

FABRICOM

JUDGMENT OF THE COURT (Second Chamber)

3 March 2005 *

In Joined Cases C-21/03 and C-34/03,

REFERENCES for a preliminary ruling under Article 234 EC from the Conseil d'État (Belgium), made by decisions of 27 December 2002, received at the Court on 29 and 22 January 2003, respectively, in the proceedings

Fabricom SA

v

État belge,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber (Rapporteur),
C. Gulmann, J.-P. Puissochet, N. Colneric and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,

Registrar: R. Grass,

* Language of the case: French.

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Fabricom SA, by J. Vanden Eynde and J.-M. Wolter, avocats,
- the Austrian Government, by M. Fruhmann, acting as Agent,
- the Finnish Government, by T. Pynnä, acting as Agent,
- the Commission of the European Communities, by K. Wiedner and B. Stromsky, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 November 2004,

gives the following

Judgment

¹ The references for a preliminary ruling concern the interpretation 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), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) ('Directive 92/50'), and, more particularly, of Article 3(2) thereof, 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), as amended by Directive 97/52 ('Directive 93/36'), and, more particularly, of Article 5(7) thereof, of 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), as amended by Directive 97/52 ('Directive 93/37'), and, more particularly, of Article 6(6) thereof, and also of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by European Parliament and Council Directive 98/4/EC of 16 February 1998 (OJ 1998 L 101, p. 1) ('Directive 93/38'), and, more particularly, of Article 4(2) thereof, in conjunction with the principle of proportionality, freedom of trade and industry and the right to property. The references also concern 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) and, more particularly, of Articles 2(1)(a) and 5 thereof, and also of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14) and, more particularly, of Articles 1 and 2 thereof.

2 The references were made in proceedings between Fabricom SA ('Fabricom') and the Belgian State concerning the lawfulness of national provisions which, on certain conditions, preclude a person who has been instructed to carry out preparatory work in connection with a public contract or an undertaking connected to such a person from participating in that contract.

Legal background

Community rules

- 3 Article VI(4) of the agreement on government procurement annexed to Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1) ('the public contracts agreement'), provides:

'Entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.'

- 4 Under Article 3(2) of Directive 92/50:

'Contracting authorities shall ensure that there is no discrimination between different service providers.'

- 5 Article 5(7) of Directive 93/36 provides:

'Contracting authorities shall ensure that there is no discrimination between the various suppliers.'

6 Article 6(6) of Directive 93/37 provides:

'Contracting authorities shall ensure that there is no discrimination between the various contractors.'

7 Under Article 4(2) of Directive 93/38:

'Contracting authorities shall ensure that there is no discrimination between different suppliers, contractors or service providers.'

8 The 10th recital in the preamble to Directive 97/52, the terms of which are substantially reproduced in the 13th recital in the preamble to Directive 98/4, states:

'... contracting authorities may seek or accept advice which may be used in the preparation of specifications for a specific procurement, provided that such advice does not have the effect of precluding competition'.

9 Article 2 of Directive 89/665 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;

...'

10 Under Article 1 of Directive 92/13:

- ‘1. The Member States shall take the measures necessary to ensure that decisions taken by contracting entities 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(8), on the grounds that such decisions have infringed Community law in the field [of] procurement or national rules implementing that law as regards:

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

and

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

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

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular 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 entity of the alleged infringement and of his intention to seek review.'

11 Article 2 of Directive 92/13 provides:

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

either

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

and

- (b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

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

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

...'

National rules

- 12 Article 32 of the Royal Decree of 25 March 1999 amending the Royal Decree of 8 January 1996 on the public procurement of works, supplies and services and on public works concessions (*Moniteur belge*, 9 April 1999, p. 11690; 'Article 32 of the Royal Decree of 25 March 1999 amending the Royal Decree of 8 January 1996'), provides:

'...

1. No person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services shall be permitted to apply to participate in or to submit a tender for a contract for those works, supplies or services.

2. An undertaking connected to any person referred to in paragraph 1 shall be permitted to apply to participate in or to submit a tender only where it establishes that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition.

For the purposes of this article, "undertaking connected" means any undertaking over which a person referred to in paragraph 1 may, directly or indirectly, exercise a dominant influence or any undertaking which may exercise a dominant influence over that person or which, like that person, is subject to the dominant influence of another undertaking by virtue of its ownership, financial participation or the rules

which govern it. Dominant influence shall be presumed where an undertaking, directly or indirectly, with respect to another undertaking:

- (1) holds a majority of the subscribed capital of the undertaking; or
- (2) is entitled to a majority of the votes attached to the shares issued by the undertaking; or
- (3) may nominate more than half the members of the body responsible for the administration, management or supervision of the undertaking.

