JUDGMENT OF THE COURT (Sixth Chamber)
4 March 1999 *

In Case C-258/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Unabhängiger Verwaltungssenat für Kärnten (Austria) for a preliminary ruling in the proceedings pending before that body between

Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI)

and

Landeskrankenanstalten-Betriebsgesellschaft

on 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 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),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: P. J. G. Kapteyn (Rapporteur), President of the Chamber, G. Hirsch, J. L. Murray, H. Ragnemalm and R. Schintgen, Judges,

Advocate General: A. Saggio,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI), by Rainer Kurbos, Rechtsanwalt, Graz,

— Landeskrankenanstalten-Betriebsgesellschaft, by Klaus Messiner and Ute Messiner, Rechtsanwälte, Klagenfurt,

— the Austrian Government, by Wolf Okresek, Sektionschefrat at the Federal Chancellor's Office, acting as Agent,

— the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, and Claudia Schmidt, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Landeskrankenanstalten-Betriebsgesellschaft, represented by Klaus Messiner and Gerhard Maderthaner, Leiter der Rechtsabteilung, the Austrian Government, represented by Michael Fruhmann, of the Federal Chancellor's Office, and the Commission, represented by Hendrik van Lier and Claudia Schmidt, at the hearing on 17 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 1 October 1998,

gives the following

Judgment

1 By order of 8 July 1997, received at the Court on 17 July 1997, the Unabhängiger Verwaltungssenat für Kärnten (Independent Administrative Senate for Carinthia) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty five questions on 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 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2 Those questions were raised in proceedings between Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) (hereinafter 'the plaintiff') and Landeskrankenanstalten-Betriebsgesellschaft (the establishment responsible for the management of *Land* hospitals, hereinafter 'the defendant') concerning the award of a service contract relating to the construction of a paediatric hospital in Klagenfurt.

Community law

3 Article 1(1) of Council Directive 89/665/EEC, as amended by Article 41 of Directive 92/50, provides:

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

4 Article 1(2) and (3) of Directive 89/665 provide:

'2. Member States shall ensure that there is no discrimination between undertakings claiming 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 public supply or public works 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 authority of the alleged infringement and of his intention to seek review.'

5 Article 2 of the same directive 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;

(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;

(c) award damages to persons harmed by an infringement.

...

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

8. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a

case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

6 Articles 8, 9 and 10 of Directive 92/50 provide:

Article 8

'Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.'

Article 9

'Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.'

Article 10

'Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

7 Under Article 168 of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21), Directive 92/50 was to be transposed into Austrian law before 1 January 1995.

Austrian law

8 As far as the *Land* of Carinthia is concerned, Directive 89/665 was transposed by the Kärntner Auftragsvergabegesetz (Law of the *Land* of Carinthia on the award of public contracts) which entered into force on 1 January 1994 (LGBl. No 55/1994). In Section VIII ('Remedies'), Article 59(1) provides that the procedure for awarding public contracts under that Law is to be subject to monitoring by the Unabhängiger Verwaltungssenat für Kärnten (an independent administrative authority responsible for verifying the legality of administrative measures adopted by the *Land*, hereinafter 'the UVK').

9 The provisions concerning that authority are contained in a special statute, the Kärntner Verwaltungssenatsgesetz (LGBl. No 104/1990). It governs in particular the terms of reference of the authority, its composition and its independence.

10 It is common ground that, in the *Land* of Carinthia, the transposition of Directive 92/50 did not take effect until 1 July 1997.

The questions referred

11 The plaintiff submitted a tender in a procedure for the award of a contract organised by the defendant for the construction of a paediatric hospital in Klagenfurt. The procedure related to a number of engineering services, including planning, consultancy and studies for the various medical facilities.

12 After the contract was awarded to the Viennese company CMT Medizintechnik Gesellschaft mbH, the plaintiff, which had also participated in the procedure, commenced proceedings before the UVK, alleging that the tendering procedure had infringed the Community rules on public service contracts and was therefore unlawful.

