

JUDGMENT OF THE COURT (Third Chamber)

9 June 2011 *

In Case C-401/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 24 September 2009,

Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented by N. Korogiannakis, dikigoros,

appellant,

the other party to the proceedings being:

European Central Bank (ECB), represented by F. von Lindeiner and G. Gruber, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta, E. Juhász (Rapporteur) and J. Malenovský, Judges,

Advocate General: P. Mengozzi,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 27 January 2011,

gives the following

Judgment

- ¹ By its appeal, *Evropaïki Dynamiki – Proigmena Systemata Tilepikoinonion Pliroforikis kai Tilematikis AE* ('*Evropaïki Dynamiki*') seeks to have set aside the order of the Court of First Instance of the European Communities (now 'the General Court') of 2 July 2009 in Case T-279/06 *Evropaïki Dynamiki v ECB* ('the order under appeal'), by which the General Court dismissed its action for annulment of the decisions of the European Central Bank (ECB) not to accept its tender submitted in the context of the negotiated procedure for the provision of IT consultancy and IT development services and to award the contract to the successful tenderers.

Background to the dispute

- 2 On 19 July 2005, the ECB published a contract notice in the Supplement to the *Official Journal of the European Union* (OJ 2005 S 137) concerning a negotiated procedure for the provision of IT consultancy and IT development services with pre-selection of appropriate candidates. The purpose of that negotiated procedure was to select two contractors with a view to supplying services to the ECB in the performance of framework contracts.
- 3 On 29 August 2005, Evropaïki Dynamiki submitted an application on behalf of the E2Bank consortium, the other member of which was Engineering Ingegneria Informatica SpA. From the 23 applications received, the ECB procurement committee selected 7 candidates, including the consortium.
- 4 On 22 December 2005, the ECB notified the tender specifications to the candidates selected and invited them to submit their tenders. The tender specifications included the invitation to tender and five annexes, including the draft framework contract.
- 5 Point 2.4 of Annex 3 to the invitation to tender laid down an obligation on tenderers to obtain authorisation under the German law governing the supply of temporary staff (*Arbeitnehmerüberlassungsgesetz*, ‘the AÜG’), and stated that tenderers were required to give a firm commitment to be in possession of the permit to supply temporary staff (*Arbeitnehmerüberlassungsgenehmigung*, ‘the required permit’) when the contract was signed.
- 6 The ECB received five tenders within the time-limit fixed, including that of the E2Bank consortium. That tender, which was found to be complete, included, in particular,

the firm commitment of the two members of the E2Bank consortium to obtain the required permit before the contract was signed. As evidence of that commitment, copies of two permit applications made on 3 and 6 February 2006 to the competent German authorities had been supplied.

- 7 After evaluating the tenders, the ECB procurement committee decided to invite the three best-ranked tenderers to negotiate. The E2Bank consortium was ranked fourth.
- 8 Further to negotiations conducted in the course of April 2006, the ECB procurement committee decided to continue negotiations only with two tenderers, since the third tenderer, established in India, had not been able to resolve the ECB's concerns about obtaining the required permit. The negotiations with the two remaining tenderers were finalised in the course of June 2006.
- 9 By letter of 11 July 2006, Evropaíki Dynamiki stated that it was concerned about the legality of the public procurement procedure in question, claiming, *inter alia*, that the obligation to hold the required permit constituted discrimination against tenderers established outside Germany.
- 10 After being informed, by letter of 31 July 2006, of the decision to award the two framework contracts to the two successful tenderers, Evropaíki Dynamiki, by letter of 1 August 2006, requested additional information regarding the evaluation of the tenders, asked the ECB to reconsider its decision and stated its intention to bring the matter before the General Court if its appeal were dismissed. The ECB procurement committee took the view that that letter was a formal appeal and submitted it to the appeal body of the ECB, which, by letter dated 18 August 2006, informed Evropaíki Dynamiki that it had dismissed the appeal.

