JUDGMENT OF THE COURT (Sixth Chamber)

27 February 2003 *

In Case C-327/00,

REFERENCE to the Court under Article 234 EC by the Tribunale amministrativo regionale per la Lombardia (Italy) for a preliminary ruling in the proceedings pending before that court between

Santex SpA

and

Unità Socio Sanitaria Locale n. 42 di Pavia,

interveners:

Sca Mölnlycke SpA,

Artsana SpA

and

Fater SpA,

* Language of the case: Italian.

on the interpretation of Article 22 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) and Article 6(2) EU,

THE COURT (Sixth Chamber),

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

Advocate General: S. Alber,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Italian Government, by U. Leanza, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato,

— the French Government, by A. Bréville-Viéville and G. de Bergues, acting as Agents,

— the Austrian Government, by H. Dossi, acting as Agent,

— Commission of the European Communities, by M. Nolin and R. Amorosi, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Italian Government, the French Government and the Commission at the hearing on 6 December 2001,

after hearing the Opinion of the Advocate General at the sitting on 7 February 2002,

gives the following

Judgment

1 By order of 23 June 2000, received at the Court on 4 September 2000, the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy) referred for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 22 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) and Article 6(2) EU.

2 Those questions were raised in proceedings between Santex SpA ('Santex') and Unità Socio Sanitaria Locale n. 42 di Pavia ('USL') concerning a tendering procedure relating to a supply contract.

The legal context

The Community legislation

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

'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 national rules implementing that law.'

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

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

...

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

5 Directive 93/36 repealed Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1). The references made by Article 1(1) of Directive 89/665, in particular, to the directive thereby repealed must be construed as references to Directive 93/36 by virtue of the second paragraph of Article 33 of the latter.

6 Article 22 of Directive 93/36 provides:

'1. Evidence of the supplier's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

...

(c) a statement of the supplier's overall turnover and its turnover in respect of the products to which the contract relates for the three previous financial years.

2. The contracting authorities shall specify in the notice or in the invitation to tender which reference or references mentioned in paragraph 1 they have chosen and which references other than those mentioned under paragraph 1 are to be produced.

3. If, for any valid reason, the supplier is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

The national legislation

7 Article 22 of Directive 93/36 was transposed into Italian law by Article 13 of Legislative Decree No 358 of 24 July 1992 entitled 'Testo unico delle disposizioni in materia di appalti pubblici di forniture, in attazione delle direttive 77/62/CEE, 80/767/CEE e 88/295/CEE' (Consolidated provisions relating to public supply contracts, implementing Directives 77/62/EEC, 80/767/EEC and 88/295/EEC, GURI No 188 of 11 August 1992, *supplemento ordinario* No 104, p. 5, hereinafter 'Legislative Decree No 358/1992').
The latter article provides:

'1. Evidence of the competing undertakings' financial and economic standing may be furnished by one of the following documents:

...

(c) a statement of the undertaking's overall turnover and the turnover in respect of the products to which the contract relates for the three previous financial years.

2. The contracting authorities shall specify in the notice or in the invitation to tender which of the documents mentioned in paragraph 1 must be produced and any references which are to be produced. ...

3. If, for any valid reason, the supplier is unable to provide the references requested, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

8 Article 36(1) of Royal Decree No 1054 of 26 June 1924 approving the 'Testo unico delle leggi sul Consiglio di Stato' (Consolidated laws on the Council of State, GURI No 158 of 7 July 1924, hereinafter 'Royal Decree No 1054/1924'), the scope of which was extended to include the administrative courts by Article 19 of Law No 1034 of 6 December 1971 relating to the 'Istituzione dei tribunali amministrative regionali' (Establishment of the Regional Administrative Courts, GURI No 314 of 13 December 1971, p. 7891), provides:

'Except where time-limits are prescribed by specific laws relating to applications for review, the time-limit for submitting an application for review to the Consiglio di Stato in its judicial capacity shall be 60 days from the date on which the administrative decision was notified in the form and manner laid down by regulation or from the date on which it is apparent that the person concerned became fully aware of it...'

