundeskartellamt*, which is itself subject to supervision by the Ministry for Economic Affairs, that the term of office of the chairman and the official assessors is not fixed and that the provisions for guaranteeing impartiality apply only to lay members.
- 35 It must be observed first of all that, according to Paragraph 57c(1) of the HGrG, the supervisory board carries out its task independently and under its own responsibility. According to Paragraph 57c(2) of the HGrG, the members of the chambers are independent and subject only to observance of the law.
- 36 Under Paragraph 57c(3) of the HGrG, the main provisions of the *Richtergesetz* concerning annulment or withdrawal of their appointments and concerning their independence and removal from office apply by analogy to official members of the chambers. In general, the provisions of the *Richtergesetz* concerning annulment and withdrawal of judges' appointments apply also to lay members. Furthermore, the impartiality of lay members is ensured by Paragraph 57c(2) of the HGrG, which provides that they must not hear cases in which they themselves were involved through participation in the decision-making process regarding the award of a contract or in which they are, or were, tenderers or representatives of tenderers.

- 37 It must also be pointed out that, in this particular instance, the Federal Supervisory Board exercises a judicial function, for it can find that a determination made by a review body is unlawful and it can direct the review body to make a fresh determination.
- 38 It follows from all the foregoing that the Federal Supervisory Board, in the procedure which led to this reference for a preliminary ruling, is to be regarded as a court or tribunal within the meaning of Article 177 of the Treaty, so that the question it has referred to the Court is admissible.

Substance

- 39 By its question, the Federal Supervisory Board is asking in effect whether it follows from Article 41 of Directive 92/50 that, if that directive has not been transposed by the end of the period laid down for that purpose, the appeal bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear appeals relating to procedures for the award of public service contracts.
- 40 It must be stated first of all that it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. However, it is the Member States' responsibility to ensure that those rights are effectively protected in each case. Subject to that reservation, it is not for the Court to involve itself in the resolution of questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system (judgment in Case C-446/93 *SEIM* [1996] ECR I-73, paragraph 32).
- 41 Although Article 41 of Directive 92/50 requires the Member States to adopt the measures necessary to ensure effective review in the field of public service contracts, it does not indicate which national bodies are to be the competent

bodies for this purpose or whether these bodies are to be the same as those which the Member States have designated in the field of public works contracts and public supply contracts.

- 42 It is, however, common ground that Paragraphs 57a to 57c of the HGrG were designed to transpose Directive 89/665 and that Paragraph 57a was to be the basis for the transposition of Directive 92/50 which the Federal Government has still not undertaken.
- 43 That being the case, it must be reiterated first of all that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. It follows that, when applying national law, whether adopted before or after the directive, the national court having to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the EC Treaty (see the judgments in Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20; and in Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 26).
- 44 Secondly, the question of the designation of a body competent to hear appeals in relation to public service contracts is relevant even where Directive 92/50 has not been transposed. Where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, the Court has recognized, subject to certain conditions, the right of individuals to rely in law on a directive as against a defaulting Member State. Although this minimum guarantee cannot justify a Member State absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive (see, in particular, the judgment in Case C-253/98 *Commission v Germany* [1996] ECR I-2423, paragraph 13), it may nevertheless have the effect of enabling individuals to rely, as against a Member State, on the substantive provisions of Directive 92/50.

- 45 If the relevant domestic provisions cannot be interpreted in conformity with Directive 92/50, the persons concerned, using the appropriate domestic law procedures, may claim compensation for the damage incurred owing to the failure to transpose the directive within the time prescribed (see, in particular, the judgment in Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845).
- 46 The answer to be given to the question referred to the Court must accordingly be that it does not follow from Article 41 of Directive 92/50 that, where that directive has not been transposed by the end of the period laid down for that purpose, the appeal bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear appeals relating to procedures for the award of public service contracts. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In circumstances such as those arising in the present case, the national court must determine in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.

Costs

- 47 The costs incurred by the German Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national tribunal, the decision on costs is a matter for that body.

On those grounds,

THE COURT,

in answer to the question referred to it by the Vergabeüberwachungsausschuß des Bundes by order of 5 February 1996, hereby rules:

It does not follow from 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 that, where that directive has not been transposed by the end of the period laid down for that purpose, the appeal bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear appeals relating to procedures for the award of public service contracts. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In circumstances such as those arising in the present case, the national court must determine in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.

Rodríguez Iglesias	Mancini	Moitinho de Almeida	
Murray	Sevón	Kakouris	Kapteyn
Gulmann	Edward	Puissochet	Hirsch
Jann	Ragnemalm	Wathelet	Schintgen

Delivered in open court in Luxembourg on 17 September 1997.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President