Proceedings before the General Court and the order under appeal

- 11 On 9 October 2006, Evropaïki Dynamiki brought an action before the General Court for annulment of the decisions of the ECB not to accept its tender and to award the contract to the successful tenderers. In support of its action, Evropaïki Dynamiki put forward eight pleas in law.
- 12 After rejecting the ECB's plea of inadmissibility based on Evropaïki Dynamiki's alleged lack of legal interest in bringing proceedings, the General Court examined, in the first place, the eighth plea in the action, which alleged that the requirement for tenderers to hold the required permit was unlawful.
- 13 By the first limb of that plea, Evropaïki Dynamiki claimed that the ECB had introduced that requirement in an arbitrary manner and had favoured service providers established in Germany.
- 14 By the second limb of its eighth plea, Evropaïki Dynamiki stated that, in accordance with the AÜG, the required permit is provided to foreign companies only if, in their Member State of establishment, they hold a permit relating to the supply of temporary staff. Pursuant to Greek legislation, such a permit can be issued only to undertakings which exclusively carry out an activity of supplying such staff. Thus, it is impossible for the appellant to obtain that permit in Greece and, consequently, to obtain the required permit.
- 15 By the third limb of that plea, Evropaïki Dynamiki submitted that the requirement for tenderers to hold the required permit is contrary to the European Union rules on public contracts and accordingly constitutes a breach of the freedom to provide services, provided for by Article 49 EC.

- 16 By the fourth limb of that plea, Evropaīki Dynamiki submitted that the requirement is discriminatory and infringes the principle of transparency.
- 17 In the order under appeal, the General Court noted, as a preliminary point, that the ECB, like the institutions of the European Union, has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a public contract following an invitation to tender and that the General Court's review should be limited to checking that there has been no serious and manifest error.
- 18 As regards the first limb of the eighth plea in the action, the General Court pointed out, first of all, that Evropaīki Dynamiki did not contest either the lawfulness of the fact that the framework contract was governed by German law or the fact that any dispute arising out of the contractual relationship between the ECB and the contractor was subject to the exclusive jurisdiction of the Amtsgericht/Landgericht Frankfurt am Main (Local Court/Regional Court, Frankfurt-am-Main). Next, the General Court noted that the supply of services in performance of the framework contract required the provision to the ECB, on a professional basis, of staff, which required the ECB's contractor to hold the required permit. It also noted that, according to the case-law of the Bundesarbeitsgericht (German Federal Labour Court), the scope of the requirement under the AÜG is not limited to interim agencies, but also applies to companies in the IT sector which post their employees to other companies. Lastly, as regards the assertion that, when a contract for supply of an expert to the ECB was concluded in May 2006, no permit had been required, the General Court held that any infringement of the AÜG in the past by the ECB did not exempt the ECB from correctly applying that law during the present negotiated procedure.
- 19 Accordingly, the General Court concluded that the ECB had not erred in either its interpretation or its application of the AÜG when it took the view that the supply of services in question was subject to the obligation to hold the required permit and that, by laying down that requirement, the ECB had neither acted in an arbitrary

manner nor favoured tenderers established in Germany. Consequently, the General Court held that the first limb of the eighth plea was manifestly devoid of any foundation in law.

- 20 As regards the second limb of the eighth plea, the General Court observed that, in the context of an action for annulment brought pursuant to Article 230 EC, it is not competent to assess whether the interaction between two national laws effectively constitutes an obstacle to the freedom to provide services, which is prohibited by Article 49 EC. The General Court recalled that, in order to contest the compatibility with Community law of a decision not to grant the required permit, *Evropaïki Dynamiki* could have brought an action for annulment before the national court against the decisions of the national authorities concerned. Consequently, the General Court held that the second limb of the eighth plea was manifestly inadmissible.
- 21 As regards the third limb of that plea, after noting, first of all, that *Evropaïki Dynamiki* had not relied on any rule of law which would have permitted the ECB to avoid, in the present case, the territorial scope of German law and that the institutions are required to ensure that the conditions laid down in an invitation to tender do not induce potential tenderers to infringe the national legislation applicable to their business, the General Court held that the ECB cannot be criticised for having applied provisions of German law.
- 22 Next, the General Court noted that, when *Evropaïki Dynamiki* argues that the ECB ought not to have demanded the required permit, that undertaking in truth disputes the compatibility of the AÜG with Article 49 EC and with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). However, in order to review the lawfulness of national legislation in the light of Community law,

Evropaĭki Dynamiki should have brought an action before the national court, which would thus have been able to refer a question to the Court of Justice for a preliminary ruling.

