OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 7 June 2007 [1]

1. The present reference from the Hanseatisches Oberlandesgericht (Hanseatic Higher Regional Court) in Bremen, Germany, essentially asks the Court whether Community law precludes a tenderer from being generally excluded from the right under Directive 89/665 [2] to apply for a review of tender decisions on the ground that it has not challenged, within the time-limit set by national law, a decision which has incorrectly placed the tendering procedure outside the scope of that directive.

2. The claimant in the main proceedings tendered unsuccessfully for a software contract which had been put out to tender under the national procedure. It then complained, first, that there should have been a Community-wide tendering procedure because the relevant threshold value had been exceeded and, second, that the subsequent award decision was unlawful. The complaints were declared inadmissible on the ground that the time-limit for challenging the choice of procedure had expired, so that the review procedure for public contracts falling within the scope of Community law was not available.

3. The reference invites the Court to examine further the circumstances in which the imposition of time-limits for challenging decisions in public tendering procedures may compromise the principle of effectiveness which underlies Directive 89/665.

Relevant legislation

Directive 89/665

4. Directive 89/665 seeks to ensure that the procedures for the award of public works,

1 — Original language: English.

2 — Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (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).

supply and service contracts laid down in the relevant Community directives are applied effectively. It does this by providing for a system of review procedures and remedies for infringements.

5. The following recitals in the preamble to Directive 89/665 are relevant:

'[1] ... Community Directives on public procurement, in particular ... Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, [3] ... do not contain any specific provisions ensuring their effective application;

[2] ... [T]he existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected;

[3] ... [T]he opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; ... for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law;

[4] ...

[5] ... [T]he short duration of the procedures means that the aforementioned infringements need to be dealt with urgently;

...'

6. Article 1 of Directive 89/665 provides:

'1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the

3 — (OJ 1977 L 13, p. 1.) This directive was repealed and replaced by Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) and Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1). Directive 93/36 was in turn one of the directives repealed and replaced by European Parliament and Council Directive 2004/18/EC 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).

scope of Directives ... 77/62/EEC, and 92/50/EEC, [4] decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law.

2. ...

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 ... 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.'

7. Article 2 of Directive 89/665 deals with the remedies that should be available in respect of the reviews. Article 2(7) states that '[t]he Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced'.

Directive 93/36 [5]

8. Article 10 of Directive 93/36 lays down, inter alia, the minimum time-limits in open procedures for the receipt of tenders valued above the threshold for applying Community rules. Article 10(1) states that such procedures must remain open for at least 52 days from the sending of the tender notice. That period may be reduced, as a general

4 — See footnote 2. Directive 92/50 was amended by Directives 93/36, 97/52 and 2001/78 and repealed, save for Article 41 (which amended Article 1(1) of Directive 89/665), by Directive 2004/18 (see footnote 3 above). Under Article 2 of Directive 92/50 (and, subsequently, paragraph 2 of Article 1(2)(d) of Directive 2004/18), a contract which includes both supplies and services is considered to be a service contract if the value of services exceeds that of the products supplied. The contract at issue in the present case includes both supplies (software licences) and services (training and maintenance), whose relative values are not clear from the documents in the case file. It is thus uncertain whether it would qualify as a supply or as a service contract. However, the threshold value bringing a contract within the scope of Directive 89/665 is the same in both cases.

5 — See footnote 3. Similar provisions to Article 10(1) and (1a) of Directive 93/36 are to be found, for public service contracts, in Article 18(1) and (2) of Directive 92/50. Both sets of provisions were subsequently replaced by Article 38(2) and (4) of Directive 2004/18.

rule, to a minimum of 36 days, but under no circumstances to less than 22 days, if a prior information notice was published under conditions set out in Article 10(1a).

German legislation [6]

9. Part four of the German Gesetz gegen Wettbewerbsbeschränkungen (Law Against Restrictions on Competition) ('GWB') covers the award of public contracts. [7] Paragraph 100(1) states that '[t]his part applies only to contracts which reach or exceed the values set out in the regulations provided for by paragraph 127 (threshold values).' [8]

10. Paragraph 107 of the GWB covers applications for review to the procurement board. Paragraph 107(3) of the GWB sets out the time-limits for applying to the procurement board for review of alleged infringements of the procurement rules and states:

'The application is inadmissible where the applicant was already aware during the award procedure of the alleged infringement of the procurement rules and did not immediately complain to the awarding authority. The application is also inadmissible where no complaint is raised about infringements of the procurement rules that are identifiable [9] on the basis of the tender notice with the awarding authority by, at the latest, the end of the period stipulated in the tender notice for bidding or for applications to participate in the award procedure.'