13 Considering that it was unable to adjudicate on the dispute before it without seeking clarification as to the interpretation of Directives 89/665 and 92/50, the UVK stayed proceedings pending a preliminary ruling from the Court of Justice on the following five questions:

'1. Is Article 2(8) 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 to be interpreted as meaning that the Unabhängiger Verwaltungssenat für Kärnten fulfils the conditions for a body responsible for review procedures with respect to services?

2. Are these or other provisions of Council Directive 89/665/EEC 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, from which there derives an individual right to have review proceedings conducted before authorities or courts which comply with the provisions of Article 2(8) of Directive 89/665/EEC, to be interpreted as being sufficiently precise and specific that, in the event of non-transposition of the directive in question by the Member State, an individual may successfully assert that legal right against the Member State in legal proceedings?

3. Are the provisions of Article 41 of Directive 92/50/EEC in conjunction with Directive 89/665/EEC, which are the basis of an individual's right to have review proceedings conducted, to be interpreted as meaning that a national court with the characteristics of the Unabhängiger Verwaltungssenat für Kärnten may, when conducting review proceedings on the basis of national provisions such as Article 59 et seq. of the Carinthian Auftragsvergabegesetz and the regulations relating thereto, disregard those provisions if they prevent the carrying out of review proceedings under the Carinthian Auftragsvergabegesetz for the award of public service contracts, and therefore nevertheless conduct review proceedings in accordance with Article 8 of the Carinthian Auftragsvergabegesetz?

4. Are the services mentioned in the facts of the case, with reference to Article 10 of Directive 92/50/EEC, to be classified as services coming under Annex IA, Category No 12, of Directive 92/50/EEC (architectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services)?

5. Are the provisions of Directive 92/50/EEC to be interpreted as satisfying the conditions laid down in the judgment in Case 41/74 *Van Duyn* (paragraph 12) for the direct applicability of a Community directive, with the result that

services coming under Annex IA of the directive are to be awarded under the procedure therein mentioned, or are the relevant provisions of the directive in connection with the services mentioned in Annex IA capable of fulfilling the conditions laid down in the said case?'

The first question

14 By its first question the referring body seeks essentially to ascertain whether provisions such as those which govern its composition and functioning conform with the conditions laid down in Article 2(8) of Directive 89/665.

15 That provision is concerned with bodies hearing appeals against decisions adopted by authorities responsible for awarding public contracts falling within the scope of that directive.

16 Under the first subparagraph of Article 2(8) of Directive 89/665, Member States have two options in organising review procedures for public contracts.

17 The first option consists in vesting the power to hear appeals in judicial authorities. Under the second option, that power is, initially, granted to non-judicial authorities. In such circumstances, the decisions of those authorities must be amenable to judicial review or to review by another authority which meets the special requirements laid down in the second subparagraph of Article 2(8) of Directive 89/665 in order to ensure that an adequate remedy is available (Case C-103/97 *Köllensperger* [1999] ECR I-551, paragraph 29).

18 As the Advocate General observed in points 12 to 14 of his Opinion, a body such as the UVK displays all the characteristics required for it to be recognised as a court or tribunal within the meaning of Article 177 of the Treaty.

19 It follows that if, as in a case such as this, the reviewing authority is of a judicial nature, the particular requirements of the second subparagraph of Article 2(8) of Directive 89/665 do not apply.

20 Accordingly, the answer to be given to the referring body must be that the conditions laid down in Article 2(8) of Directive 89/665 do not apply to authorities whose composition and functioning are governed by rules such as those to which that body is subject.

The second and third questions

21 By its second and third questions, which it is appropriate to consider together, the referring body seeks essentially to ascertain whether Article 2(8) or other provisions of Directive 89/665 must be construed as meaning that, if Directive 92/50 has not been transposed by the end of the period laid down for that purpose, the review bodies in the Member States with jurisdiction to review procedures for the award of public supply contracts and public works contracts, established under Article 2(8) of Directive 89/665, may also hear appeals concerning procedures for the award of public service contracts.

22 It must be noted at the outset that, in Case C-54/96 *Dorsch Consult* v *Bundesbaugesellschaft Berlin* [1997] ECR I-4961, paragraph 40, and Case C-76/97 *Tögel* v *Niederösterreichische Gebietskrankenkasse* [1998] ECR I-5357, paragraph 22), the

Court held that it was for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law but that in each case the Member States must ensure that those rights are effectively protected. Subject to that reservation, it is not for the Court to involve itself in the resolution of questions of jurisdiction which may arise within the national judicial system from the classification of certain legal situations based on Community law.

23 In paragraphs 41 and 23 of those judgments, respectively, the Court went on to state that although Article 41 of Directive 92/50 requires the Member States to adopt the measures necessary to ensure effective review in the field of public service contracts, it does not indicate which national bodies are to be the competent bodies for that purpose or whether those bodies are to be the same as those which the Member States have designated in the field of public works contracts and public supply contracts.

24 It is nevertheless undisputed that, on the date on which the plaintiff instituted proceedings before the UVK, Directive 92/50 had not yet been transposed into domestic law in Carinthia. The Law transposing it did not enter into force until 1 July 1997.

25 Having regard to similar circumstances, in paragraphs 43 and 25 respectively of *Dorsch Consult* and *Tögel*, cited above, the Court stated that the Member States' obligation arising from a directive to achieve the result prescribed by the directive and their duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. It followed that, when applying national law, whether adopted before or after the directive, the national court having to interpret that law must do so, as far as possible, in the light of the wording and purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph

of Article 189 of the EC Treaty (see the judgments in Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20; and in Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 26).

26 In paragraphs 44 and 26 respectively of its judgments in *Dorsch Consult* and *Tögel*, cited above, the Court also pointed out that the question of the designation of a body competent to hear appeals in relation to public service contracts is relevant even where Directive 92/50 has not been transposed. Where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, the Court has recognised, subject to certain conditions, the right of individuals to rely in law on a directive as against a defaulting Member State. Although this minimum guarantee cannot justify a Member State in absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive (see, in particular, the judgment in Case C-253/95 *Commission* v *Germany* [1996] ECR I-2423, paragraph 13), it may nevertheless have the effect of enabling individuals to rely, as against a Member State, on the substantive provisions of Directive 92/50.

27 Finally, in paragraphs 45 and 27 respectively of the same judgments, the Court reiterated that, if the relevant domestic provisions cannot be interpreted in conformity with Directive 92/50, the persons concerned, using the appropriate domestic law procedures, may claim compensation for the damage incurred owing to the failure to transpose the directive within the time prescribed (see, in particular, the judgment in Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845).

28 The answer to the second and third questions must therefore be that neither Article 2(8) nor any other provisions of Directive 89/665 may be interpreted as meaning that, if Directive 92/50 has not been transposed by the end of the period prescribed for that purpose, the review bodies in the Member States with jurisdiction to review procedures for the award of public supply contracts and public works contracts, established under Article 2(8) of Directive 89/665, may also hear appeals concerning procedures for the award of public service contracts. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement that the rights of individuals must be protected

effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In circumstances such as those arising in the case in the main proceedings, the national court must determine in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.

The fourth question

29 By its fourth question the referring body seeks to ascertain whether services such as those with which the defendant's invitation to tender was concerned fall within Category No 12 of Annex I A to Directive 92/50.

30 Category No 12 of Annex I A to Directive 92/50 comprises architectural services, engineering services and integrated engineering services, urban planning and landscape architectural services, related scientific and technical consulting services and technical testing and analysis services.

31 For the reasons given by the Advocate General in point 25 of his Opinion, it is clear that services such as those with which the defendant's invitation to tender is concerned fall within Category No 12 of Annex I A to Directive 92/50.