- 23 Lastly, the General Court found that Evropaĭki Dynamiki cannot validly base its arguments on the case-law on which it relies. The General Court observed, in that regard, that, first, in Case 31/87 *Beentjes* [1988] ECR 4635 the contracting authority had taken into account an additional criterion which had not been imposed by national legislation and that, second, Case C-290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I-9461 concerned questions referred for a preliminary ruling relating to the compatibility of provisions of national law with Community law. Therefore, the General Court rejected the third limb of the eighth plea in part as manifestly unfounded and in part as manifestly inadmissible.
- 24 As regards the fourth limb of that plea, the General Court noted that, since the requirement for tenderers to hold the required permit was clearly set out in a number of documents relating to the negotiated procedure and Evropaĭki Dynamiki had had no difficulty in interpreting the disputed requirement, Case C-421/01 *Traunfellner* [2003] ECR I-11941 – which concerns the principle of transparency and the obligation to state minimum specifications in the contract documents – was entirely irrelevant to the resolution of the dispute before it.
- 25 As regards Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617 and Joined Cases C-226/04 and C-228/04 *La Cascina and Others* [2006] ECR I-1347, the General Court observed that, in accordance with *Universale-Bau and Others*, the procedure for awarding a public contract must comply, at every stage, particularly that of selecting the candidates in a restricted procedure, with both the principle of the equal treatment of the potential tenderers and the principle of transparency. It pointed out

that *La Cascina and Others* concerns questions referred for a preliminary ruling relating to the compatibility of provisions of national law with Community law in the light, in particular, of the principles of non-discrimination and transparency.

- 26 The General Court held that Evropaïki Dynamiki cannot validly submit that it had not been sufficiently informed of the disputed requirement and so cannot successfully rely on the principle of transparency. With regard to the alleged breach of the principle of non-discrimination, it pointed out that the disputed requirement applied to all tenderers. Therefore, the General Court rejected the fourth limb of the eighth plea in part as manifestly unfounded and in part as manifestly inadmissible.
- 27 Consequently, the General Court rejected the eighth plea in the action in part as manifestly inadmissible and in part as manifestly unfounded.
- 28 As regards the first seven pleas in the action, the General Court rejected these as manifestly inadmissible.
- 29 In that connection, the General Court observed, on the one hand, that Evropaïki Dynamiki had not succeeded in demonstrating that the mandatory criterion laid down in the documents relating to the negotiated procedure, requiring tenderers to hold the required permit, was unlawful and, on the other hand, that that company had expressly accepted in its written pleadings that it could not under any circumstances obtain the required permit in Germany. Thus, the General Court found that Evropaïki Dynamiki could not benefit from the fact that one or more of the first seven pleas might prove well founded. Even if the decisions rejecting its tender and awarding the contract to other tenderers were to be annulled on the basis of those pleas, the fact remains that Evropaïki Dynamiki has not succeeded in demonstrating the unlawfulness of the ground for exclusion upheld by the ECB, with the result that the ECB could replace the contested decisions only with a fresh decision rejecting Evropaïki Dynamiki's tender on the basis of that ground for exclusion.

- 30 The General Court noted that an applicant cannot have a legitimate interest in the annulment of a decision where it is already certain that that decision which concerns it cannot be other than reconfirmed. Accordingly, it held that Evropaīki Dynamiki, following the rejection of the eighth plea in its action, no longer had a legitimate interest in putting forward other pleas in order to obtain the annulment of the decisions rejecting its tender and awarding the contract to other tenderers. The General Court also observed that a plea for annulment is inadmissible on the ground of an applicant's lack of interest in bringing proceedings where, even if the plea were well founded, annulment of the contested act on the basis of that plea would not give the applicant satisfaction.
- 31 Consequently, the General Court dismissed the action in part as manifestly inadmissible and in part as manifestly unfounded.

Proceedings before the Court of Justice and the forms of order sought

- 32 By its appeal, Evropaīki Dynamiki, acting on behalf of the E2Bank consortium, claims that the Court should:
- set aside the order under appeal;
 - annul the measures by which the ECB excluded the E2Bank consortium from the procedure and awarded the contract to another tenderer, and
 - order the ECB to pay the costs, including those incurred at first instance.

33 The ECB contends that the Court should:

- dismiss the appeal; and
- order the appellant to pay the costs.

Admissibility of the appeal

34 The ECB submits that the appeal is inadmissible since it was lodged on behalf of the E2Bank consortium without a power of attorney being granted to that effect. It states that Evropaïki Dynamiki had lodged the action for annulment before the General Court on behalf of that consortium and that it had attached to the application a power of attorney signed by a representative of Engineering Ingegneria Informatica SpA, a member of that consortium. However, the scope of that power of attorney was limited to proceedings before the General Court and it did not authorise the donee of the power to bring an appeal before the Court of Justice.