11. The Vergabeverordnung (Public Procurement Regulation) ('VgV') [10] contains inter alia the threshold values referred to in Paragraph 127(1) of the GWB. [11] At the material time Paragraph 2 of the VgV provided:

'The threshold amount is:

...

6 — The translations of the titles and provisions of German legislation cited are my own.

7 — Gesetz gegen Wettbewerbsbeschränkungen of 26 August 1998, BGBl. 1998 I, p. 2521. Part four comprises Paragraphs 97 to 129. It is divided into three sections, the second of which (Paragraphs 102 to 124) covers review procedures.

8 — Paragraph 127(1) of the GWB empowers the federal government, with the agreement of the Bundesrat (the upper house of the federal parliament), to transpose into German law by means of a regulation the threshold values in Community directives on the coordination of procedures for awarding public contracts.

9 — '[E]rkennbar' in the German original.

10 — Verordnung über die Vergabe öffentlicher Aufträge, 9 January 2001, BGBl. 2001 I, p. 110.

11 — See footnote 8 above.

3. for all other supply or service contracts: EUR 200 000.'

12. Part A of the Verdingungsordnung für Leistungen (Rules for the Placing of Public Supply and Service Contracts by Tender) ('VOL/A') [12] contains detailed rules for awarding supply and service contracts by tender. Paragraph 17 relates inter alia to the contents of the tender notice. Paragraph 17(1)(2) provides:

'The tender notice should at least contain the following details:

...

(c) Nature and scope of the goods or services to be supplied ...' [13]

12 — 2002 version of 17 September 2002, *Bundesanzeiger* No 216a. Sections 1 and 2 cover awards respectively below and above the Community threshold. Corresponding paragraphs in each section bear the same number. In each section the wording of Paragraph 17(1)(2)(c) is identical.

13 — 'Diese Bekanntmachung soll mindestens folgende Angaben enthalten: ... Art und Umfang der Leistung' in the German original.

The main proceedings and the reference made

13. On or before 21 March 2005 the defendant in the main proceedings, the Free Hanseatic City of Bremen ('Bremen'), issued a 'national invitation to tender under the VOL/A' for a software contract. [14] The closing date was 12 April 2005. The tender notice contained no quantification of the scope or value of the contract. Under the heading 'Menge und Umfang' (volume and scope) it stated:

'On behalf of the Senator for Employment, Women, Health, Youth and Social Affairs in Bremen, standard software is sought for SGB XII (social service — Adult and Economic Aid) for PC-based case handling to meet the requirements laid down in the tender documents. The tender documents can be downloaded free of charge from *www.vergabe.bremen.de. ...*'

14 — The translations of the parts of the tender notice and tender documents cited are my own.

14. Lämmerzahl GmbH ('Lämmerzahl'), the claimant in the main proceedings, is a limited company specialising in software for public authorities. It duly obtained the tender documents, which included the following three documents:

15. First, the document entitled 'price sheet/price breakdown 1' ('the price document') asked tenderers to provide, under the section headed 'licence contract', unit prices for full licences according to various possible ranges of quantities to be supplied (11-50, 51-100, 101-200, 201-500 licences). There was an alternative request for unit-pricing for read-only licences (1-5, 6-10, 11-50, 51-100 licences). As a further alternative, a price was requested for a 'Landeslizenz' (State licence).[15] The section headed 'service contract' asked tenderers to quote for training approximately 300 employees and 10 administrators. Nowhere did the document state the actual number of licences required.

15 — In its letter of 6 April 2005 (see point 20 below), Bremen said that a State licence would be for an unlimited number of licences for use in Bremen and Bremerhaven.

16. Second, the document setting out the object of the tender invitation ('the object document') stated that approximately 200 employees in the economic aid area, 45 in social services and 65 in the central units would work with the software system.

17. Third, the 'table of goods and services' indicated a 'minimum or estimated volume' of one unit. Again, it failed to indicate the total number of licences required.

18. Lämmerzahl raised four questions relating to the tender documents, to which Bremen replied by letter on 24 March 2005. At that stage, Lämmerzahl did not ask about the number of licences, or the volume or value of the contract.

