JUDGMENT OF THE COURT (Sixth Chamber)
18 June 2002 *

In Case C-92/00,

REFERENCE to the Court under Article 234 EC by the Vergabekontrollsenat des Landes Wien (Austria) for a preliminary ruling in the proceedings pending before that court between

Hospital Ingenieure Krankenhaustechnik Planungs-GmbH (HI)

and

Stadt Wien,

on the interpretation of Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and of Directive 92/50 in the version thereof resulting from European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives

* Language of the case: German.

92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1),

THE COURT (Sixth Chamber),

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

Advocate General: A. Tizzano,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Hospital Ingenieure Krankenhaustechnik Planungs-GmbH (HI), by R. Kurbos, Rechtsanwalt,

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

— the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by R. Roniger, Rechtsanwalt,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2001,

gives the following

Judgment

1 By order of 17 February 2000, received at the Court on 10 March 2000, the Vergabekontrollsenat des Landes Wien (Public-Procurement Review Chamber of the Vienna Region) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1; hereinafter 'Directive 89/665') and of Directive 92/50 in the version thereof resulting from European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1; hereinafter 'Directive 92/50').

2 Those questions were raised in a dispute between the German company Hospital Ingenieure Krankenhaustechnik Planungs-GmbH (hereinafter 'HI') and the City of Vienna, concerning the latter's withdrawal of an invitation to tender for a public service contract for which HI had submitted a tender.

Legal background

Community legislation

3 Article 1(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 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, in Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

4 Under Article 2(1) and (5) of Directive 89/665:

'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;

...

...

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.'

5 Article 12(2) of Directive 92/50 provides:

'Contracting authorities shall promptly inform candidates and tenderers of the decisions taken on contract awards, including the reasons why they have decided not to award to a contract for which there has been an invitation to tender or to

start the procedure again, and shall do so in writing if required. They shall also inform the Office for Official Publications of the European Communities of such decisions.'

The national legislation

6 Paragraphs 32(2) to (4) of the Wiener Landesvergabegesetz (Viennese law on public procurement, hereinafter the 'WLVergG'), LGBl. No 36/1995, in the version published in LGBl. No 30/1999, provide, under the heading 'Rectification and withdrawal of invitations to tender':

'2. An invitation to tender may be withdrawn during the period for submission of tenders where events occur which, had they been previously known, would have excluded an invitation to tender being made or led to an invitation to tender with a substantially different content.

3. At the expiry of the period for submitting tenders, the invitation to tender must be withdrawn where compelling grounds exist. Compelling grounds exist in particular

(1) where the events described in subparagraph 2 are not known until after the expiry of the period for submitting tenders,

or

(2) where all the tenders had to be excluded.

4. An invitation to tender may be withdrawn, for example, where

(1) no tender acceptable from an economic point of view has been submitted,

or

(2) ... only one tender remains after the exclusion of other tenders.'

7 Under the WLVergG, the Vergabekontrollsenat des Landes Wien has jurisdiction to rule on review proceedings concerning procedures for the award of public supply, works and service contracts.

8 In particular, Paragraph 94(2) of the WLVergG provides that the Vergabekontrollsenat is to rule at first and last instance in review proceedings, and that its decisions cannot be amended or annulled through administrative channels. Under Paragraph 94(3), the procedure in such review proceedings is governed by the Allgemeine Verwaltungsverfahrensgesetz (General Code of Administrative Procedure) and the Verwaltungsvollstreckungsgesetz (Law on Execution in Administrative Matters), save where provision is made otherwise in the WLVergG.

9 Paragraph 95 of the WLVergG is worded as follows:

'1. The Vergabekontrollsenat shall be composed of seven members, nominated by the Government of the Land for a mandate of six years. Mandates are renewable. Three members, who may also be employees of the Viennese municipal administration qualified in the area, shall be appointed after consultation with the municipal administration; one member shall be appointed after consultation with the Wirtschaftskammer (Vienna Chamber of Commerce); one member shall be appointed after consultation with the Kammer für Arbeiter und Angestellte (Chamber for Workers and Employees) of Vienna; and one member shall be appointed after consultation with the Architekten- und Ingenieurkonsultenkammer (Chamber of Architects and Consulting Engineers) for the *Länder* of Vienna, Lower Austria and Burgenland. The chairman shall be a judge, appointed after consultation with the President of the Oberlandesgericht Wien (Higher Regional Court, Vienna) ...