35 Evropaïki Dynamiki contends that the last paragraph of that power of attorney does not limit it to proceedings before the General Court, but includes the exhaustion of all possible legal means.

36 The Court finds that, admittedly, under the first paragraph of that power of attorney, Evropaïki Dynamiki is authorised to undertake all the necessary legal actions on behalf of the E2Bank consortium before the General Court.

- 37 However, the second paragraph of the power of attorney states that it will remain valid for as long as it is necessary in order to complete all legal actions as they are prescribed by the applicable legislation.
- 38 Accordingly, the power of attorney in question must be considered also to cover the present appeal brought before the Court of Justice.
- 39 Therefore, the appeal is admissible.

Substance

- 40 Evropaïki Dynamiki relies on four grounds of appeal.

The first ground of appeal, alleging infringement of Article 114 of the Rules of Procedure of the General Court

- 41 By this ground of appeal, Evropaïki Dynamiki submits that the General Court infringed Article 114 of its Rules of Procedure by finding that the ECB's plea of inadmissibility was admissible, even though it had not been submitted by separate document.
- 42 The ECB contends that this ground is unfounded since Article 114 of the Rules of Procedure of the General Court requires that a plea of inadmissibility be raised in a separate document only where the General Court is requested to give a decision on that matter separately from examining the substance of the case.

- 43 In that connection, it must be observed, at the outset, that Article 114 of the Rules of Procedure of the General Court in no way requires that every plea of inadmissibility be submitted by separate document.
- 44 On the contrary, the submission of such a plea by separate document is necessary only if the party submitting it intends to ask the General Court for a decision on the admissibility of the action without going to the substance of the case.
- 45 Thus, a plea of inadmissibility may be raised in a defence and examined, by the General Court, when it adjudicates on the action.
- 46 It follows that the first ground of appeal must be rejected.

The second ground of appeal, alleging infringement of the rules relating to the legal interest in bringing proceedings

- 47 By this ground of appeal, Evropaïki Dynamiki submits that the General Court should have examined the first seven pleas in the action, even though it had rejected the eighth plea, and that it erred in finding that there was no legal interest in bringing proceedings. Evropaïki Dynamiki submits that the concept of a legal interest in bringing proceedings must be interpreted broadly, as is apparent both from the case-law of the Court of Justice and from the provisions 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).

- 48 The ECB contends that a lack of legal interest in bringing proceedings must be declared where annulment of the contested decision would not give the applicant satisfaction. It contends that the General Court was fully entitled, after rejecting the eighth plea, to reject the first seven pleas raised before it by EvropaĀki Dynamiki, since, even if they were well founded, the contract could not have been concluded with the E2Bank consortium because the latter did not possess the required permit and could never have obtained it.
- 49 In that connection, the Court finds that, in referring to the case-law of this Court, the General Court was fully entitled to find that, first, an applicant cannot have a legitimate interest in annulment of a decision where it is already certain that that decision which concerns it cannot be other than reconfirmed (see, to that effect, Case 432/85 *Souna v Commission* [1987] ECR 2229, paragraph 20) and, second, a plea for annulment is inadmissible on the ground of lack of interest in bringing proceedings where, even if it were well founded, annulment of the contested act on the basis of that plea would not give the applicant satisfaction (see, to that effect, Case 37/72 *Marcato v Commission* [1973] ECR 361, paragraphs 2 to 8).
- 50 It follows that the General Court, after rejecting the eighth plea in EvropaĀki Dynamiki's action, cannot be criticised for finding that it was no longer necessary to adjudicate on EvropaĀki Dynamiki's seven other pleas, which would not have enabled it to succeed in its action.
- 51 As regards EvropaĀki Dynamiki's argument that, in any event, it retained an interest in bringing proceedings in relation to the first seven pleas of its action, since it was possible for it to obtain the required permit through a subsidiary established in Germany, EvropaĀki Dynamiki did not refer to such a possibility before the General Court. To allow it to put forward for the first time an argument which it did not raise before the General Court would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the jurisdiction of the Court of Justice is confined to review of the findings of law on the pleas argued before the General Court (see

Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533, paragraph 126 and case-law cited). The argument is therefore inadmissible.

52 Therefore, the second ground of appeal must be rejected.

The third ground of appeal, alleging the non-mandatory character of the required permit

53 By this ground of appeal, Evropaïki Dynamiki submits that the General Court erred in finding that it was mandatory for tenderers to possess the required permit. It also submits that German law did not require a permit of that kind to be obtained in the present case and that it had entered into other contracts with the ECB without holding that permit. It also submits that the fact that the ECB required that permit is contrary to European Union law on public procurement and also Article 49 EC.

54 The ECB contends that the obligation for tenderers to hold the required permit is not one which it introduced, but that possession of that permit is a mandatory requirement arising from German law.

55 In that connection, it should be noted that an appeal must indicate precisely the contested elements of the General Court's decision which the appellant seeks to have set

aside and also the legal arguments specifically advanced in support of the appeal (see, inter alia, Case C-425/07 P *AEPI v Commission* [2009] ECR I-3205, paragraph 25 and the case-law cited). That requirement is not satisfied by a ground of appeal which, without even including an argument specifically identifying the error allegedly vitiating the decision under appeal, merely reproduces arguments previously submitted before the General Court. Such a ground of appeal amounts in reality to no more than a request for re-examination of a plea submitted before the General Court, which the Court of Justice does not have jurisdiction to undertake (see, in particular, Case C-131/03 P *Reynolds Tobacco and Others v Commission* [2006] ECR I-7795, paragraph 50 and case-law cited).

⁵⁶ In the present case, it must be noted that the General Court, as is apparent from paragraphs 52 to 94 of the order under appeal and paragraphs 12 to 27 of this judgment, analysed in great detail the alleged unlawfulness of the requirement for tenderers to hold the required permit.

⁵⁷ This Court finds that Evropaīki Dynamiki's objections in this ground of appeal are not directed specifically at aspects of the General Court's reasoning, in the order under appeal, which led it to reject the eighth plea expounded before it. By this ground of appeal – which, as the Advocate General also noted at point 57 of his Opinion, essentially reproduces the eighth plea in law – Evropaīki Dynamiki repeats in substance the objections, raised before the General Court, to the ECB's decision, as expressed in the documents relating to the disputed contract, to oblige tenderers in this case to hold the required permit.

⁵⁸ The third ground of appeal must therefore be rejected as inadmissible.

The fourth ground of appeal, alleging breach of the obligation to state reasons

⁵⁹ By this ground of appeal, Evropaïki Dynamiki submits that the General Court did not apply the relevant provisions which would have led it to annul the contested decision and that, in any event, the ECB did not provide valid justification or sufficient information in support of that decision. By referring in the heading of this ground of appeal to Article 253 EC, Article 12(1) 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), Article 100(2) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1), and Article 149(2) of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357 p. 1), Evropaïki Dynamiki seems also to be arguing that the order under appeal failed to have regard to those provisions of European Union law.

⁶⁰ The ECB contends that this ground of appeal is inadmissible and, in the alternative, unfounded.

⁶¹ As regards, first, the provisions of European Union law relied on by Evropaïki Dynamiki in this ground of appeal, the Court finds that it simply refers to them, without proving that they are applicable in the present case and without setting out in what respect the order under appeal infringes those provisions. According to case-law, a mere abstract statement of a plea in an appeal, unsupported by more specific information, does not fulfil the duty to state the reasons for an appeal (see, to that effect,

order of 29 November 2007 in Case C-107/07 P *Weber v Commission*, paragraphs 24 and 25, and order of 10 February 2009 in Case C-290/08 P *Correia de Matos v Commission*, paragraphs 18 and 19).

⁶² As regards, second, Evropaīki Dynamiki's other arguments based on the fact that the General Court did not reply to its argument that mere submission of the scores relating to the evaluation of the tenders did not constitute justification of the ECB's decision to award the contract to the successful tenderers, it should be observed that the General Court confined its assessment to the plea concerning the unlawfulness of the requirement for tenderers to hold the required permit. After rejecting that plea, the General Court was justified, as is apparent from paragraph 50 of this judgment, in rejecting the seven other pleas in the action – in particular the fifth and sixth pleas alleging, first, breach of the principles of transparency and sound administration and of the duty to state reasons, and, second, errors in assessment when evaluating the appellant's tender – as being manifestly inadmissible, without considering the substance of Evropaīki Dynamiki's arguments.

⁶³ Consequently, the fourth ground of appeal must be rejected in its entirety.

⁶⁴ Since none of the grounds of appeal relied on by Evropaīki Dynamiki has been upheld, the appeal must be dismissed.

Costs

- ⁶⁵ Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal pursuant to Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the ECB has applied for costs to be awarded against Evropaïki Dynamiki and the latter has been unsuccessful, Evropaïki Dynamiki must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE to pay the costs.**

[Signatures]