Before excluding any undertaking on the ground that it is presumed to have obtained an unfair advantage, the contracting authority shall, by registered letter, invite that undertaking to provide within 12 calendar days, unless in a particular case the invitation allows a longer period, evidence of, for example, its connections, its degree of independence or any circumstances showing that dominant influence has not been established or has not affected the relevant contract.

3. Paragraphs 1 and 2 shall not apply:

- (1) to public contracts covering both the setting-up and the implementation of a project;
- (2) to public contracts awarded by negotiated procedure without publication at the time of the commencement of the procedure for the purposes of Article 17(2) of the Law.'

- 13 Article 26 of the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996 on public works, supplies and services contracts in the water, energy, transport and telecommunications sectors (*Moniteur belge*, 28 April 1999, p. 14144; ‘the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996’), is essentially worded in the same terms as Article 32 of the Royal Decree of 25 March 1999 amending the Royal Decree of 8 January 1996.

Main proceedings and questions referred to the Court

- 14 Fabricom is a contractor which is regularly required to submit tenders for public contracts, particularly in the water, energy, transport and telecommunications sectors.

Case C-21/03

- 15 By application lodged before the Conseil d’État on 25 June 1999, Fabricom seeks annulment of Article 26 of the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996.

- 16 It claims that that provision is, inter alia, contrary to the principle of equal treatment of all tenderers, to the principle of the effectiveness of judicial review as guaranteed by Directive 92/13, to the principle of proportionality, to freedom of trade and industry and also to the right to property as laid down in Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.

- 17 The Belgian State disputes the pleas put forward by Fabricom.
- 18 As regards Article 26 of the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996, the Conseil d'État states that, according to the terms of the preamble to the Royal Decree of 25 March 1999 and to the terms of the Report to the King which precedes it, Article 26 is designed to prevent a person desiring to be awarded a public contract from deriving an advantage, contrary to free competition, from research, experiments, studies or development carried out in connection with works, supplies or services relating to such a contract.
- 19 The Conseil d'État considers that that provision, generally and without distinction, precludes a person who has been instructed to carry out such research, experiments, studies or development and, consequently, an undertaking deemed to be connected to that person, from participating in or submitting tenders for a contract. Nor, unlike the position of the connected undertaking, does that provision allow the person concerned to prove that, in the circumstances of the case, he has been unable to obtain, by means of one of those operations, an advantage capable of upsetting the equality between tenderers. It does not expressly require that the awarding authority reach a decision within a specific period on the evidence which the connected undertaking provides in order to show that the dominant influence is not established or has no effect on the market concerned.
- 20 Being of the view that the outcome of the dispute before it requires an interpretation of certain provisions of the public procurement directives, the Conseil d'État decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
- '1. Do ... Directive 98/38 ..., and in particular Article 4(2) thereof, and Directive 98/4 ..., in conjunction with the principle of proportionality, freedom of trade and industry and respect for the right to property guaranteed in particular by

Protocol No 1 of 20 March 1952 to the Convention for the Protection of Human Rights and Fundamental Freedoms, preclude any person who has been instructed to carry out research, experiments, studies or development in connection with a public contract for works, supplies or services from being permitted to apply to participate in or to submit a tender for that contract where that person has not been given an opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition?

2. Would the answer to the preceding question be different if those directives, considered in conjunction with that principle, freedom and right, were interpreted as referring only to private undertakings or to undertakings which have provided services for valuable consideration?

3. May ... Directive 92/13 ..., and in particular Articles 1 and 2 thereof, be interpreted as meaning that a contracting entity may refuse, up to the end of the procedure for the examination of tenders, to allow an undertaking connected to any person who has been instructed to carry out research, experiments, studies or development in connection with supplies or services to participate in the procedure or to submit a tender, even though, when questioned on that point by the awarding authority, the undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition?

Case C-34/03

- 21 By application lodged before the Conseil d'État on 8 June 1999, Fabricom seeks annulment of Article 32 of the Royal Decree of 25 March 1999 amending the Royal Decree of 8 January 1996.

22 The pleas put forward by Fabricom are essentially the same as those put forward in Case C-21/03. The information provided by the Conseil d'État in respect of Article 32 is identical to that set out in Case C-21/03 in respect of Article 26 of the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996.

23 In those circumstances, the Conseil d'État decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do ... Directive 92/50 ..., and in particular Article 3(2) thereof, ... Directive 93/36 ..., and in particular Article 5(7) thereof, ... Directive 93/37 ..., and in particular Article 6(6) thereof, and Directive 97/52 ..., and in particular Articles 2(1)(b) and 3(1)(b) thereof, in conjunction with the principle of proportionality, freedom of trade and industry and respect for the right to property guaranteed in particular by Protocol No 1 of 20 March 1952 to the Convention for the Protection of Human Rights and Fundamental Freedoms, preclude any person who has been instructed to carry out research, experiments, studies or development in connection with a public contract for works, supplies or services from being permitted to apply to participate in or to submit a tender for that contract where that person has not been given an opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition?