9 Article 5 of Legge no 2248 sul contenzioso amministrativo (Law No 2248 of 20 March 1865 on administrative proceedings, hereinafter 'Law No 2248/1865'), provides:

'The judicial authorities shall apply general and local administrative acts and regulations in so far as they are in conformity with primary legislation.'

The main proceedings and the questions referred for a preliminary ruling

10 The order for reference shows that, on 23 October 1996, USL published in the *Official Journal of the European Communities* a notice of invitation to tender for the direct supply to people's homes of absorbent incontinence products, for an amount estimated at ITL 1 067 372 000 per year.

11 That notice contained a clause according to which the only undertakings which would be eligible to tender were those which had achieved 'over the last three financial years, in respect of an identical service to that forming the subject-matter of the invitation to tender, [an] overall turnover of at least three times the amount of the contract in question' (hereinafter 'the disputed clause').

12 By letter of 25 November 1996, Santex informed the contracting authority that it considered that that clause constituted an unlawful restriction on competition. It stated that, in view of the fact that that type of service had only been provided by local health authorities very recently, the application of that clause would create an unfair advantage in favour of the undertaking which had obtained the contract at the time of the previous tendering procedure and would exclude many candidates, including itself, even though it had, over the previous year, achieved a turnover equal to twice the annual estimated amount of the contract.

13 In view of those comments, USL postponed the examination of the tenders. It requested the tenderers to send it further documents, stating that the disputed clause could be interpreted as referring to the undertakings' total turnover. The turnover relating to supplies of products identical to those forming the subject-matter of the contract in question would be taken into account, not as a condition of eligibility to tender, but as one of the criteria for assessing the quality of the tenders.

14 Sca Mölnlycke SpA (hereinafter 'Mölnlycke'), which had obtained the contract for the supply of identical products for the previous period, objected to that interpretation. It sent USL a letter calling for strict compliance with the disputed clause.

15 By letter of 24 January 1997, USL, implicitly upholding that objection by Mölnlycke, again requested the tenderers to send it information on the turnover which they had achieved in respect of supplies of products identical to those forming the subject-matter of the contract in question, together with a list of the health institutions to which those products had been supplied.

16 On 20 February 1997, USL adopted a decision excluding from the tendering procedure all companies which did not satisfy the economic condition laid down by the disputed clause, including Santex (hereinafter 'the exclusion decision'). The contract was awarded to Mölnlycke by decision of 8 April 1997 (hereinafter 'the award decision').

17 Taking the view that, if it had been allowed to tender, it would have been awarded the contract, Santex brought before the Tribunale amministrativo regionale per la Lombardia an action for the annulment of, in particular, the exclusion decision, as well as the award decision and the notice of invitation to tender, on grounds of infringement of the law and misuse of powers. It also sought, by way of interim relief, suspension of the application of the acts thereby contested.

18 Both USL and Mölnlycke, which intervened in the main proceedings, pleaded that the action for annulment directed against the notice of invitation to tender was out of time. Only that notice had caused damage directly to Santex by preventing it from participating in the tendering procedure.

19 By interim order of 29 May 1997, the Tribunale amministrativo regionale per la Lombardia suspended application of the contested acts. It held that, even though the action for annulment of the notice of invitation to tender was to be regarded as out of time, application of the disputed clause should nevertheless be barred on the ground of a breach of the principles of Community competition law.

20 By order of 29 August 1997, the Consiglio di Stato (Council of State) (Italy) set aside that order of the referring court.

21 The interim proceedings having been concluded, USL entered into a contract with Mölnlycke.

22 The Tribunale amministrativo regionale per la Lombardia, to which the Consiglio di Stato remitted the case for adjudication on the substance, states in its order for reference that it is of the opinion that the disputed clause limits the right of access to a tendering procedure in breach of the provisions of Article 22 of Directive 93/36, which are reproduced verbatim in Article 13 of Legislative Decree No 358/1992.