19. Lämmerzahl then sent Bremen an e-mail on 4 April 2005 requesting further clarification of the tender documents. Its first question asked whether the total prices requested in the offer document and the table of goods and services related to 'the sum of the prices in the price sheet for the licence contract based on 310 licences (the

310 employees specified in the [object document])' or whether other prices (e.g. maintenance and service costs) should be included. Three of the other questions in Lämmerzahl's e-mail referred to 'the above-mentioned 310 licences'.

20. Bremen replied by letter on 6 April 2005. In answer to the first question it said that the overall tender price (total price of licence costs, maintenance costs and services) should be entered in the offer document. None of Bremen's answers mentioned or expressly commented on the figure of 310 licences which Lämmerzahl had included in its questions.

21. Lämmerzahl then submitted a tender based on 310 licences, together with training and maintenance, for EUR 603 500 net. It was selected for the testing stage along with a rival tenderer, PROSOZ Herten GmbH ('PROSOZ').

22. On 6 July 2005 Bremen wrote to Lämmerzahl informing it that it had been unsuccessful because its offer had not been the most economically advantageous.

23. On 14 July 2005 Lämmerzahl sent a written complaint to Bremen and on 21 July 2005 submitted an application for a procurement review. It stated that it had discovered from taking legal advice on 14 July 2005 that Bremen should have issued a Community-wide, rather than a national, invitation to tender because the value of the contract exceeded the EUR 200 000 threshold. It also alleged that its software had not been properly tested.

24. On 2 August 2005 the Third Procurement Board of the City of Bremen ('the Board') dismissed the application. It stated that, even if the threshold figure had been exceeded and the wrong tendering procedure had thus been used, such an irregularity was identifiable from the tender invitation. Accordingly, Lämmerzahl's complaints were out of time under Paragraph 107(3), second sentence, of the GWB.

25. Lämmerzahl appealed to the referring court. First, it claimed the irregularity in the choice of procedure had not been identifiable from the tender notice. Second, it repeated its objection to the testing and selection procedure, claiming that the PROSOZ tender was manifestly incomplete and contained an unlawful costing arrangement which should have led to its exclusion ('the substantive complaints').

26. By an interim decision of 7 November 2005, the referring court refused to extend the suspensory effect of the appeal because it considered that it did not have any prospect of success. It agreed with the Board that by virtue of the limitation period in Paragraph 107(3), second sentence, of the GWB, Lämmerzahl was out of time in challenging the choice of the national procedure and Bremen's estimate of the contract value. Consequently, the company was precluded from recourse to the GWB review procedure, which was only available for tendering procedures exceeding the threshold value.

27. Bremen then awarded the contract to PROSOZ.

28. In the order for reference, the national court appears to accept that the contract value exceeded the EUR 200 000 threshold. [16] However, it considers that Lämmerzahl is time-barred from access to the GWB review procedure by virtue of Paragraph 107(3), second sentence, of the GWB.

29. In reaching that conclusion, the national court does not rule definitively on the question whether, under national law, 'identifiable on the basis of the tender notice' means that an irregularity has to be identifiable from the tender notice alone. It considers that, if that phrase can encompass other documents, Lämmerzahl should have realised from the details in the tender documents that the threshold would be exceeded. It should in any event have realised this from its own calculations. If, on the other hand, an irregularity has to be identifiable from the tender notice alone, the very absence of any indication of the contract's scope would in itself constitute an identifiable irregularity, since such an omission would be contrary to Paragraph 17(1)(2)(c) of the VOL/A. [17] It would further prevent a tenderer from verifying the choice of procedure and challenging it if necessary.

30. The national court nonetheless has reservations as to whether its decision of 7 November 2005 might deprive tenderers of their right to an effective review of alleged infringements of Community law, in breach of Article 1 of Directive 89/665. It considers that the limitation set out in Paragraph

16 — It seems that Bremen had used the national tendering procedure as a result of a valuation of EUR 150 000 (made in 2004) on the basis of 150 rather than 310 licences.

17 — Lämmerzahl refers to this provision in the VOL/A as 'non-mandatory'. The referring court states, however, that the word 'soll' ('should') generally indicates an obligation to comply, absent compelling reasons to the contrary. See point 12 above and the footnote thereto. The referring court derives its interpretation of 'soll' from the 'General Comments' section at the end of the VOL/A.

