JUDGMENT OF THE COURT (Second Chamber)

9 December 2010 *

In Case C-568/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Rechtbank Assen (Netherlands), made by decision of 17 December 2008, received at the Court on 22 December 2008, in the proceedings

Combinatie Spijker Infrabouw/De Jonge Konstruktie,

Van Spijker Infrabouw BV,

De Jonge Konstruktie BV

v

Provincie Drenthe,

* Language of the case: Dutch.

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, A. Arabadjiev, A. Rosas, A. Ó Caoimh and P. Lindh, Judges,

Advocate General: P. Cruz Villalón,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Combinatie Spijker Infrabouw/De Jonge Konstruktie, Van Spijker Infrabouw BV and De Jonge Konstruktie BV, by H. Hoogwout, advocaat,

— the Provincie Drenthe, by M. Mutsaers and A. Hoekstra-Borzymowska, advocaten,

— the Netherlands Government, by C. Wissels and Y. de Vries, acting as Agents,

— the Commission of the European Communities, by M. Konstantinidis and S. Noë, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 1(1) and (3) and 2(1) and (6) 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; 'Directive 89/665').

2 The reference has been made in the context of a dispute between Combinatie Spijker Infrabouw/De Jonge Konstruktie, Van Spijker Infrabouw BV and De Jonge Konstruktie BV ('Combinatie and others') and Provincie Drenthe (Province of Drenthe; 'Provincie'), concerning the award of a public works contract.

Legal context

Union legislation

3 The fifth recital of Directive 89/665 states:

'Whereas, since procedures for the award of public contracts are of such short duration, competent review bodies must, among other things, be authorised to take interim measures aimed at suspending such a procedure or the implementation of any decisions which may be taken by the contracting authority; whereas the short duration of the procedures means that the aforementioned infringements need to be dealt with urgently'.

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

'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 nation[al] 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. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

5 Article 2(1) and (6) of Directive 89/665 read:

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

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

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

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

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

3. Review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate.

4. The Member States may provide that when considering whether to order interim measures the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures.

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.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

6 By virtue, respectively, of Article 36 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) and Article 33 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), have been repealed.

7 Article 82 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) provides that Directive 92/50, save for Article 41 thereof, and Directives 93/36 and 93/37 are repealed. References to those repealed directives as a whole are to be construed as references to Directive 2004/18.

8 According to Article 7(c) of Directive 2004/18, as amended by Commission Regulation (EC) No 2083/2005 of 19 December 2005 (OJ 2005 L 333, p. 28), that directive was applicable, between 1 January 2006 and 31 December 2007, to public works contracts with a value exclusive of value added tax (VAT) estimated to be equal to or greater than EUR 5 278 000.

9 Article 9(5)(a) of Directive 2004/18 provides:

'Where a proposed work or purchase of services may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots.

[…]'

National legislation

10 At the time of the facts giving rise to the dispute in the main proceedings, the Kingdom of the Netherlands had not adopted specific measures for transposing Directive 89/665 into national law, taking the view that Netherlands legislation in force already met the requirements of that directive.

11 According to the information in the Court's file, the award of public contracts is a matter for private law, the award of a public contract constitutes an act of private law, and decisions preliminary to the award of a public contract taken by administrative bodies are regarded as preparatory acts of private law. The civil courts have jurisdiction to hear disputes on the award of public contracts as regards both the adoption of protective measures and the procedure on the substance. The administrative courts do not have jurisdiction, unless a law provides otherwise.

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

12 According to the order for reference, the Provincie decided to renew two bascule bridges on the Erica-Ter Apel navigable waterway in the Commune of Emmen (Netherlands). That navigable waterway is stated to be of great importance at the international level. The European Union granted a subsidy in support of that project, on condition that the works were carried out within a certain time-limit, fixed at 1 July 2008.

13 The contract for the renewal of the bascule bridges was made the subject-matter of a public call for tenders at European level. The contract notice of 13 July 2007 was published in the supplement to the *Official Journal of the European Union*.

14 The tenderers were subjected to certain conditions, particularly as regards technical capacity, integrity and solvency. Other conditions concerned the tenders themselves, particularly as regards the evidence which had to accompany them. The criterion for award of the contract was the lowest price.

15 The contract notice was amended by a notice of 23 July 2007.

16 The tenders, which had to be lodged before 19 September 2007, were opened on that date, and the Provincie issued a report at the conclusion of that operation. It was stated therein, amongst other things, that four tenderers had submitted a tender, and that the lowest tender, of EUR 1 117 200, was that of Machinefabriek Emmen BV ('MFE'), whilst Combinatie's tender, of EUR 1 123 400, came second.

17 By letter of 2 October 2007, the Provincie informed Combinatie and others that it intended to award the contract to MFE because its tender was the lowest, without further explanations.

18 Combinatie and others objected to that decision, by letter of 9 October 2007, arguing that there was serious evidence to cast doubt as to whether MFE did in fact meet the criteria for the award of the contract. That letter gave rise to a telephone conversation with the staff of the Provincie, during which the question was raised whether a successor undertaking might use the references of its predecessor.

19 On 18 October 2007, Combinatie and others brought an application for interim measures against the Provincie before the Rechtbank Assen, from which it sought a ruling that MFE had submitted an invalid tender, that Combinatie had submitted the lowest tender, and that the Provincie should award the contract to the latter.

20 By letter of 1 November 2007, the Provincie informed all tenderers that it had decided to withdraw its call for tenders because, following an analysis by its award procedure staff, it had become apparent that the procedure was vitiated by such flaws that it was no longer possible to continue. According to that letter, the main flaws were as follows: (a) the requirement concerning experience had been reduced from 60 to 50 % of the market in question, and the requirement concerning turnover had been reduced from 150 to 125 % of that amount; (b) the reference period for calculation of turnover had been extended from 3 to 5 years; (c) the criterion of experience had been modified in such a way that it no longer fully corresponded to the criterion initially laid down; (d) those modifications had been communicated on the website www.aanbestedingskalender.nl, but not on the website on which the call for tenders had been published, namely www.ted.europa.eu. In that same letter, the Provincie indicated that it was considering the possibility of making a fresh call for tenders.

21 Combinatie and others took the view that the letter of 1 November 2007 was not a factor sufficient to enable it to withdraw its application for interim measures, but it nevertheless modified the claims made therein.

22 On 9 November 2007, MFE intervened in the interim proceedings on the advice of the Provincie, claiming that the court hearing those proceedings should award the contract to MFE.

23 By judgment of 28 November 2007, the judge hearing the application for interim measures at the Rechtbank Assen took the view that MFE had convincingly argued, by means of documents lodged during the award procedure and commented upon at the hearing, that the works which had been carried out in the past by Machinefabriek Hidding BV, which during 2005 became Synmet Engineering & Production BV, could be attributed to it. The judge hearing the application for interim measures also found that MFE had met the conditions laid down by the Provincie in the call for tenders and provided the necessary information in time, that the signature of the model K declaration lodged by MFE's representative should be regarded as sufficient, and that MFE had submitted the lowest tender.

24 The judge hearing the application for interim measures ruled that the Provincie had not acted consistently when it defined the turnover and experience criteria, and that substantive changes had been introduced into the call for tenders. Nevertheless, the court found that the changes had been made at an early stage of the award procedure, that those changes did not appear to have been introduced in order to favour one of the tenderers, and that neither did it appear that third parties had submitted a tender after the project was modified. In those circumstances, the court held that the changes were not of sufficient importance to permit the conclusion that the call for tender procedure had not been sufficiently transparent.

25 The court considered that, having regard to the principles of equality and legitimate expectations, and by reason of pre-contractual good faith, it was no longer permissible for the Provincie, at that stage of the award procedure, to award, following a second call for tenders, the same works contract to an undertaking other than that which fulfilled the conditions laid down at the time of the first call for tenders.

26 The court therefore prohibited the Provincie from awarding the contract to an undertaking other than MFE, and declared that decision immediately enforceable.