2. The members and their substitutes must have extensive knowledge of the are of the award of public contracts, especially, as regards members appointed after consultation with the municipal council, from the economic and technical standpoint:

...

3a. Any member under long-term incapacity from exercising his functions normally on account of physical or mental disability, or who has committed serious failures to fulfil his obligations, shall be removed from his mandate by decision of the Vergabekontrollsenat. That decision must be taken after hearing the person concerned, who may not take part in the vote.

4. The members of the Vergabekontrollsenat shall carry out their functions in full independence and shall not be bound by instructions.

5. The members of the Vergabekontrollsenat are under the duty of confidentiality, in accordance with Paragraph 20(3) of the Bundesverfassungsgesetz (Federal Constitutional Law).

6. The Vergabekontrollsenat shall sit when convened by the chairman. Where a member has a personal interest, or is temporarily prevented from fulfilling his functions, his substitute must be called. Members of the Vergabekontrollsenat may not adjudicate on a proceeding which involves the award of a contract within the area of operation of the institution (in the case of employees of the Vienna municipal administration, the service, the sub-contracting undertaking or the establishment) of which they form part. If there are serious reasons for doubting the impartiality of a member, he must refrain from exercising his functions and ask to be replaced. The parties may object to members of the Vergabekontrollsenat on grounds of partiality. Where the Vergabekontrollsenat rules on the possible partiality of a member and on objections, the member concerned shall not be entitled to vote. The names of the members of the Vergabekontrollsenat and of the institution (in the case of employees of the Vienna municipal administration, the service, the sub-contracting undertaking or the establishment) of which they form part shall be published in the Amtsblatt der Stadt Wien (Official Journal of the City of Vienna) at the beginning of each calendar year on the initiative of the chairman.

7. Review proceedings must be submitted to a vote in the order determined by the chairman. Five members constitute a quorum, decisions being taken by an absolute majority. Abstention is not allowed. The Vergabekontrollsenat does not sit in public. Sessions are minuted. Decisions must be adopted in writing and mention the names of the members of the Vergabekontrollsenat who took part in the vote. The decision must be signed by the chairman ... .

8. Members of the Vergabekontrollsenat perform that activity without remuneration. They are to be sworn in before the Landeshauptmann (Prime Minister of the Land).

...

10. The Vergabekontrollsenat shall adopt rules of procedure.

...'

10 Paragraph 99 of the WLVergG, headed 'Jurisdiction of the Vergabekontrollsenat', provides:

'1. The Vergabekontrollsenat shall have jurisdiction, on request, over review proceedings in accordance with the following provisions:

(1) until the date of the award to issue interim orders and to annul unlawful decisions of the award section of the awarding authority in order to eliminate infringements of the law within the meaning of Paragraph 101;

(2) after the award of the contract to hold that the contract was not awarded to the tenderer who submitted the best tender, by reason of an infringement of this law within the meaning of Paragraphs 47 and 48(2). In such proceedings,

the Vegabekontrollsenat also has jurisdiction to make a finding, at the request of the awarding authority, whether the contract would have been awarded to a candidate or tenderer whose tender was not accepted in the absence of the legal infringements found.

2. The Vergabekontrollsenat shall be obliged to entertain review proceedings only in so far as the decision alleged to be unlawful is essential to the outcome of the contract awarding procedure.'

11 Paragraph 101 of the WLVergG provides:

'The Vergabekontrollsenat must set aside decisions of the awarding authority adopted in the course of a contract awarding procedure:

(1) where discriminatory technical, economic or financial specifications appear in the tender notice inviting undertakings to participate in a closed procedure or a negotiated tender, or in the invitation to tender or tender specifications; or

(2) where a tenderer is passed over in breach of the criteria appearing in the tender notice in which undertakings are invited to participate in a closed procedure or a negotiated tender and the awarding authority might have come to a decision more favourable to the applicant if the infringed provisions had been complied with.'