107(3), second sentence, of the GWB conforms in principle with the directive in the light of the Court's case-law.[18] However, when the contract value has wrongly been estimated to be below the threshold, failure to complain within the time-limit deprives a tenderer of a review not only of that irregularity, but also of its substantive complaints. If a contracting authority is able to deprive an unwary tenderer of substantive protection by committing an identifiable irregularity, there is potential for abuse.

31. The national court also wonders whether the draconian consequences of limitation should only be triggered if the tenderer is able to ascertain unequivocally from the tender notice that the contracting authority is assuming that the contract will fall below the threshold value.

32. In the light of these considerations, the referring court has stayed the main proceedings and referred two questions to the Court:

'(1) Is it compatible with Directive 89/665/EEC, in particular Article 1(1) and (3), for a tenderer to be generally barred from gaining access to a review of a contracting authority's decision to award public contracts because the tenderer through its own fault did not raise an irregularity in the award procedure within the time-limit laid down for that purpose in national law, where the irregularity relates

(a) to the form of invitation to tender selected

or

(b) to the correctness of the determination of the contract price (the estimate is obviously wrong or the method of determination is not sufficiently transparent)

and where, on the basis of the contract value as correctly determined or to be determined, it would be possible to review other irregularities in the award procedure which, considered in isolation, would not be time-barred?

(2) Should the details in a tender notice relevant to determination of the contract price be subject to any special

18 — The Court has ruled that the setting of reasonable time-limits for bringing proceedings is compatible with Article 1 of Directive 89/665: Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 75 to 79.

requirements so as to enable the conclusion to be drawn from irregularities relating to the estimated contract price that the protection of primary law is generally precluded even if the correctly estimated contract price exceeds the relevant threshold amount?'

33. Written observations have been submitted by Lämmerzahl, Bremen, Austria, Lithuania and the Commission. Lämmerzahl, Bremen and the Commission also made further observations at the hearing on 28 March 2007.

Admissibility

34. Bremen submits that the conditions for an Article 234 EC reference are not met. What is at issue is the particular application of a national provision whose conformity with Community law is not in doubt.

35. I do not accept that argument. What lies behind the referring court's first question is whether Article 1 of Directive 89/665 precludes the possibility of a general exclusion from the right to review in circumstances such as those in the main proceedings.

36. As to the referring court's second question, it is quite true that the Court cannot provide a list of precisely what should appear in tender notices. [19] However, it is competent to interpret the relevant principles and provisions of Community law in order to help the national court to determine whether these have been infringed in a particular case.

37. The reference is therefore admissible.

The questions

Preliminary

38. The two questions which the referring court asks may be reformulated as follows:

(1) If a tenderer has failed within the time-limit set by national law to challenge a

19 — The Community legislator has imposed certain harmonised requirements in respect of contracts whose value exceeds the relevant threshold: see footnote 3 above.

decision incorrectly placing a public tender outside the scope of Community protection, does Directive 89/665 prevent the tenderer from being denied the right conferred by that directive to a review of any further decisions in the tender process?

(2) What details should appear on the tender notice so as to enable the conclusion to be drawn that the contract value has been wrongly estimated to fall below the threshold for the protection granted by Directive 89/665?

39. The referring court's second question relates to whether the irregularity in issue can be detected. That question is central to determining whether a limitation period for challenging that irregularity is compatible with Community law. I shall therefore examine the two questions referred together. Most of the parties submitting observations have indeed broadly adopted this approach.

Observations

40. Lämmerzahl submits that while a time-limit such as that contained in Paragraph 107(3), second sentence, of the GWB is in principle compatible with Directive 89/665, it acts as a derogation from the right to review. Accordingly, the phrase 'identifiable on the basis of the tender notice' must be interpreted narrowly. It cannot extend to the identification of an omission, the challenging of which might lead in turn to the identification of Bremen's error in estimating the contract value. That error — and hence the erroneous choice of procedure — could not be identified from the tender notice. It was thus impossible or excessively difficult for Lämmerzahl to exercise its Community rights.

41. Lithuania considers that where a time-limit starts to run on publication of the tender notice, the rights of tenderers under Community law are protected effectively only if they are provided with full and objective information about the volume of the tender at that point. If they are not, the time-limit should start to run only once they know of, or are in a position to ascertain, the procedural error in question.