(2) Would the answer to the preceding question be different if those directives, considered in conjunction with that principle, freedom and right, were interpreted as referring only to private undertakings or to undertakings which have provided services for valuable consideration?

(3) May ... Directive 89/665 ..., and in particular Articles 2(1)(a) and 5 thereof, be interpreted as meaning that a contracting authority may refuse, up to the end of

the procedure for the examination of tenders, to allow an undertaking connected to any person who has been instructed to carry out research, experiments, studies or development in connection with supplies or services to participate in the procedure or to submit a tender, even though, when questioned on that point by the awarding authority, the undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition?’

- 24 By order of the President of the Court of 4 March 2003, Cases C-21/03 and C-34/03 were joined for the purposes of the written and oral procedures and also of the judgment.

The questions referred to the Court

First question referred in Cases C-21/03 and C-34/03

- 25 By the first question referred in Cases C-21/03 and C-34/03, the national court is seeking essentially to ascertain whether the provisions of Community law to which it refers preclude a rule, such as that laid down in Article 26 of the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996 and Article 32 of the Royal Decree of 25 March 1999 amending the Royal Decree of 8 January 1996, which states that any person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not allowed to participate in or to submit a tender for a public contract for those works, supplies or services where that person is not permitted to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition (‘the rule at issue in the main proceedings’).

- 26 In that regard, it must be borne in mind that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition (Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 81 and the case-law cited there).
- 27 Furthermore, it is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Case C-434/02 *Arnold André* [2004] ECR I-11825, paragraph 68 and the case-law cited there, and Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 70 and the case-law cited there).
- 28 A person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services relating to a public contract (hereinafter ‘a person who has carried out certain preparatory work’) is not necessarily in the same situation as regards participation in the procedure for the award of that contract as a person who has not carried out such works.
- 29 Indeed, a person who has participated in certain preparatory works may be at an advantage when formulating his tender on account of the information concerning the public contract in question which he has received when carrying out that work. However, all tenderers must have equality of opportunity when formulating their tenders (see, to that effect, Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, paragraph 54).

- 30 Furthermore, that person may be in a situation which may give rise to a conflict of interests in the sense that, as the Commission correctly submits, he may, without even intending to do so, where he himself is a tenderer for the public contract in question, influence the conditions of the contract in a manner favourable to himself. Such a situation would be capable of distorting competition between tenderers.
- 31 Taking account of the situation in which a person who has carried out certain preparatory work may find himself, therefore, it cannot be maintained that the principle of equal treatment requires that that person be treated in the same way as any other tenderer.
- 32 Fabricom, and also the Austrian and Finnish Governments, submit, essentially, that the difference in treatment established by a rule such as that at issue in the main proceedings and which consists in prohibiting, in all circumstances, a person who has carried out certain preparatory works from participating in a procedure for the award of the public contract in question is not objectively justified. They claim that such a prohibition is disproportionate. Equal treatment for all tenderers is also ensured where there is a procedure whereby an assessment is made, in each specific case, of whether the fact of carrying out certain preparatory works has conferred on the person who carried out that work a competitive advantage over other tenderers. Such a measure is less restrictive for a person who has carried out certain preparatory work.
- 33 In that regard, it must be held that a rule such as that at issue in the main proceedings does not afford a person who has carried out certain preparatory work any possibility to demonstrate that in his particular case the problems referred to in paragraphs 29 and 30 of the present judgment do not arise.
- 34 Such a rule goes beyond what is necessary to attain the objective of equal treatment for all tenderers.

35 Indeed, the application of that rule may have the consequence that persons who have carried out certain preparatory works are precluded from the award procedure even though their participation in the procedure entails no risk whatsoever for competition between tenderers.

36 In those circumstances, the answer to the first question referred in Cases C-21/03 and C-34/03 must be that Directive 92/50 and, more particularly, Article 3(2) thereof, Directive 93/36 and, more particularly, Article 5(7) thereof, Directive 93/37 and, more particularly, Article 6(6) thereof, and also Directive 93/38 and, more particularly, Article 4(2) thereof, preclude a rule, such as that laid down in Article 26 of the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996 and Article 32 of the Royal Decree of 25 March 1999 amending the Royal Decree of 8 January 1996, whereby a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition.

Second question referred in Cases C-21/03 and C-34/03

37 By the second question referred in Cases C-21/03 and C-34/03, the national court asks whether the answer to the first question is different where Directives 92/50, 93/36, 93/37 and 93/38, considered in conjunction with the principle of proportionality, freedom of trade and industry and the right to property, are interpreted as referring only to private undertakings or to undertakings which have provided services for valuable consideration.

- 38 That question is based on a hypothesis which cannot be accepted.
- 39 There is nothing in those directives to indicate that they may be interpreted as referring, as regards their applicability to undertakings which are participating or intend to participate in a public contract procedure, only to private undertakings or to undertakings which have provided services for valuable consideration. Furthermore, the principle of equal treatment precludes the application of a rule such as that at issue in the main proceedings solely to private undertakings or to undertakings which have provided services for valuable consideration and which have carried out certain preparatory works where it would not apply to undertakings not having one of those qualities which have also carried out such preparatory work.
- 40 Accordingly, there is no need to answer the second question referred in Cases C-21/03 and C-34/03.

Third question referred in Cases C-21/03 and C-34/03

- 41 By the third question referred in Cases C-21/03 and C-34/03, the national court is seeking essentially to ascertain whether Directive 89/665 and, more particularly, Articles 2(1)(a) and 5 thereof, and also Directive 92/13 and, more particularly, Articles 1 and 2 thereof, preclude the contracting entity from being able to refuse, until the end of the procedure for the examination of tenders, to allow an undertaking connected with any person who has carried out certain preparatory works from participating in the procedure or from submitting a tender, even though, when questioned on that point by the awarding authority, the undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition.

- 42 In that regard, it should be borne in mind that, since the issue in the case relates to detailed procedural rules governing the remedies intended to protect rights conferred by Community law on candidates and tenderers harmed by decisions of contracting authorities, those rules must not compromise the effectiveness of Directive 89/665 (Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 72).
- 43 Furthermore, the provisions of Directives 89/665 and 92/13, which are intended to protect tenderers against arbitrary decisions by the contracting authority, seek to reinforce existing arrangements for ensuring effective application of Community directives on the award of public contracts, in particular where infringements can still be rectified. Such protection cannot be effected if the tenderer is not able to rely on those rules against the contracting authority (Case C-212/02 *Commission v Austria*, not published in the European Court Reports, paragraph 20 and the case-law cited there).
- 44 The possibility that the contracting authority might delay, until the procedure has reached a very advanced stage, taking a decision as to whether an undertaking connected with a person who has carried out certain preparatory works may participate in the procedure or submit a tender, when that authority has before it all the information which it needs in order to take that decision, deprives that undertaking of the opportunity to rely on the Community rules on the award of public contracts as against the awarding authority for a period which is solely within that authority's discretion and which, where necessary, may be extended until a time when the infringements can no longer be usefully rectified.
- 45 Such a situation is capable of depriving Directives 89/665 and 92/13 of all practical effect as they are susceptible of giving rise to an unjustified postponement of the possibility for those concerned to exercise the rights conferred on them by Community law. It is also contrary to the objectives of Directives 89/665 and 92/13, which seek to protect tenderers vis-à-vis the awarding authority.

- 46 The answer to the third question referred in Cases C-21/03 and C-34/03 must therefore be that Directive 89/665 and, more particularly, Articles 2(1)(a) and 5 thereof, and also Directive 92/13 and, more particularly, Articles 1 and 2 thereof, preclude the contracting authority from being able to refuse, up to the end of the procedure for the examination of tenders, to allow an undertaking connected with any person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services from participating in the procedure or submitting an offer, even though, when questioned on that point by the awarding authority, that undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition.

Costs

- 47 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

1. **Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, and, more particularly, Article 3(2) thereof, Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by Directive 97/52, and, more particularly, Article 5 (7) thereof, Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by Directive 97/52, and, more particularly, Article 6(6) thereof, and also Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by European Parliament and Council Directive 98/4/EC of 16 February 1998, and, more**

particularly, Article 4(2) thereof, preclude a rule such as that laid down in Article 26 of the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996 on public works, supply and service contracts in the water, energy, transport and telecommunications sectors, and Article 32 of the Royal Decree of 25 March 1999 amending the Royal Decree of 8 January 1996 on public works, supply and service contracts and on the award of public contracts, whereby a person who has been instructed to carry out research, experiments, studies or development in connection with a public works, supplies or services contract is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition.

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 and, more particularly, Articles 2(1)(a) and 5 thereof, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and, more particularly, Articles 1 and 2 thereof, preclude the contracting entity from refusing, until the end of the procedure for the examination of tenders, to allow an undertaking connected with any person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services to participate in the procedure or to submit a tender, even though, when questioned on that point by the awarding authority, that undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition.

[Signatures]