23 In particular, the referring court considers that the clause in question is contrary to the principles of proportionality and non-discrimination in so far as it goes beyond what is necessary in order to verify the economic and financial soundness of the tenderers. It thus grants an unfair advantage to undertakings which hold a dominant position on the market, to the detriment of those which are able to demonstrate their reliability by other means.

24 However, that court states that it is required to rule first on the plea of inadmissibility raised by USL and Mölnlycke. In that regard, it observes that, if it were accepted that the disputed clause prevented Santex from participating in the procedure at the stage of the notice of invitation to tender, the conclusion would have to be that the clause in question should have been challenged within 60 days from the date on which Santex became aware of it, in accordance with Article 36 of Royal Decree No 1054/1924.

25 The referring court argues that, taking as its basis Article 5 of Law No 2248/1865, the Consiglio di Stato held, in general terms, that an administrative court may, in the same way as an ordinary court, disapply a provision of a regulation which is contrary to a higher-ranking provision and affects an individual right.

26 However, it is clear, according to the referring court, from the settled case-law of the Consiglio di Stato concerning public contracts that acts which have the effect of directly infringing the right to participate in an invitation to tender must be challenged within the ordinary limitation period of 60 days if such a challenge is not to be out of time, and that, when that period has expired, it is no longer possible to disapply notices of invitations to tender or their clauses.

27 The referring court is of the opinion that the principle laid down in Article 5 of Law No 2248/1865 should also apply to clauses in a public-contract notice which are contrary to Community law. It takes the view that, in order to ensure the effectiveness of the judicial protection of rights conferred by the Community legal order, it must be able to disapply the disputed clause regardless of whether national procedural rules have been complied with.

28 According to the referring court, the circumstances of the case in the main proceedings seem such as to warrant refusal to apply the disputed clause, in accordance with the approach described in the previous paragraph. On the one hand, it points out that USL led Santex to believe that the disputed clause would be interpreted restrictively or reformulated in the course of the tendering procedure. USL therefore created a situation of uncertainty prejudicial to the bringing of an action in time and thus made it excessively difficult, if not impossible, to apply Community law to the procedure for the award of the supply contract at issue in the main proceedings.

29 On the other hand, that court argues that a finding that the acts contested in the main proceedings are unlawful would serve the administration's interest, which is in opening the invitation to tender to as wide a participation as possible.

30 The Tribunale amministrativo regionale per la Lombardia also considers it relevant to examine these issues in the light of the judicial protection of fundamental rights afforded by Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

31 In the light of all those considerations, the Tribunale amministrativo regionale per la Lombardia decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. May Article 22 of Directive 93/36/EEC of 14 June 1993 be interpreted as meaning that the competent national courts are required to protect citizens of the Union harmed by acts adopted in breach of Community law by resorting, in particular, to disapplication as provided for in Article 5 of the Italian law of 20 March 1865 with respect to clauses of an invitation to tender which are

contrary to Community law but which were not challenged within the short limitation period laid down by national procedural law in order to apply Community law of their own motion whenever it is found, first, that the application of Community law has been seriously impeded or in any event rendered difficult and, second, that there is a public interest, of Community or national origin, which justifies such application?

2. Does Article 6(2) EU which, by providing for respect of the fundamental rights safeguarded by the European Convention for the Protection of Human Rights and Fundamental Freedoms, has adopted the principle of effective judicial protection enshrined in Articles 6 and 13 of that Convention, lead to the same conclusion?'

The first question

Observations submitted to the Court

32 The Italian Government argues that it is the principle of legal certainty which justifies the barring of challenges to a notice of invitation to tender where more than 60 days have elapsed since its publication. Otherwise the legitimate expectations of competitors convinced of the lawfulness of the tendering procedure would be infringed.