42. Bremen considers that Paragraph 107(3), second sentence, of the GWB is compatible with Directive 89/665. The criterion of identifiability ensures that the exercise of a tenderer's Community rights is not made impossible or excessively difficult. Putting the estimated value on the tender notice

could distort competition. It is sufficient that the averagely experienced market participant should be able to calculate the contract value from the information provided. At the hearing Bremen pointed out that, even without the right to review under Directive 89/665, general remedies were available under national law. However, it conceded that these were less effective than the procedure under the GWB.

43. Austria considers that a general exclusion from the Community review procedure as a result of failing to challenge the irregularity in question within the time-limit is compatible with Directive 89/665, provided that the particular application of the time-limit does not infringe the principle of effective protection.

44. The Commission adopts a similar position. It notes that the sanction of foreclosure ensures that irregularities are challenged as soon as possible. That is desirable in view of the potential consequences of having to restart the tender procedure. At the hearing, the Commission stated that the failure to challenge an irregularity in time should lead to foreclosure only if the tenderer could identify the irregularity or should have done so had it acted with the care to be expected of an experienced and diligent trader.

45. The Commission also considers that fundamental principles of the EC Treaty such as equality and transparency are applicable even to tenders falling below the Community threshold. [20]

Assessment

46. The Community principle of effectiveness lies at the core of the protection which Directive 89/665 provides. As the Court has long held, this principle requires that the exercise of rights conferred by Community law must not be rendered virtually impossible or excessively difficult. [21]

47. The first three recitals to Directive 89/665 thus emphasise that the purpose of the directive is to ensure the effective

20 — In my Opinion in Case C-195/04 *Commission* v *Finland* [2007] ECR I-3351, I have dealt at length with this argument.

21 — See for example Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12 and the case-law cited, and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 43 and the case-law cited.

application of the harmonising Community directives on public procurement, by providing a system of remedies for 'infringements of Community law in the field of public procurement or national rules implementing that law'. Article 1(1) spells out the requirement for effective review of decisions taken by contracting authorities. Article 2(7) provides for decisions taken by the appropriate review bodies to be enforced effectively.

48. The second and fifth recitals stress, however, that public procurement procedures are characterised by their short duration. Any infringements therefore need to be dealt with urgently, at a stage when they can be corrected. Rapidity of review is thus considered to be an aspect of effectiveness and is expressly identified in the third recital and in Article 1(1).

49. Directive 89/665 therefore provides for the possibility of reviewing a decision even before it has caused actual harm. Under Article 1(3), standing is given to 'any person having or having had an interest in obtaining a particular public supply ... contract and who has been *or risks being* harmed by an alleged infringement' (emphasis added). In the same vein, Article 1(3) permits Member States to require an interested party to give prior notice to the contracting authority of its intention to seek judicial review, underlining the need to try to resolve issues as rapidly as possible.

50. The directive does not expressly authorise the use of limitation periods for applying for review of contracting authorities' decisions. The imposition of time-limits under national implementing legislation is, however, in principle compatible with the requirement for rapid review, since it quickly becomes impractical to reverse such decisions. Moreover, the Court has long recognised that reasonable time-limits constitute an application of the fundamental principle of legal certainty. [22]

51. In *Universale-Bau* [23] the Court held that Directive 89/665 does not preclude national legislation from setting a reasonable time-limit for bringing an application to review a contracting authority's decision. A time-limit

22 — See Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 33 and the case-law cited.

23 — Cited in footnote 18 above.

is reasonable if it satisfies both the principle of effectiveness, as laid down by the directive, and the principle of legal certainty. [24]

52. The need to balance these two principles distinguishes limitation periods from derogating provisions, with which Lämmerzahl seeks to equate them. There are many kinds of derogation in Community law, justified for various reasons. Often, such derogations are exceptions to EC Treaty rights or other general principles. As a rule, they are permitted when necessary to protect specific interests. In order to give effect to overriding principles, derogations are typically interpreted restrictively. Limitation periods, on the other hand, strike a balance between the individual's rights and the wider public interest. Since they nevertheless limit rights, they must be examined carefully to determine whether their application in fact undermines the principle of effective protection.

53. The Court undertook such an examination in *Santex*. [25] There, it elaborated on *Universale-Bau* and applied criteria established in previous case-law [26] to the question of the reasonableness of time-limits in the context of Directive 89/665. It held that a limitation provision must be examined 'by reference, in particular, to the role of that provision in the procedure, its progress and its special features, viewed as a whole'. Thus, even if a time-limit per se is not contrary to the principle of effectiveness, its application in the circumstances of a particular case may render it so. [27]

54. In *Grossmann Air Service*, the Court indicated that the objectives of speed and effectiveness in Directive 89/665 require an interested party who is aware of an irregularity to challenge it [28] and had scant sympathy for the applicant, who had waited until the award decision before challenging an alleged illegality in the invitation to tender. [29]

55. The criterion of knowledge or awareness of an irregularity on the part of a tenderer

24 — *Universale-Bau*, paragraphs 76 and 77.

25 — Case C-327/00 *Santex* [2003] ECR I-1877, paragraphs 49 to 66.

26 — *Peterbroeck* (cited in footnote 21 above), paragraph 14.

27 — Idem, paragraphs 56 and 57.

28 — Case C-230/02 *Grossmann Air Service* [2004] ECR I-1829, paragraph 37.

29 — The applicant in that case believed that the specifications of the tender invitation discriminated against him. Before the award decision he neither challenged those specifications, nor did he submit a tender. The Court held that a refusal to acknowledge an applicant's interest in obtaining the particular contract in the circumstances of the case did not impair the effectiveness of Directive 89/665.

underlies not only *Grossmann*, but also other cases. If a time-limit for challenging an irregularity starts to run before the tenderer has knowledge, or if a tenderer is otherwise penalised for not raising a challenge in a situation where it did not know and could not have known of an irregularity, the principle of effectiveness is undermined. In *Santex*, the tenderer was not aware of the contracting authority's interpretation of the disputed clause until the relevant time-limit had expired [30] and could not therefore be excluded by the time-limit from seeking review. In *GAT*, a case not concerned with a time-limit, the Court held that an applicant cannot be denied the right to claim damages for the harm caused by a decision because a previous decision was unlawful. There, the previous decision had not been challenged and the applicant was therefore not necessarily aware of its irregularity. [31]

56. It follows from the Court's case-law set out above that the placing of a time-limit under national law on the exercise of the right to review provided for by Directive 89/665 is compatible with Community law provided that such a time-limit does not render the exercise of that right virtually impossible or excessively difficult. In determining whether that is the case, not only the length of the limitation period but also factors in the review procedure in which the time-limit operates must be examined. Awareness is a key factor. Whilst the objectives of speed and effectiveness in the directive require an interested party that is aware of an irregularity to challenge it, such a party cannot be shut out of its right to review by a time-limit triggered by something of which it could not reasonably have been aware.

57. Can a time-limit still be compatible with Community law if the failure to challenge an irregularity in time also deprives a tenderer of the possibility of challenging any further, subsequent irregularities in the tender process? That is certainly a drastic sanction. Is it a permissible one?

58. It is common ground that the consequence of not challenging the choice of national procedure within the time-limit is

30 — *Santex*, paragraph 60.

31 — Case C-315/01 [2003] ECR I-6351, paragraphs 53 and 54, and see also point 46 of the Opinion of Advocate General Geelhoed.

that, as a matter of general legal principle, that procedure prevails and the tender procedure falls thereafter outside the scope of the directive. This is to be distinguished from the situation in *GAT*, where the Court held that, since every decision taken by a contracting authority in a public tender is reviewable under Directive 89/665, a tenderer cannot be denied the right to claim damages for an allegedly illegal award decision on the ground that a previous decision rendered the procedure defective (without, however, taking it outside the scope of the directive). [32]

59. One possibility would be to create an exception to the rule in *Universale-Bau* and hold that the possibility of challenging a decision which appears wrongly to take the particular tender procedure outside the scope of Community protection cannot be subject to a limitation period. That does not seem to me to be a sensible solution. First, it would upset the balance between effectiveness and legal certainty which Directive 89/665 seeks to achieve. Second, a tenderer might be tempted not to challenge the procedure (which after all could appear to work in its favour by limiting competition), unless or until it discovered, through the award decision, that the right to a review under Directive 89/665 actually mattered to it.

60. Suggesting that a longer time-limit should be required where the consequences of being out of time are draconian seems to me to beg as many questions as it answers.

61. I therefore conclude that a time-limit for challenging decisions in a tender procedure is still compatible with the principle of effectiveness, combined with the need for rapidity and legal certainty, even when the consequence of failing to challenge an irregularity within the time-limit removes a tenderer from the protection of the review procedure conferred by Directive 89/665.