32 The answer to the fourth question must therefore be that services of the kind with which the defendant's invitation to tender is concerned, namely tasks relating to

the preparation and execution of projects for the construction of a paediatric clinic in a hospital and the corresponding medical facilities, fall within Category No 12 of Annex I A to Directive 92/50.

The fifth question

33 By its fifth question the referring body seeks essentially to ascertain whether Directive 92/50 may be relied on by individuals before national courts.

34 As the Court held in paragraph 42 of *Tögel*, cited above, it is settled case-law (see the judgment in Case 31/87 *Beentjes* v *Netherlands State* [1988] ECR 4635, paragraph 40) that whenever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied on by individuals against the State where that State fails to implement the directive in national law within the prescribed period or where it fails to implement it correctly.

35 It is therefore necessary to consider whether the relevant provisions of Directive 92/50 appear, as regards their content, to be unconditional and sufficiently precise to be relied on by an individual against the State.

36 It was held in paragraph 44 of *Tögel*, cited above, that the provisions of Title I, concerning the matters and persons covered by the directive, and of Title II, on the procedures applicable to contracts for the services listed in Annexes I A and I B, are unconditional and sufficiently precise to be relied on before a national court.

37 It was also held, in paragraph 45 of *Tögel*, that under Articles 8 and 10, which form part of Title II, the awarding authorities are required, in unconditional and precise terms, to award public contracts for services in accordance with national procedures in conformity with the provisions of Titles III to VI in the case of services coming wholly or mainly under Annex I A and with the provisions of Articles 14 and 16 in the case of services coming wholly or mainly under Annex I B. Article 14 constitutes Title IV whilst Article 16 appears under Title V.

38 Finally, the Court held in paragraph 46 of *Tögel* that the detailed provisions of Titles III to VI of Directive 92/50 on the choice of award procedures and the rules applicable to competitions, common technical and advertising rules, and participation and selection and award criteria, are, subject to exceptions and qualifications which are apparent from their terms, unconditional and sufficiently clear and precise to be relied on by service providers before national courts.

39 The answer to the fifth question must therefore be that the provisions of Titles I and II of Directive 92/50 may be relied on directly by individuals before national courts. As regards the provisions of Titles III to VI, they may also be relied on by an individual before a national court if it is clear from an individual examination of their wording that they are unconditional and sufficiently clear and precise.

Costs

40 The costs incurred by the Austrian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, pending before the referring body, the decision on costs is a matter for that body.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Unabhängiger Verwaltungssenat für Kärnten by order of 8 July 1997, hereby rules:

1. **The conditions laid down in Article 2(8) 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 do not apply to authorities whose composition and functioning are governed by rules such as those to which that body is subject.**

2. **Neither Article 2(8) nor any other provisions of Directive 89/665 may be interpreted as meaning that, if Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts has not been transposed by the end of the period prescribed for that purpose, the review bodies in the Member States with jurisdiction to review procedures for the award of public supply contracts and public works contracts, established under Article 2(8) of Directive 89/665, may also hear appeals concerning procedures for the award of public service contracts. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In circumstances such as those arising in the case in the main proceedings, the national court must determine in particular whether such a**

right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.

3. Services of the kind with which the defendant's invitation to tender is concerned, namely tasks relating to the preparation and execution of projects for the construction of a paediatric clinic in a hospital and the corresponding medical facilities, fall within Category No 12 of Annex I A to Directive 92/50.

4. The provisions of Titles I and II of Directive 92/50 may be relied on directly by individuals before national courts. As regards the provisions of Titles III to VI, they may also be relied on by an individual before a national court if it is clear from an individual examination of their wording that they are unconditional and sufficiently clear and precise.

Kapteyn Hirsch Murray

Ragnemalm Schintgen

Delivered in open court in Luxembourg on 4 March 1999.

R. Grass

Registrar

P. J. G. Kapteyn

President of the Sixth Chamber