33 Referring also to the case-law of the Court, according to which, in the absence of Community rules, it is for the law of each Member State to lay down the detailed

procedural rules governing proceedings before the courts to safeguard rights which individuals derive from provisions of Community law which have direct effect, the Italian Government argues that the requirements laid down by that case-law are fulfilled by the national legislation at issue in the main proceedings. It states, in particular, that there is no discrimination under Italian law, since any infringement of either national or Community law by an administrative act can result in the annulment of that act, and that there is nothing to prevent effective application of Community law.

34 The Italian Government also submits that the effect of allowing national courts to disapply national procedural rules whenever an unlawful act is challenged for being in breach of Community law would be to produce unjustified variations in the protection of individuals' rights depending on whether those rights derived from Community law or domestic law.

35 The French Government submits that a national court is not required to determine of its own motion whether a domestic legal act is compatible with a provision of Community law where that act has not been challenged within the time-limit laid down by the national procedural rules.

36 The rules on limitation periods at issue in the main proceedings are rules of public policy which cannot be disregarded by the parties or by the national court. In particular, the limitation period of 60 days is intended to implement the principle of legal certainty by regulating and limiting in time the right to challenge the clauses of an invitation to tender. That period cannot be regarded as rendering the exercise of the rights conferred by the Community legal order virtually impossible or excessively difficult.

37 According to the French Government, only where the contracting authority has, by its conduct, contributed to the non-compliance with the limitation period, is it possible to envisage allowing the party concerned, in addition to the possibility of obtaining compensation for the damage suffered, the right to bring proceedings after the expiry of that period. However, it contends that, in the circumstances of the case in the main proceedings, Santex could not disregard the need to protect itself against any eventuality by bringing, within the limitation period, proceedings for review of the notice of invitation to tender at issue in the main proceedings while continuing its discussions with the contracting authority.

38 The Austrian Government submits that, by its first question, the referring court is seeking to ascertain whether the provisions of Community law concerning public contracts preclude the application of rules under domestic law governing limitation periods. It infers from this that reference should be made to Directive 89/665.

39 In view of the fact that that directive does not contain any provision making the bringing of an action in connection with a procedure for the award of public contracts subject to a limitation period, the Member States are entitled to regulate this matter, on the twofold condition that the objectives of that directive are not undermined and that the principles of effectiveness and equal treatment under the EC Treaty are observed.

40 The Austrian Government adds that the national provisions at issue in the main proceedings have the effect not only of speeding up the tendering procedure, but also of reducing the likelihood of vexatious actions, while at the same time fostering the protection of the rights of all tenderers. Those provisions do not in any way infringe the principles of effectiveness and equality. Consequently, Directive 89/665 does not preclude their application.

41 The Commission likewise maintains that, since the main proceedings relate to a public contract, the first question should be examined in the light of Directive 89/665.

42 It observes in that regard that the directive in question provides for an obligation for Member States to ensure that decisions taken by the contracting authority can be reviewed effectively and rapidly, enabling unlawful decisions to be set aside regardless of whether an earlier decision has been challenged within the time-limit laid down. Both a decision excluding an applicant from an invitation to tender and a decision to award a contract constitute decisions taken by the contracting authority for the purposes of that directive.

Findings of the Court

43 As a preliminary point, it should be observed that, as may be seen from paragraphs 22 and 23 of this judgment, the referring court considers it to have been established that the disputed clause is incompatible with both Article 22 of Directive 93/36 and Article 13 of Legislative Decree No 358/1992.

44 However, as that court points out in its order for reference, it cannot declare the action in the main proceedings admissible since it is applying national procedural rules under which, once the period prescribed for bringing an application for review of a notice of invitation to tender has expired, all pleas in law alleging that that notice is unlawful are also inadmissible for the purpose of challenging another decision of the contracting authority.

45 In addition, the order for reference shows that the Tribunale amministrativo regionale per la Lombardia considers that the conduct of the contracting authority in the case in the main proceedings rendered impossible or excessively difficult the exercise of the rights conferred by Community law on the tenderer harmed by the disputed clause.