62. I turn now to an examination of the time-limit, including its particular features, in the present case.

63. The limitation period fixed in Paragraph 107(3), second sentence, of the GWB runs

32 — *GAT* (cited in footnote 31 above), paragraphs 51 to 54.

from the publication of the tender notice until the deadline for submitting offers. In the present case, that period seems to have been at least 23 days. [33] In view of the fact that the Community legislator considers a minimum period of 22 days to be sufficient for preparing and submitting a tender, [34] it would be difficult to argue that 23 days were insufficient for challenging an alleged irregularity. Such a time-limit for bringing a challenge thus does not in principle appear to infringe the principle of effectiveness underlying Directive 89/665, especially in view of the need, underlined in that directive, for a rapid review procedure. [35]

64. However, the particularity of the time-limit specified in Paragraph 107(3), second sentence, of the GWB is that it starts to run if the alleged regularity in question is identifiable on the basis of the tender notice.

65. What, therefore, is the degree or nature of knowledge of an irregularity which may be attributed to a tenderer without breaching the effectiveness principle underlying Directive 89/665?

66. It seems to me that a requirement of actual, or subjective, knowledge on the part of the tenderer would run counter to legal certainty. Furthermore, in circumstances such as those of the present case, it could be difficult to prove that a tenderer had actual knowledge of an irregularity, and a requirement of such proof would hardly be consistent with the need for a rapid review process.

67. It therefore seems preferable to formulate the test in terms of a standard of deemed, or objective, knowledge. The Court already applies an objective standard in respect of tenderers' ability to interpret award criteria against the yardstick of equality of treatment in public procurement, namely the ability of a 'reasonably well-informed and normally diligent tenderer'. [36] The same formula seems appropriate in the

33 — See point 13 above.

34 — See point 8 above.

35 — Research carried out by the relevant departments of the Court indicates that such time-limits for challenging tender invitations are within the range of limitation periods adopted by other Member States. The following time-limits apply in the countries surveyed which consider a public invitation to tender to be a justiciable act and provide for a review of such an invitation either expressly or as part of a general review system: 7 or 14 days depending on the procedure (Austria, Poland), 14 days (Finland), 15 days (Hungary), one month (Portugal), the deadline for submitting offers (Slovenia), two months (Greece, Spain), three months (Ireland, UK). No time-limit is specified in France and Luxembourg. In Denmark, the Netherlands and Sweden, the tender invitation can be challenged even after the contract is signed.

36 — Case C-19/00 *SIAC* [2001] ECR I-7725, paragraph 42. An alternative formulation, from the area of protection of legitimate expectations, is that of a 'prudent and alert economic operator': see for example Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479. Bremen and the Commission have suggested further possible formulations (points 42 and 44 above).

context of what knowledge of an irregularity in the tender procedure it is reasonable to deem a tenderer to possess.

68. A 'reasonably well-informed and normally diligent tenderer' can be deemed to be experienced in submitting tenders in its particular field. It can also be expected to have a general knowledge and understanding of key legal considerations affecting the markets in which it operates. In the context of the present case, this would entail a general knowledge of national and Community tender procedures and relevant thresholds, including the possibilities for challenging decisions under both procedures and the time-limits for bringing such challenges.

69. What information needs to be available to enable such a tenderer, in circumstances such as those in the present case, to ascertain that the wrong choice of procedure has been used?

70. I do not agree with Bremen that publishing the estimated value of the contract would distort competition. After all, Community public procurement legislation, an important aim of which is to promote competition, requires estimated contract values to be published in some cases. [37]

71. Since the choice of procedure is a function of the estimated total contract value, the information must enable the tenderer to work out that value. This would include not only goods to be supplied, but also the cost of any support, training or maintenance included in the contract scope. I accept Lithuania's submission on this point, namely that nothing less than a clear and full disclosure of the scope or volume of the project will allow a tenderer, on the basis of its own experience and knowledge of market rates, to calculate the estimated total value.

72. The existence of such an information requirement, combined with the application of the criterion of the knowledge and experience attributable to a reasonably well-informed and normally diligent tenderer, should resolve the referring court's concerns about potential abuse in respect of

37 — See Annex VII A to Directive 2004/18 (footnote 3 above), which came into force after the material events in the present case. In contract notices, the estimated total value of works, supplies or services in framework agreements must be disclosed. In prior information notices for public supply contracts, either the quantity or the value of the products to be supplied must be given.

the ability of a contracting authority to take advantage of an unwary tenderer. [38]

73. I do not think that this information must necessarily appear in the tender notice itself. A tenderer can reasonably be expected to act on references in the notice to other documents, provided it is clearly indicated where these are to be obtained. In this respect, the Court has already ruled that award criteria are compatible with the principle of equal treatment if they are mentioned in the contract documents or contract notice. [39] If the necessary information delineating the scope of the contract is contained in the documents, then the time-limit for challenging an irregularity starts to run only once the tenderer has been able to obtain them, or would have been able to obtain them had it acted promptly.

74. However, I do not think that the mere absence of a stated scope or estimated contract volume from the original tender notice would be sufficient to put a reasonably well-informed and normally diligent tenderer on notice that the contracting authority had wrongly estimated the tender value. Even if that absence constitutes an irregularity in itself, requiring the tenderer to challenge it in order to discover whether it concealed a further irregularity that could affect the tenderer's rights seems to me to render the exercise of those rights excessively difficult, particularly in view of the time-limit. This is *a fortiori* the case if it is at least open to argument whether the stipulation under Paragraph 17(1)(2)(c) of the VOL/A to publish the scope of the contract is mandatory. [40]

75. It is ultimately for the national court, as sole judge of fact, to decide at what point (if at all) a reasonably well-informed and normally diligent tenderer should have discovered that the wrong procedure had been used. The following observations may nevertheless be of assistance.

76. In the present case, the tender documents could readily be downloaded from the Bremen website. However, it appears that neither the notice itself nor the tender documents stated the scope or volume of the project.

77. It is true that the 'service contract' part of the price document specified training for

38 — See point 30 above.

39 — *SIAC* (cited in footnote 36 above), paragraphs 40 and 42.

40 — See point 29 above *in fine*.

about 300 employees and 10 administrators, and that the object document indicated that about 310 employees would work with the system. However, the request to indicate unit prices for different possible ranges of numbers of licences in the 'licence contract' part of the price document could reasonably have been read as implying that a lower number of licences might be considered or that the final number of licences had not yet been decided (let alone how many licences would be full versus read-only). [41]

78. Lämmerzahl contacted Bremen on at least two occasions to find out more details about the tender invitation. In its second set of questions it made it clear that it was assuming that 310 licences would be required. But this was never expressly confirmed by Bremen. The most that can be said is that Bremen, by not contradicting this figure in its reply of 6 April 2005, tacitly endorsed Lämmerzahl's assumption that around 310 licences were required.

79. In short, it appears that neither the tender notice and documents nor the information which Bremen subsequently provided explicitly indicated how many licences were required. Nevertheless, it is clear that Lämmerzahl went on to submit a tender whose value was three times the threshold for Community-wide tenders.

80. Against that background, it is for the national court to decide whether, in all the circumstances, the application of Paragraph 107(3), second sentence, of the GWB afforded effective protection. This would be the case if the information on the tender notice or documents enabled a reasonably well-informed and normally diligent tenderer to discover that the wrong procedure had been used. If it is not possible to interpret this provision in such a way that it is compatible with Article 1(1) of Directive 89/665, the former should be disapplied [42] and the latter, which has direct effect, [43] applied.

41 — The inconsistency between the different ranges of numbers of licences and the figure of 310 employees cannot be fully explained by the permutation possibilities between full and read-only licences. The maximum number of read-only licences for which pricing was requested is 100; and the first three ranges for which full licence pricing is requested fall below the balance (210) which would be required to bring the total to 310.

42 — See *Santex* (cited in footnote 25 above), paragraphs 63 to 65 and the case-law cited.

43 — See Case C-15/04 *Koppensteiner* [2005] ECR I-4855, paragraph 38.

Conclusion

81. I accordingly suggest that the Court should combine the two questions referred and answer them as follows:

If a tenderer has failed within the time-limit set by national law to challenge a choice of procedure incorrectly placing a public tender invitation outside the scope of Community protection, 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 does not preclude the tenderer from being excluded from the right provided by that directive to review further decisions in the tender process, provided that the application of the time-limit does not in fact make it virtually impossible or excessively difficult to challenge the choice of procedure in the circumstances. This would be the case if the information available on the tender notice or tender documents were insufficient to enable a reasonably well-informed and normally diligent tenderer to discover that the wrong procedure had been used. It is for the national court to verify this in a given case.