JUDGMENT OF THE COURT (Second Chamber)

8 September 2005 *

In Case C-129/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'État (Belgium), made by decision of 25 February 2004, received at the Court on 9 March 2004, in the proceedings

Espace Trianon SA,

Société wallonne de location-financement SA (Sofibail)

v

Office communautaire et régional de la formation professionnelle et de l'emploi (FOREM),

* Language of the case: French.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), R. Schintgen, G. Arestis and J. Klučka Judges,

Advocate General: C. Stix-Hackl,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 16 December 2004,

after considering the observations submitted on behalf of:

— Espace Trianon SA and Société wallonne de location-financement SA (Sofibail), by P. Coenraets and C. Lépinois, avocats,

— the Office communautaire et régional de la formation professionnelle et de l'emploi (FOREM), by M. Uyttendaele, M. Mareschal and D. Gerard, avocats,

— the Austrian Government, by M. Fruhmann, acting as Agent,

— the Commission of the European Communities, by K. Wiedner and B. Stromsky, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 March 2005,

gives the following

Judgment

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

2 The reference has been made in the course of proceedings between Espace Trianon SA (hereinafter 'Espace Trianon') and Société wallonne de location-financement SA (hereinafter 'Sofibail'), which are members of the consortium 'Espace Trianon-Sofibail', and the Office communautaire et régional de la formation professionnelle et de l'emploi (hereinafter 'FOREM') regarding a procedure for the award of a public contract.

Law

Community legislation

3 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 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.

...

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. ...'

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

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

...

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

...'

5 Article 21 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) provides:

'Tenders may be submitted by groups of contractors. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.'

National legislation

6 Under Article 14(1) of the Consolidated Laws of 12 January 1973 on the Conseil d'État (Council of State) (*Moniteur belge* of 21 March 1973, p. 3461), the Conseil d'État has jurisdiction over actions for annulment of decisions awarding public contracts.

7 The first paragraph of Article 19 of those Consolidated Laws, which regulates, inter alia, standing to bring actions for annulment, provides:

'... actions for annulment ... may be brought before the Administrative Section by any party who establishes harm or an interest and are to be submitted in writing to the section in accordance with the formal requirements and time-limits specified by the King.'

8 As regards the decision to bring an action, Article 522(2) of the Companies Code provides that for public limited companies:

'The Board of Directors shall represent the company as regards third parties and in legal proceedings, whether the company is bringing or defending an action. However, the articles of association may confer standing to represent the company, either solely or jointly, on one or more administrative officers. This clause shall be valid vis-à-vis third parties ...'

9 That Code governs the status of consortia ('sociétés momentanées'), formerly called 'associations momentanées'. A consortium is defined in Article 47 of this Code as being 'a company without legal personality and without a business name formed for specific commercial operations'.

The disputes in the main proceedings and the questions referred for a preliminary ruling

10 On 30 September 1997, FOREM, as contracting authority, had a contract notice published in the *Official Journal of the European Communities* concerning 'the design, construction and financing of a building of approximately 6 500 m^2' for the use of its Liège district headquarters.

11 On 20 February 1998 the opening of tenders took place. Five tenders had been submitted, one of which came from the consortium Espace Trianon-Sofibail.

12 On 22 December 1998 the contract was awarded by the Management Committee of FOREM to another consortium, CIDP-BPC. On 8 January 1999, that Management Committee confirmed its decision of 22 December 1998. On 25 January 1999, the award decision was notified to Espace Trianon and Sofibail.

13 On 19 February and 8 March 1999 respectively, those two companies lodged applications seeking the annulment of the decisions of FOREM's Management Committee of 22 December 1998 and 8 January 1999.

14 The Conseil d'État observes, in its decision to make a reference to the Court, that Espace Trianon's decisions to bring legal proceedings were taken by two of its administrative officers and not by its Board of Directors in accordance with its articles of association. Therefore, those decisions are irregular. The Conseil d'État observes that, by contrast, Sofibail's decisions to bring legal proceedings are not open to challenge.

15 Given that those companies submitted their tender in the name of the consortium Espace Trianon-Sofibail and that Espace Trianon's decisions to bring legal proceedings are irregular, the Conseil d'État decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling, with the aim of ascertaining whether the applications brought by Sofibail are admissible, since it is now alone in disputing the decisions of FOREM's Management Committee of 22 December 1998 and 8 January 1999:

'(1) Does Article 1 of Directive 89/665 ... preclude a provision of national law, such as the first paragraph of Article 19 of the Laws on the Conseil d'État, consolidated on 12 January 1973, which is interpreted as requiring the members of a consortium without legal personality, which, as such, has participated in a procedure for the award of a public contract and has not been awarded that contract, to act together, in their capacity as associates or in their own names, in order to bring an action against the decision awarding the contract?

(2) Would the answer to Question 1 be different where the members of the consortium brought an action together, but the application of one of its members is inadmissible?

(3) Does Article 1 of Directive 89/665 ... preclude a provision of national law, such as the first paragraph of Article 19 of the Laws on the Conseil d'État, consolidated on 12 January 1973, which is interpreted as prohibiting a member of such a consortium from bringing an action individually, either in its capacity as an associate or in its own name, against the decision awarding the contract?'