The dispute in the main proceedings and the questions referred

12 The order for reference shows that the Mayor of the City of Vienna, acting on behalf of the contracting authority, the Wiener Krankenanstaltenverbund (Vienna Associated Hospitals), published an invitation to tender for a contract entitled 'Implementation of project management for realisation of the overall catering-supply concept in the premises of the Viennese associated hospitals' in the *Official Journal of the European Communities* of 24 December 1996 and in the legal notices section of the *Wiener Zeitung* (Viennese Journal) of 30 December 1996.

13 After the submission of tenders, including the tender by HI, the City of Vienna withdrew the invitation to tender within the period for awarding the contract. It informed HI, by letter of 25 March 1997, that it had decided to abandon the procedure 'for compelling reasons in accordance with the first subparagraph of Paragraph 32(3) of the WLVergG'.

14 Following a request for information sent to it by HI, the City of Vienna explained the withdrawal of the invitation to tender as follows in a letter of 14 April 1997:

'Having regard to the results of the project carried out by the Humanomed company in 1996, the initial plan has been modified. In the discussion of these circumstances, which took place at the end of the period laid down for the submission of tenders and during the period for the award of the contract within the coordination committee, it was found that the project would in future have to be developed in a decentralised manner. It was therefore decided not to make provision for a coordinating body and the award of the contract to an outside project leader was therefore not necessary.

It is thus clear that the reasons in question would have excluded an award if they had been known previously. If another project management were to be found necessary in the context of the "provision of meals" project, an invitation to tender with a different content would have to be carried out'.

15 HI then brought a number of claims before the Vergabekontrollsenat, seeking, *inter alia*, the opening of review proceedings, an interim order, the annulment of certain tender documents and the annulment of the withdrawal of the invitation to tender. In an adjunct to the latter claim, HI cited new evidence proving, in its submission, that the decision to withdraw the invitation to tender was unlawful and again requesting that the latter be annulled.

16 In particular, HI referred to its suspicions that the City of Vienna had a direct or indirect stake in the capital of Humanomed. HI argued that that company had carried out substantial preparatory work for the invitation to tender, carried out project management and influenced the preparation of the masterplan, and that the City of Vienna had withdrawn the invitation to tender in order to circumvent the obligation to exclude Humanomed's tender with the aim of continuing its collaboration with that company. HI concluded therefrom that the withdrawal decision was discriminatory in so far as it was designed to favour an Austrian company to the detriment of a candidate from a Member State other than the Republic of Austria.

17 By decisions of 30 April and 10 June 1997, the Vergabekontrollsenat dismissed the claims for annulment of the withdrawal of the invitation to tender as inadmissible on the ground that, pursuant to Paragraph 101 of the WLVergG, only certain decisions adopted in the course of a tendering procedure, exhaustively listed, may be annulled.

18 The Verfassungsgerichtshof (Constitutional Court) (Austria), before which HI brought actions against those dismissal decisions, annulled them for infringement of the right to have the matter tried before a regular court. It held that the Vergabekontrollsenat was required to make a reference to the Court of Justice for a preliminary ruling as to whether the decision to withdraw an invitation to tender constituted a decision within the meaning of Article 2(1)(b) of Directive 89/665.

19 The referring court states at the outset that, in the event of unlawful withdrawal of an invitation to tender, the undertaking concerned may bring a civil action for damages under national law before the ordinary courts.

20 The order for reference further shows that the Vergabekontrollsenat considers that, since detailed rules for withdrawing an invitation to tender do not appear in the directives laying down substantive rules concerning public contracts, the decision to make such a withdrawal is not a decision covered by Article 2(1)(b) of Directive 89/665 and, therefore, is not a decision which, pursuant to that directive, must be capable of being the subject-matter of review proceedings.

21 Taking the view that the City of Vienna complied with the procedure laid down in Article 12(2) of Directive 92/50, the Vergabekontrollsenat is unsure whether, assuming Community law requires review of a decision withdrawing an invitation to tender, that review may concern solely the arbitrary or fictitious character of that decision.