46 It is therefore clear that the referring court is seeking guidance as to whether, in those circumstances, it is required, under Community law, to disapply the national rules on limitation periods in order to declare admissible the plea alleging that the disputed clause is in breach of Community law, which is put forward in support of the action brought against decisions which the contracting authority subsequently adopted on the basis of that clause.

47 It must be pointed out in this regard that the detailed rules for the judicial review of decisions adopted in connection with procedures for the award of public contracts are not covered by Directive 93/36, but only by Directive 89/665. The latter directive lays down the minimum conditions to be satisfied by the review procedures established in the national legal systems, so as to ensure compliance with the requirements of Community law concerning public contracts.

48 In the light of the foregoing considerations, the first question must be construed as asking, in essence, whether Directive 89/665 must be interpreted as imposing on the competent national courts, where it is established that, by its conduct, a contracting authority has rendered impossible or excessively difficult the exercise of the rights conferred by Community law on a national of the Union who has been harmed by a decision of that contracting authority, an obligation to allow as admissible pleas in law alleging that the notice of invitation to tender is incompatible with Community law, which are put forward in support of an application for review of that decision, by making use, where appropriate, of the possibility provided for by national law of disapplying national rules on limitation periods, under which, when the period prescribed for bringing applications for review of the notice of invitation to tender has expired, it is no longer possible to plead such incompatibility.

49 In order to answer the question thus reformulated, it must be recalled that the Court has already had occasion to rule in general terms on the compatibility with Directive 89/665 of national rules establishing limitation periods in connection with applications for review of contracting authorities' decisions covered by that directive.

50 In paragraph 79 of its judgment in Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, the Court held that Directive 89/665 does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the time-limit in question is reasonable.

51 In particular, the Court noted that, whilst it is for the internal legal order of each Member State to establish time-limits in respect of the remedies intended to protect rights conferred by Community law on candidates and tenderers harmed by decisions of contracting authorities, those time-limits must not compromise the effectiveness of Directive 89/665, which seeks to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (*Universale-Bau*, paragraphs 71, 72 and 74).

52 It was in those circumstances that the Court held that the setting of reasonable limitation periods for bringing proceedings satisfies, in principle, the requirement of effectiveness under Directive 89/665, since it is an application of the fundamental principle of legal certainty (*Universale-Bau*, paragraph 76).

53 It must therefore be established whether the limitation period at issue in the main proceedings satisfies the requirements of Directive 89/665, as identified by the case-law cited in paragraphs 50 to 52 of this judgment.

54 In that regard, it must be observed, first, that the limitation period of 60 days which applies to public contracts under Article 36(1) of Royal Decree No 1054/1924, as interpreted by the Consiglio di Stato, appears reasonable having regard both to the purpose of Directive 89/665 and to the principle of legal certainty.

55 Second, it must be held that such a period, which runs from the date of notification of the act or the date on which it is apparent that the party concerned became fully aware of it, is also in accordance with the principle of effectiveness since it is not in itself likely to render virtually impossible or excessively difficult the exercise of any rights which the party concerned derives from Community law.

56 However, for the purpose of applying the principle of effectiveness, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference, in particular, to the role of that provision in the procedure, its progress and its special features, viewed as a whole (see Case C-312/93 *Peterbroeck and Others* [1995] ECR I-4599, paragraph 14).

57 Consequently, although a limitation period such as that at issue in the main proceedings is not in itself contrary to the principle of effectiveness, the possibility that, in the context of the particular circumstances of the case before the referring court, the application of that time-limit may entail a breach of that principle cannot be excluded.

58 From that point of view, it is necessary to take into consideration the circumstance that, in this particular case, although the disputed clause was brought to the notice of the parties concerned at the time of the publication of the notice of invitation to tender, the contracting authority created, by its conduct, a state of uncertainty as to the interpretation to be given to that clause and that that uncertainty was removed only by the adoption of the exclusion decision.