The questions referred for a preliminary ruling

16 The first and third questions, which it is appropriate to consider together, seek to ascertain whether Article 1 of Directive 89/665 precludes a national rule under which, when a consortium without legal personality has participated as such in a procedure for the award of a public contract and has not been awarded that contract, an action may be brought against the decision awarding the contract only by all the members of that consortium acting together. With the second question, the referring court is essentially asking whether the answer to the first and third questions would be different if the members of the consortium acted together but the application of one of them is held inadmissible.

17 It must be borne in mind that, according to Article 1(1) of Directive 89/665, decisions taken by the contracting authorities must be capable of being reviewed effectively and that, in accordance with paragraph 3 of that article, the review procedures must be available at least to all persons having an interest in obtaining a public contract.

18 Espace Trianon, Sofibail and the Commission of the European Communities submit that, in circumstances such as those of the main proceedings, a national procedural rule which requires members of a consortium to bring legal proceedings together, and therefore that they unanimously agree to bring an action against a decision awarding a public contract, does not comply with the requirement regarding the availability of review procedures referred to in Article 1(3) of Directive 89/665. In their view, effective judicial protection must allow the members of such an association to have an individual right of action available to them.

19 In this respect it must be noted that Article 1(3), in referring to any person having an interest in obtaining a public contract, alludes, in a situation such as that in the main proceedings, to a person who, in tendering for the public contract at issue, has demonstrated his interest in obtaining it.

20 In this situation, it is the consortium as such which tendered and not its individual members. In the same way, all the members of the consortium, had the contract at issue been awarded to them, would have been obliged to sign the contract and carry out the work.

21 In contrast to other cases submitted to the Court (see, in particular, Case C-230/02 *Grossmann Air Service* [2004] ECR I-1829, paragraph 28, and Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 41), nothing in the case in the main proceedings prevented the members of the consortium from together bringing, in their capacity as associates or in their own names, an action for annulment of the decisions of 22 December 1998 and 8 January 1999.

22 Therefore, a national procedural rule which requires an action for annulment of a contracting authority's decision awarding a public contract to be brought by all the members of a tendering consortium does not limit the availability of such an action in a way contrary to Article 1(3) of Directive 89/665.

23 That is particularly so in this case because, as is apparent from the documents before the Court, under Belgian law the members of such a consortium may at any time, before bringing an action, settle the issue of the consortium's capacity to bring legal proceedings by internal agreement, without any other formality.

24 Furthermore, the Commission's argument that a rule such as that at issue in the main proceedings, which implies that groups of contractors are required to assume a specific legal form in order to submit a tender, is contrary to Article 21 of Directive 93/37 cannot be accepted. The national rule at issue in the main proceedings only requires a consortium to ensure, for the purpose of bringing legal proceedings, that it is represented in accordance with the rules applying to the legal form which its members have themselves assumed in order to be able to tender.

25 Moreover, it must be pointed out that the procedural rule referred to in this case applies in the same way to all actions brought by members of consortia in relation to the operations they carry out in the course of their activities, there being no need to know whether the claims are founded on a breach of Community law or of national law or whether they relate to public works contracts or to other operations.

26 Having regard to the above, it cannot be considered either that a rule such as that at issue in the main proceedings could undermine the requirement for effective review laid down in Article 1(1) of Directive 89/665. That principle does not require that an action be held admissible when the provisions relating to representation in legal proceedings, which stem from the legal form assumed, have not been adhered to as far as concerns the person who brings the proceedings.

27 Finally, as regards the second question, there is nothing to indicate that a case in which the action has, from the outset, been brought by only some of the members of the consortium and a case in which the action was initially brought by all those members, but where the application of one of them has, subsequently, been considered inadmissible, must be treated differently.

28 In both cases, the action is inadmissible pursuant to national rules which require only that applicants comply with the conditions relating to representation in legal proceedings in accordance with the legal form which the members have themselves chosen. Such requirements are general in application and do not limit the efficacy and availability of review procedures to tenderers in a manner contrary to Directive 89/665. Furthermore, the inadmissibility of the application of one of the members of a consortium may be justified by circumstances which show that no intention on the part of the member at issue to bring legal proceedings has been validly established.

29 In the light of the abovementioned the answers to the questions referred to the Court must be that:

— Article 1 of Directive 89/665 is to be interpreted as not precluding national law from providing that only the members of a consortium without legal personality which has participated, as such, in a procedure for the award of a public contract and has not been awarded that contract, acting together, may bring an action against the decision awarding the contract and not just one of its members individually;

— the same is true if all the members of such a consortium bring an action together but the application of one of its members is held inadmissible.

Costs

30 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. The costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 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 is to be interpreted as not precluding national law from providing that only the members of a consortium without legal personality which has participated, as such, in a procedure for the award of a public contract and has not been awarded that contract, acting together, may bring an action against the decision awarding the contract and not just one of its members individually.

The same is true if all the members of such a consortium act together but the application of one of its members is held inadmissible.

[Signatures]