22 Concerning the date to be taken into consideration in order to assess the legality of such a decision, the referring court considers that the fact that the decision of the awarding authority is subject to review and thus constitutes the subject-matter of the dispute would lead to the date of that decision being used, but concedes that the principle of effectiveness, as contained in the recitals in the preamble to Directive 89/665, would lead rather to the date of the decision of the review body being used.

23 In the light of those considerations, the Vergabekontrollsenat des Landes Wien decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 2(1)(b) of Directive 89/665/EEC ... require the decision of a contracting authority to cancel the procedure for the award of a contract for services to be reviewable in review proceedings leading, if appropriate, to its being set aside?

(2) If Question 1 is answered affirmatively, is there any provision of Directive 89/665 or of Directive 92/50/EEC which precludes a review limited to examination of the issue whether cancellation of the award procedure was arbitrary or a sham?

(3) If Question 1 is answered affirmatively, which is the relevant moment in time for assessing whether the decision of the contracting authority to cancel he award procedure is lawful?'

Admissibility of the questions referred

24 As a preliminary, it must be examined whether the Vergabekontrollsenat constitutes a court or tribunal within the meaning of Article 234 EC, and thus whether its questions are admissible.

25 It is settled case-law that, in order to determine whether a body making a reference for a preliminary ruling is a court or tribunal within the meaning of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, in particular, Case C-54/96 *Dorsch Consult* v *Bundesbaugesellschaft Berlin* [1997] ECR I-4961, paragraph 23, and Case C-103/97 *Köllensperger and Atzwanger* v *Gemeindeverband Bezirkskrankenhaus Schwaz* [1999] ECR I-551, paragraph 17).

26 In this case, Paragraph 94 of the WLVergG clearly shows that the Vergabekontrollsenat complies with the criteria of being established by law, having compulsory jurisdiction and an *inter partes* procedure, and applying rules of law.

27 In addition, Paragraph 95 of the WLVergG, which governs the composition and functioning of this body, guarantees its permanence and, in conjunction with Paragraph 94(3), its independence.

28 It follows that the Vergabekontrollsenat des Landes Wien must be regarded as a court or tribunal within the meaning of Article 234 EC and that its questions are admissible.

Substance

The first question

29 As the order for reference shows, the Vergabekontrollsenat wishes to know, in answer to its first question, whether the decision to withdraw an invitation to tender for a public service contract is a 'decision taken by the contracting authorities' in respect of which Member States are required, under Article 1(1) of Directive 89/665, to establish effective review procedures in their national law which are as rapid as possible.

30 In that respect, whereas Article 2(1)(b) of Directive 89/665 delimits the scope of the directive, it does not define the unlawful decisions of which annulment may be sought, confining itself to listing measures which Member States are required to take for the purposes of the review proceedings referred to in Article 1 (see, to that effect, Case C-81/98 *Alcatel Austria and Others* v *Bundesministerium für Wissenschaft und Verkehr* [1999] ECR I-7671, paragraphs 30 and 31).

31 The first question must therefore be understood as asking, essentially, whether Article 1(1) of Directive 89/665 requires the decision of the awarding authority to withdraw the invitation to tender for a public service contract to be open to review proceedings, and to annulment in appropriate cases, on the ground that it infringed Community law on public contracts or the national rules transposing that law.

32 In order to reply to the question thus reformulated, it is therefore necessary to interpret the words 'decisions taken by the contracting authorities' used in Article 1(1) of Directive 89/665.

33 The Austrian Government and the Commission essentially maintain that Member States are required to establish procedures allowing review proceedings to be brought against the withdrawal of an invitation to tender for a public service contract if that withdrawal is governed by Directive 92/50. In that respect, they consider that such withdrawal falls exclusively under national legal rules and therefore does not fall within the scope of Directive 89/665.

34 In particular, the Commission states that, in its proposal for a Council Directive 87/C 230/05 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on procedures for the award of public supply and public works contracts (OJ 1987 C 230, p. 6), it expressly proposed that the obligation of Member States to establish review procedures should extend not only to decisions taken by the contracting authorities in breach of Community law but also to those infringing national legal rules. However, in the course of the legislative process, the obligation to establish a review mechanism was limited to its present scope, so as to cover only decisions which infringe 'Community law on public contracts or the national rules transposing that law'.

35 The Austrian Government argues that the conclusion that the decision to withdraw an invitation to tender does not constitute a decision within the meaning of Directive 89/665 is confirmed by Article 2(1)(b) of that directive, which exclusively concerns decisions which the contracting authority adopts during the procedure for the award of a public contract, whereas a decision to withdraw an invitation to tender brings such a procedure to an end. Thus, the Government argues, where an invitation to tender is withdrawn unlawfully, the national legislature is required, under Directive 89/665, only to ensure that the candidates and tenderers are given a right to damages.

36 It should be recalled as a preliminary observation that Article 1(1) of Directive 89/665 places an obligation on Member States to lay down procedures enabling review of decisions taken in a tender procedure on the ground that those decisions infringed Community law on public contracts or national rules transposing that law.

37 It follows that, if a decision taken by a contracting authority in a procedure for awarding a public contract is made subject to the Community law rules on public contracts and is therefore capable of infringing them, Article 1(1) of Directive 89/665 requires that that decision be capable of forming the subject-matter of an action for annulment.

38 Therefore, in order to determine whether the decision of the contracting authority to withdraw an invitation to tender for a public service contract may be regarded as one of those decisions in respect of which Member States are required, under Directive 89/665, to establish annulment action procedures, it needs to be examined whether such a decision falls within Community law rules on public contracts.

39 In that respect, it should be noted that the only provision in Directive 92/50 relating specifically to the decision to withdraw an invitation to tender is Article 12(2), which provides, *inter alia*, that where the contracting authorities have decided to abandon an award procedure, they must inform candidates and tenderers of the reasons for their decision as soon as possible.

40 The Court of Justice has already had occasion to define the scope of the obligation to notify reasons for abandoning the award of a contract in the context of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), in

the version thereof resulting from Directive 97/52 (hereinafter 'Directive 93/37'), which contains in Article 8(2) a provision similar to Article 12(2) of Directive 92/50. In particular, in its judgment in Case C-27/98 *Fracasso and Leitschutz* v *Salzburger Landesregierung* [1999] ECR I-5697, paragraphs 23 and 25, the Court held that Article 8(2) of Directive 93/37 does not provide that the option of the contracting authority to decide not to award a contract put out to tender, implicity allowed by Directive 93/37, is limited to exceptional cases or must necessarily be based on serious grounds.

41 It follows that, on a proper interpretation of Article 12(2) of Directive 92/50, although that provision requires the contracting authority to notify candidates and tenderers of the grounds for its decision if it decides to withdraw the invitation to tender for a public service contract, there is no implied obligation on that authority to carry the award procedure to its conclusion.

42 However, even though, apart from the duty to notify the reasons for the withdrawal of the invitation to tender, Directive 92/50 contains no specific provision concerning the substantive or formal conditions for that decision, the fact remains that the latter is still subject to fundamental rules of Community law, and in particular to the principles laid down by the EC Treaty on the right of establishment and the freedom to provide services.

43 In that regard, the Court has consistently held that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, *inter alia*, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 32).

44 Directive 92/50 pursues just such an objective. As the 20th recital in its preamble shows, it is designed to eliminate practices that restrict competition in general, and participation in contracts by other Member States' nationals in particular, by improving the access of service providers to procedures for the award of contracts.

45 The Court's case-law also demonstrates that the principle of equal treatment, which underlies the directives on procedures for the award of public contracts, implies in particular an obligation of transparency in order to enable verification that it has been complied with (see, to that effect, Case C-275/98 *Unitron Scandinavia and 3-S* v *Ministeriet for Fødevarer, Landbrug og Fiskeri* [1999] ECR I-8291, paragraph 31; Case C-324/98 *Telaustria and Telefonadress* v *Telekom Austria* [2000] ECR I-10745, paragraph 61).

46 In that respect, it should be noted that the duty to notify reasons for a decision to withdraw an invitation to tender, laid down by Article 12(2) of Directive 92/50, is dictated precisely by concern to ensure a minimum level of transparency in the contract-awarding procedures to which that directive applies and hence compliance with the principle of equal treatment.

47 It follows that, even though Directive 92/50 does not specifically govern the detailed procedures for withdrawing an invitation to tender for a public service contract, the contracting authorities are nevertheless required, when adopting such a decision, to comply with the fundamental rules of the Treaty in general, and the principle of non-discrimination on the ground of nationality, in particular (see, by way of analogy, concerning the conclusion of public service concessions, *Telaustria and Telefonadress*, paragraph 60).

48 Since the decision of a contracting authority to withdraw an invitation to tender for a public service contract is subject to the relevant substantive rules of Community law, it has to be concluded that it also falls within the rules laid down by Directive 89/665 in order to ensure compliance with the rules of Community law on public contracts.

49 That finding is corroborated, first, by the wording of the provisions of Directive 89/665. As the Court pointed out in paragraph 35 of its *Alcatel Austria* judgment, the provision in Article 1(1) of that directive does not lay down any restriction with regard to the nature and content of the decisions referred to therein. Nor can such a restriction be inferred from the wording of Article 2(1)(b) of that directive (see, to that effect, *Alcatel Austria*, paragraph 32). Moreover, a restrictive interpretation of the category of decisions in relation to which Member States must ensure the existence of review procedures would be incompatible with Article 2(1)(a) of the same directive, which requires Member States to make provision for interim relief procedures in relation to any decision taken by the contracting authorities.

50 Next, the general scheme of Directive 89/665 requires a broad interpretation of that category, in so far as Article 2(5) of that directive authorises Member States to provide that, where damages are claimed on the ground that a decision by the contracting authority was taken unlawfully, the contested decision must first be set aside.

51 To hold that Member States are not required to lay down review procedures for annulment in relation to decisions withdrawing invitations to tender would amount to authorising them, by availing themselves of the option provided for in the provision mentioned in the paragraph above, to deprive tenderers adversely affected by such decisions, adopted in breach of the rules of Community law, of the possibility of bringing actions for damages.

52 Finally, it must be held that any other interpretation would undermine the effectiveness of Directive 89/665. As the first and second recitals in its preamble show, that directive is designed to reinforce existing arrangements at both national and Community level for ensuring effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified, and it is precisely in order to ensure compliance with those directives that Article 1(1) of Directive 89/665 requires the Member States to establish effective review procedures that are as rapid as possible (*Alcatel Austria*, paragraphs 33 and 34).

53 The full attainment of the objective pursued by Directive 89/665 would be compromised if it were lawful for contracting authorities to withdraw an invitation to tender for a public service contract without being subject to the judicial review procedures designed to ensure that the directives laying down substantive rules concerning public contracts and the principles underlying those directives are genuinely complied with.

54 In the light of the foregoing considerations, it must be held that the decision to withdraw an invitation to tender for a public service contract is one of those decisions in relation to which Member States are required under Directive 89/665 to establish review procedures for annulment, for the purposes of ensuring compliance with the rules of Community law on public contracts and national rules implementing that law.

55 The answer to the first question must therefore be that Article 1(1) of Directive 89/665 requires the decision of the contracting authority to withdraw the invitation to tender for a public service contract to be open to a review procedure, and to be capable of being annulled where appropriate, on the ground that it has infringed Community law on public contracts or national rules implementing that law.

The second question

56 By its second question, the referring court asks, essentially, whether national rules limiting the extent of the review of the legality of the withdrawal of an invitation to tender for a public service contract to mere examination of whether that decision was arbitrary is compatible with Directives 89/665 and 92/50.

57 It should be noted at the outset that questions concerning the scope of judicial review of a decision adopted in the context of a procedure for the award of public contracts are not covered by Directive 92/50, but fall solely within the scope of Directive 89/665. The second question must therefore be understood as asking whether Directive 89/665 precludes national rules from limiting review of the legality of the withdrawal of an invitation to tender to mere examination of whether that decision was arbitrary.

58 Since Directive 89/665 does no more than coordinate existing mechanisms in Member States in order to ensure the full and effective application of the directives laying down substantive rules concerning public contracts, it does not expressly define the scope of the remedies which the Member States must establish for that purpose.

59 Therefore, the question of the extent of the judicial review exercised in the context of the review procedures covered by Directive 89/665 must be examined in the light of the purpose of the latter, taking care that its effectiveness is not undermined.

60 In that respect, it should be recalled that, as is shown in the sixth recital in the preamble to, and in Article 1(1) of, Directive 89/665, the latter requires Member States to establish review procedures that are appropriate in the event of procedures for the award of public contracts being unlawful.

61 Therefore, having regard to the aim of strengthening remedies pursued by Directive 89/665, and in the absence of indications to the contrary, the scope of the judicial review to be exercised in the context of the review procedures referred to therein cannot be interpreted restrictively.

62 It follows that, even in cases where, as in the main proceedings, the relevant national legislation gives the contracting authorities a wide discretion in relation to the withdrawal of invitations to tender, the national courts must be able, pursuant to Directive 89/665, to check the compatibility of a decision to withdraw an invitation to tender with the relevant rules of Community law.

63 In those circumstances, it must be held that neither the letter nor the spirit of Directive 89/665 permits the conclusion that it is lawful for Member States to limit review of the legality of a decision to withdraw an invitation to tender to mere examination of whether it was arbitrary.

64 The answer to the second question must therefore be that Directive 89/665 precludes national legislation from limiting review of the legality of the withdrawal of an invitation to tender to mere examination of whether it was arbitrary.

The third question

65 In its third question, the referring court asks what time is to be taken into consideration for assessing the legality of the decision by the contracting authority to withdraw an invitation to tender.

66 In that respect, it is sufficient to note that, since Directive 89/665 is designed only to coordinate existing mechanisms in Member States in order to ensure that Community law in the matter of public contracts is complied with, it does not contain any provision as to the decisive moment for the purposes of assessing the legality of the decision to withdraw an invitation to tender.

67 Thus, in the absence of specific Community rules governing the matter, it is for the domestic legal system of each Member State to determine the decisive moment for the purposes of assessing the legality of the withdrawal decision, provided that the relevant national rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not make it practically impossible or excessively difficult to exercise rights conferred by Community law (principle of effectiveness) (see, by analogy, Case C-390/98 *Banks* v *Coal Authority and Secretary of State for Trade and Industry* [2001] ECR I-6117, paragraph 121; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29).

68 The answer to the third question must therefore be that determination of the time to be taken into consideration for assessing the legality of the decision by the contracting authority to withdraw an invitation to tender is a matter for national law, provided that the relevant national rules are not less favourable than those

governing similar domestic actions and that they do not make it practically impossible or excessively difficult to exercise rights conferred by Community law.

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Vergabekontrollsenat des Landes Wien by order of 17 February 2000, hereby rules:

1. **Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating**

to the application of review procedures to the award of public supply and public works contracts, 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, requires the decision of the contracting authority to withdraw the invitation to tender for a public service contract to be open to a review procedure, and to be capable of being annulled where appropriate, on the ground that it has infringed Community law on public contracts or national rules implementing that law.

2. Directive 89/665, as amended by Directive 92/50, precludes national legislation from limiting review of the legality of the withdrawal of an invitation to tender to mere examination of whether it was arbitrary.

3. Determination of the time to be taken into consideration for assessing the legality of the decision by the contracting authority to withdraw an invitation to tender is a matter for national law, provided that the relevant national rules are not less favourable than those governing similar domestic actions and that they do not make it practically impossible or excessively difficult to exercise rights conferred by Community law.

Macken Gulmann Puissochet

Skouris Cunha Rodrigues

Delivered in open court in Luxembourg on 18 June 2002.

R. Grass F. Macken

Registrar President of the Sixth Chamber