27 On 3 December 2007, the Provincie awarded the contract to MFE.

28 On 11 December 2007, Combinatie and others brought an interlocutory action before the Gerechsthof Leeuwarden, claiming that the judgment of the Rechtbank Assen of 28 November 1997 should be set aside.

29 By interlocutory judgment of 30 January 2008, the Gerechsthof Leeuwarden dismissed that application on the ground that MFE had a protected interest in the execution of the judgment of the Rechtbank Assen.

30 The Gerechtshof Leeuwarden held that the contract concluded meanwhile between the Provincie and MFE should be regarded as having been concluded in a legally valid manner and that, apart from individual cases, the mere fact that the call for tenders procedure was vitiated by defects did not render that validity open to challenge. The Gerechtshof concluded that the only action remaining open to Combinatie and others, were an infringement of the law on public contracts to be established, was an action for damages.

31 On 19 December 2007, Combinatie and others lodged a further appeal against the interim judgment, seeking the annulment of that judgment and the award of the contract. It desisted from that appeal after becoming aware of the interlocutory judgment

of the Gerechtshof Leeuwarden of 30 January 2008 and decided to sue the Provincie for damages before the Rechtbank Assen. The writ was issued on 29 February 2008.

32 In the context of that action, the Rechtbank Assen considers that the decision of 1 November 2007, whereby the Provincie decided to withdraw its award decision of 2 October 2007 and make a fresh call for tenders, is the only correct application of the law on public contracts. It considers that the Provincie could not reduce the experience requirement from 60 to 50 % and the turnover requirement from 150 to 125 %, that it could not extend the reference period for calculation of turnover from 3 to 5 years, and that it should have published the changes which it thus made to the call for tenders on the same internet site as that on which it had published that call. The Rechtbank Assen states that, for those reasons, it intends to give a definitive judgment in substitution for the interim judgment. The Rechtbank considers that, since the contract has been awarded and the works already begun, or perhaps even finished, the only issue is whether to award damages to Combinatie and others.

33 The Rechtbank Assen questions whether that unlawful act falls to be ascribed to the Provincie, given the circumstances and the statutory structure of legal protection within which it took place. The major social interests to which the Provincie refers and the decision of the court hearing the application for interim measures, along with the Netherlands legislature's choice of legal protection system, might serve as justification.

34 In those circumstances, the Rechtbank Assen decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Must Article 1(1) and (3) and Article 2(1) and (6) of Directive 89/665 be interpreted as meaning that they have not been complied with if the legal

protection to be afforded by national courts in disputes relating to tendering procedures governed by European law is impeded by the fact that conflicting decisions may arise under a system in which both administrative courts and civil courts may have jurisdiction with respect to the same decision and its consequences?

(b) Is it permissible in this context for the administrative courts to be confined to forming an opinion and ruling on the tendering decision, and if so, why and/or under what conditions?

(c) Is it permissible in this context for the Algemene wet bestuursrecht (Netherlands General Law on Administrative Law), which, as a rule, governs applications for access to the administrative courts, to exclude such applications in the case of decisions concerning the conclusion of a contract by the contracting authority with one of the tenderers, and if so, why and/or under what conditions?

(d) Is the answer to Question 2 of relevance in this context?

(2) (a) Must Article 1(1) and (3) and Article 2(1) and (6) of Directive 89/665 be interpreted as meaning that they have not been complied with if the only procedure for obtaining a rapid decision is characterised by the fact that it is in principle geared to a rapid mandatory measure, that lawyers have no right to exchange views, that [no] evidence is, as a rule, presented in other than written form and that statutory rules on evidence are not applicable?

(b) If not, does this also apply if the decision does not lead to the final determination of the legal situation and does not form part of a decision-making process leading to such a final decision?

(c) Does it make a difference in this context if the decision is binding only on the parties to the proceedings, even though other parties may have an interest?

(3) Is it compatible with Directive 89/665 for a court, in interim relief proceedings, to order the contracting public authority to take a tendering decision which is subsequently deemed, in proceedings on the substance, to be contrary to tendering rules under European law?

(4) (a) If the answer to the previous question is in the negative, must the contracting public authority be deemed liable in that regard, and if so, in what sense?

(b) Does the same apply if the answer to that question is in the affirmative?

(c) If that authority is required to pay damages, does Community law set criteria for determining and estimating those damages, and if so, what are they?

(d) If the contracting public authority cannot be deemed liable, is it possible, under Community law, for some other person to be shown to be liable, and on what basis?

(5) If it in fact appears to be impossible, or extremely difficult, under national law and/or with the aid of the answers to the above questions to attribute liability, what must the national court do?'

The questions referred

Preliminary observation

35 Pursuant to Article 1(1) thereof, Directive 89/665 applies as regards contract award procedures falling within the scope of Directive 71/305, that latter directive having been replaced by Directive 93/37, itself replaced by Directive 2004/18.

36 According to Article 7(c) thereof, Directive 2004/18 applied, both at the date of publication of the contract notice and at the date of the award of the contract at issue in the main proceedings, to public works contracts the value of which, excluding VAT, was equal to, or higher than, EUR 5 278 000.

37 According to the order for reference, the amount of the successful tender in the procedure giving rise to the dispute in the main proceedings was EUR 1 117 200, including VAT.

38 The question therefore arises whether or not the contract at issue in the main proceedings falls within the scope of Directive 2004/18.

39 On 8 December 2009, the Court sent the referring court a request for clarification pursuant to Article 104(5) of the Rules of Procedure, with a view to determining the estimated value of the contract at issue in the main proceedings and, in particular, to determine whether that contract formed part of an aggregate whole for the purposes of Article 9(5)(a) of that directive, with the result that account would need to be taken of the estimated overall value of that aggregate whole.

40 By letter of 28 January 2010, which reached the Registry of the Court of Justice on 2 February 2010, the referring court indicated that the contract at issue in the main proceedings concerned works forming part of a more extensive project, namely the renewal of the Erica-Ter Apel navigable waterway, of an amount estimated at EUR 6 100 000.

41 It is possible to infer from that answer that the contract at issue in the main proceedings forms part of an aggregate whole for the purposes of Article 9(5)(a) of Directive 2004/18, the overall amount of which exceeds the threshold for the application of the latter. The Court therefore considers that that contract falls within the scope of that directive, and thus within the scope of Directive 89/665.

The first question

42 According to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, in particular, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, and Case C-459/07 *Elshani* [2009] ECR I-2759, paragraph 40).

43 Nevertheless, the Court has held that it cannot give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation or validity of European Union (EU) law bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*Bosman*, paragraph 61; *Elshani*, paragraph 41).

44 As is apparent from the order for reference, the first question is based on the premiss that, in the context of national law, both the administrative courts and the civil courts may have jurisdiction in relation to the same decision taken in the context of the award of a public contract, which might lead to the adoption of contradictory court decisions.

45 However, the observations submitted to the Court by the Kingdom of the Netherlands and the Commission show that, under Netherlands law, the civil courts generally have exclusive jurisdiction to hear disputes on the award of public contracts. According to those observations, the administrative courts have jurisdiction in the matter if a particular law so provides. In that case, they would have exclusive jurisdiction. It would therefore be impossible, under Netherlands law, for an administrative court and a civil court both to have jurisdiction concerning the same dispute on the award of public works contracts.

46 It is true that, when ruling in the context of a reference for a preliminary ruling, the Court of Justice may not rule on the interpretation of national laws or regulations (Case 32/76 *Saieva* [1976] ECR 1523, paragraph 7; Joined Cases 91/83 and 127/83 *Heineken Brouwerijen* [1984] ECR 3435, paragraph 10; and Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraph 13).

47 However, it is undisputed that, in the dispute in the main proceedings, there is no risk of contradictory decisions through the intervention of an administrative court, since all the proceedings have taken place before civil courts.

48 According to the Court's information, therefore, the interpretation of EU law requested in the first question bears no relation to the subject-matter of the dispute in the main proceedings.

49 Therefore, the first question must be regarded as inadmissible.

The second question

50 By its second question, part (a), the referring court asks, in essence, whether Directive 89/665 precludes a system in which, in order to obtain a rapid decision, the only procedure available is characterised by the fact that it is geared to a rapid mandatory measure, that lawyers have no right to exchange views, that no evidence is, as a rule, presented other than in written form and that statutory rules on evidence are not applicable.

51 It should be remembered, as is stated in the fifth recital of Directive 89/665, that the short duration of procedures for the award of public contracts means that infringements of provisions of EU law need to be dealt with urgently.

52 In view of that objective, Article 1(1) of Directive 89/665 provides for the establishment in the Member States of review procedures which are effective, and in particular as rapid as possible, against decisions which may have infringed EU law on public procurement or national rules implementing that law.

53 More specifically, Article 2(1)(a) of that directive requires Member States to make provision for the powers to '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'.

54 Since Article 2(2) of the same directive provides that the powers specified in Article 2(1) may be conferred on separate bodies responsible for different aspects of the review procedure, it follows in particular that Member States may confer the power to take provisional measures and the power to award damages on separate bodies.

55 Article 2(3) of Directive 89/665 provides that review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate. It follows that this directive allows Member States to provide, in their national legislation, that suspensive measures may be applied for, in appropriate cases, in proceedings which are separate from those concerning the substance of the procedures for the award of public contracts.

56 Article 2(4) of the said directive, which provides that a decision not to grant interim measures shall not prejudice any other claim of the person seeking those measures, also allows for the possibility of a procedure on the substance separate from the procedure seeking the grant of interim measures.

57 Thus, it may be concluded that Directive 89/665 leaves Member States a discretion in the choice of the procedural guarantees for which it provides, and the formalities relating thereto.

58 It should be noted that, since the characteristics of the interim procedure at issue in the main proceedings are inherent in procedures seeking the quickest possible adoption of interim measures, they comply, as such, with the requirements of Articles 1(1) and 2(1)(a) of Directive 89/665.

59 It follows from the above that Directive 89/665 does not preclude a system in which, in order to obtain a rapid decision, the only procedure available is characterised by the fact that it is geared to a rapid mandatory measure, that lawyers have no right to exchange views, that no evidence is, as a rule, presented other than in written form and that statutory rules on evidence are not applicable.

60 By part (b) of its second question, the national court asks whether the above analysis also applies where the interim judgment does not lead to the final determination of the legal situation and does not form part of a decision-making process leading to such a final decision.

61 By its nature, an interim measure does not finally determine the legal situation. Moreover, the effects produced by the decision-making process of which that measure forms part follow from the internal legal order of the State concerned. Therefore, Directive 89/665 does not preclude the adoption of such a measure.

62 By part (c) of its second question, the referring court asks whether it makes a difference that the interim judgment is binding only on the parties, even though other parties may have an interest.

63 That part of the question is based on a hypothesis that does not obtain in the main dispute. In that dispute, the interim proceedings were not limited to the applicant and the defendant, namely Combinatie and others and the Provincie. On the contrary, a third interested party, namely MFE, was able to intervene to defend its interests, and moreover to do so with success.

64 Consequently, there is no need to reply to that part of the question.

65 Having regard to the above considerations, the answer to the second question is that Article 1(1) and (3) and Article 2(1) and (6) of Directive 89/665 do not preclude a system in which, in order to obtain a rapid decision, the only procedure available is characterised by the fact that it is geared to a rapid mandatory measure, that lawyers have no right to exchange views, that no evidence is, as a rule, presented in other than written form, that statutory rules on evidence are not applicable and that the judgment does not lead to the final determination of the legal situation and does not form part of a decision-making process leading to such a final decision.

The third question

66 By its third question, the referring court asks in essence whether Directive 89/665 must be interpreted as precluding a court hearing an application for interim measures from ordering an awarding authority to adopt a decision to award a public contract which, in the course of a subsequent procedure on the substance, will be declared incompatible with Directive 2004/18.

67 As stated in paragraph 42, it is for the national court to assess, having regard to the particular features of the case, the relevance of the questions which it puts to the Court.

68 The third question of the referring court is based on the premiss that, in the main proceedings, the court hearing the application for interim measures has ordered the awarding authority to award the contract in question to MFE.

69 According to the findings contained in the order for reference, that premiss in inaccurate. As the referring court finds, the court hearing the application for interim measures has prohibited the Provincie from awarding the contract to an undertaking other than MFE. It is not, however, apparent from the information on file that the court hearing the application for interim measures required the Provincie to award the contract to MFE.

70 In that respect, in reply to a question put by the Court, Combinatie and others, the Kingdom of the Netherlands and the Commission argued that the Provincie could have pursued a number of courses of action following the interim judgment of 28 November 2007 other than awarding the contract at issue in the main proceedings to MFE.

71 It is, moreover, apparent from the replies received by the Court that the Provincie could have refrained from awarding the contract or brought court action on the substance, or appealed against the interim judgment of 28 November 2007 or, finally, have waited, before awarding the contract, for a possible appeal to be made by Combinatie and others against that interim judgment.

72 Concerning that fourth possibility, the documents before the Court show that Combinatie and others did in fact bring an appeal, on 11 December 2007, against the interim judgment, whereas the Provincie awarded the contract to MFE on 3 December 2007.

73 It follows that the hypothesis that a court hearing an interim application required an awarding authority to adopt a decision awarding a public contract does not obtain in the dispute in the main proceedings.

74 In order to give a useful answer to the referring court, it is thus necessary to reformulate the third question. By that question, the national court is actually asking whether Directive 89/665 must be interpreted as precluding a court hearing an application for interim measures, in order to adopt a provisional measure, from carrying out an interpretation of Directive 2004/18 which is subsequently classified as erroneous by the court dealing with the substance.

75 As has been emphasised in paragraphs 52 to 54 of this judgment, Directive 89/665 requires Member States to establish review procedures against decisions which may have infringed EU law on public procurement or national rules implementing that law.

76 Article 2(2) of that directive provides that such procedures may be handled by separate bodies from those responsible for actions on the substance, such as actions for damages.

77 Given the possibility of making provision for such a system, the possibility cannot be excluded that the court hearing an application for interim measures and the court dealing with the substance, called upon successively to deal with the same dispute, might give a divergent interpretation of the relevant EU legal rules. On the one hand, the court hearing an application for interim measures is called upon to give a decision in the context of an urgent procedure in which both the gathering of evidence and the examination of the pleas of the parties is necessarily more cursory than in the context of the proceedings on the substance. On the other hand, the intervention of the court hearing an application for interim measures is not designed, like that of the court hearing the substance, to rule definitively on the claims presented to it but to protect provisionally the interests at stake, possibly by balancing them.

78 The EU legislature has recognised the specific nature of the mission of the court hearing an application for interim measures in Article 2(1)(a) and (4) of Directive 89/665, by emphasising in particular the provisional nature of the measures taken by such a court.

79 It is inherent in the review system established by that directive that the court hearing the substance may adopt an interpretation of EU law, and of Directive 2004/18 in particular, which is different from that of the court hearing an application for interim measures. Such a divergence in assessment does not imply that a court system such as that at issue in the main proceedings does not comply with the requirements of Directive 89/665.

80 Therefore, the answer to the third question is that Directive 89/665 must be interpreted as not precluding a court hearing an application for interim measures, for the purposes of adopting a provisional measure, from carrying out an interpretation of Directive 2004/18 which is, subsequently, classified as erroneous by the court hearing the substance of the case.

The fourth question

81 By its fourth question, parts (a) and (b), the referring court asks, in essence, whether an awarding authority may be held liable where it makes a decision to award a public contract following a direction to that effect by a court hearing an application for interim measures, and that decision is, during subsequent proceedings on the substance, declared incompatible with EU rules on the award of public contracts.

82 Those questions are based on the hypothesis that, in the dispute in the main proceedings, the court hearing the application for interim measures directed the awarding authority to award the contract in question to a certain operator.

83 As explained in paragraphs 69 to 73 of this judgment, that is not the case in the dispute in the main proceedings.

84 Under those circumstances, it is not necessary to answer the fourth question, parts (a) and (b).

85 By its fourth question, part (c), the referring court asks, in essence, whether, if the awarding authority has to make good the damage arising from an infringement of EU law on the award of public contracts, EU law provides criteria on the basis of which the damage may be determined and estimated and, if so, what those criteria are.

86 Article 2(1)(c) of Directive 89/665 clearly indicates that Member States must make provision for the possibility of awarding damages in the case of infringement of EU law on the award of public contracts, but contains no detailed statement either as to the conditions under which an awarding authority may be held liable or as to the determination of the amount of the damages which it may be ordered to pay.

87 That provision gives concrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible. According to case-law developed since the adoption of Directive 89/665, but which is now consistent, that principle is inherent in the legal order of the Union. The Court has held that individuals harmed have a right to reparation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals (Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR

I-5357, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraphs 31 and 51; and Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraphs 19 and 20).

88 As matters stand at present, the case-law of the Court of Justice has not yet set out, as regards review of the award of public contracts, more detailed criteria on the basis of which damage must be determined and estimated.

89 As regards EU legislation, it should be noted that Directive 89/665 has been largely amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC (OJ 2007 L 335, p. 31), adopted after the date of the facts which gave rise to the dispute in the main proceedings. However, on that occasion, the EU legislature refrained from adopting any provisions on that point.

90 In the absence of EU provisions in that area, it is for the legal order of each Member State to determine the criteria on the basis of which damage arising from an infringement of EU law on the award of public contracts must be determined and estimated (see, by analogy, Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 46; and Case C- 314/09 *Strabag and Others* [2010] ECR I-8769, paragraph 33) provided the principles of equivalence and effectiveness are complied with (see, to that effect, Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 98).

91 It is apparent from well-established case-law that the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of

rights conferred by EU law (principle of effectiveness) (see, in particular, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 43; Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 46; and Case C-246/09 *Bulicke* [2010] ECR I-7003, paragraph 25).

92 Therefore, the answer to the fourth question, part (c) is that, as regards State liability for damage caused to individuals by infringements of EU law for which the State may be held responsible, the individuals harmed have a right to redress where the rule of EU law which has been infringed is intended to confer rights on them, the breach of that rule is sufficiently serious, and there is a direct causal link between the breach and the loss or damage sustained by the individuals. In the absence of any provisions of EU law in that area, it is for the internal legal order of each Member State, once those conditions have been complied with, to determine the criteria on the basis of which the damage arising from an infringement of EU law on the award of public contracts must be determined and estimated, provided the principles of equivalence and effectiveness are complied with.

93 In view of that answer, there is no need to reply to part (d) of the fourth question.

The fifth question

94 By the fifth question, the referring court asks what the national court must do if it proves impossible or extremely difficult in practice to attribute liability.

95 Given the answers to the previous questions and having regard to the Court's file on the case, there is nothing to indicate that that is so in the case in the main proceedings.

96 Therefore, this question does not require an answer.

Costs

97 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. 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:

1. **Article 1(1) and (3) and Article 2(1) and (6) 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, do not preclude a system in which, in order to obtain a rapid decision, the only procedure available is characterised by the fact that it is geared to a rapid mandatory measure, that lawyers have no right to exchange views, that no evidence is, as a rule, presented other than in written form, that statutory rules on evidence are not applicable, and that the judgment does not lead to the final determination of**

the legal situation and does not form part of a decision-making process leading to such a final decision.

2. **Directive 89/665, as amended by Directive 92/50, must be interpreted as not precluding a court hearing an application for interim measures, for the purposes of adopting a provisional measure, from carrying out an interpretation of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts which is, subsequently, classified as erroneous by the court hearing the substance of the case.**

3. **As regards State liability for damage caused to individuals by infringements of European Union (EU) law for which the State may be held responsible, the individuals harmed have a right to redress where the rule of EU law which has been infringed is intended to confer rights on them, the breach of that rule is sufficiently serious, and there is a direct causal link between the breach and the loss or damage sustained by the individuals. In the absence of any provisions of EU law in that area, it is for the internal legal order of each Member State, once those conditions have been complied with, to determine the criteria on the basis of which the damage arising from an infringement of EU law on the award of public contracts must be determined and estimated, provided the principles of equivalence and effectiveness are complied with.**

[Signatures]