59 As is apparent from the information provided by the referring court, USL indicated initially that it would take account of the reservations expressed by Santex and that it would not apply the economic condition laid down by the disputed clause at the tender admission stage. It was only by means of the exclusion decision, which eliminated from the tendering procedure all tenderers who did not satisfy that condition, that the contracting authority stated its definitive position regarding the interpretation of the disputed clause.

60 It must therefore be acknowledged that, in the circumstances of the case in the main proceedings, it was only when it was informed of the exclusion decision that the tenderer harmed was able to find out what interpretation the contracting authority actually placed upon that clause of the notice of invitation to tender. In view of the fact that, at that stage, the period prescribed for bringing proceedings for review of that notice had already expired, that tenderer was deprived, under the rules on limitation periods, of any opportunity to plead before a court, in proceedings for review of the subsequent decisions which caused it harm, the incompatibility of that interpretation with Community law.

61 In the circumstances of the case in the main proceedings, the changing conduct of the contracting authority may be considered, in view of a limitation period, to have rendered excessively difficult the exercise by the harmed tenderer of the rights conferred on him by Community law.

62 Since the referring court alone has jurisdiction to interpret and apply the national legislation, it falls to it, in circumstances such as those of the case in the main proceedings, to interpret, as far as is at all possible, the rules establishing that limitation period in such a way as to ensure observance of the principle of effectiveness deriving from Directive 89/665.

63 As is clear from the case-law of the Court, when applying domestic law the national court must, as far as is at all possible, interpret it in a way which accords with the requirements of Community law (see, in particular, Case C-165/91 *Van Munster* [1994] ECR I-4661, paragraph 34, and Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraph 39).

64 Where application in accordance with those requirements is not possible, the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessary disapplying any provision in so far as its application would, in the circumstances of the case, lead to a result contrary to Community law (see, in particular, Case C-347/96 *Solred* [1998] ECR I-937, paragraph 30, and *Engelbrecht*, paragraph 40).

65 It follows that, in circumstances such as those of the case in the main proceedings, it is for the referring court to ensure observance of the principle of effectiveness under Directive 89/665 by applying its national law in such as way as to enable a tenderer harmed by a decision of the contracting authority adopted in breach of Community law to safeguard the possibility of raising pleas in law alleging that breach in support of applications for review of other decisions of the contracting authority, by availing itself, where appropriate, of the possibility afforded, according to the referring court, by Article 5 of Law No 2248/1865 of disapplying the national rules governing such applications so far as limitation periods are concerned.

66 The answer to the first question referred for a preliminary ruling must therefore be that Directive 89/665 must be interpreted as imposing on the competent national courts, where it is established that, by its conduct, a contracting authority has rendered impossible or excessively difficult the exercise of the rights conferred by the Community legal order on a national of the Union who has been harmed by a decision of that contracting authority, an obligation to allow as admissible pleas in law alleging that the notice of invitation to tender is incompatible with Community law, which are put forward in support of an application for review of that decision, by availing itself, where appropriate, of the possibility afforded by national law of disapplying national rules on limitation periods, under which, when the period prescribed for bringing proceedings for review of the notice of invitation to tender has expired, it is no longer possible to plead such incompatibility.

The second question

67 In view of the answer given to the first question, there is no need to answer the second question.

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Tribunale amministrativo regionale per la Lombardia by order of 23 June 2000, hereby rules:

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, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as imposing on the competent national courts, where it is established that, by its conduct, a contracting authority has rendered impossible or excessively difficult the exercise of the rights conferred by the Community legal order on a national of the Union who has been harmed by a decision of that contracting authority, an obligation to allow as admissible pleas in law alleging that the notice of invitation to tender is incompatible with Community law, which are put forward in support of an application for review of that decision, by availing itself, where appropriate, of the possibility afforded by national law of disapplying national rules on limitation periods, under which, when the period prescribed for bringing proceedings for review of the notice of invitation to tender has expired, it is no longer possible to plead such incompatibility.

Puissochet Schintgen Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 27 February 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber