JUDGMENT OF THE COURT (Second Chamber)

16 June 2005 *

In Joined Cases C-462/03 and C-463/03,

REFERENCES under Article 234 EC for a preliminary ruling from the Bundesvergabeamt (Austria), made by decisions of 27 October 2003, received at the Court on 4 November 2003, in the proceedings

Strabag AG (C-462/03),

Kostmann GmbH (C-463/03)

v

Österreichische Bundesbahnen,

* Language of the case: German

THE COURT (Second Chamber),

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

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Strabag AG, by W. Mecenovic, Rechtsanwalt,

— Kostmann GmbH, by R. Kurbos, Rechtsanwalt,

— Österreichische Bundesbahnen, by J. Schramm, Rechtsanwalt,

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

— the French Government, by G. de Bergues and D. Petrausch, acting as Agents,

— the Netherlands Government, by S. Terstal and N.A.J. Bel, acting as Agents,

— the Commission of the European Communities, by K. Wiedner, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 2(2)(c) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement

procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

2 The references were made in the course of proceedings between Strabag AG and Kostmann GmbH respectively and Österreichische Bundesbahnen (Austrian Federal Railways, 'the ÖBB'), concerning the award to competitors of the former parties of procurement contracts for the construction and double-track extension of railway lines involving, in particular, the carrying out of work involving earthworks, levelling and concreting, and the construction of railway bridges and works.

Law

The relevant provisions of Community law

3 Article 1(1) of Directive 93/38 defines certain concepts used in that act. So, under Article 1(1), (2), (4) and (7), for the purpose of the directive:

'(1) "public authorities" shall mean the State, regional or local authorities, bodies governed by public law, or associations formed by one or more of such authorities or bodies governed by public law.

A body is considered to be governed by public law where it:

— is established for the specific purpose of meeting needs in the general interest, not being of an industrial or commercial nature,

— has legal personality, and

— is financed for the most part by the State, or regional or local authorities, or other bodies governed by public law, or is subject to management supervision by those bodies, or has an administrative, managerial or supervisory board more than half of whose members are appointed by the State, regional or local authorities, or other bodies governed by public law;

(2) "public undertaking" shall mean any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

— hold the majority of the undertaking's subscribed capital, or

— control the majority of the votes attaching to shares issued by the undertaking, or

— can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body;

...

(4) "... works ... contracts" shall mean contracts for pecuniary interest concluded in writing between one of the contracting entities referred to in Article 2, and a ... contractor ..., having as their object ... either the execution, or both the execution and design or the realisation, by whatever means, of building or civil engineering activities referred to in Annex XI. These contracts may, in addition, cover supplies and services necessary for their execution ...

...

(7) "open, restricted and negotiated procedures" shall mean the award procedures applied by contracting entities whereby:

(a) in the case of open procedures, all interested suppliers, contractors or service providers may submit tenders;

(b) in the case of the restricted procedures, only candidates invited by the contracting entity may submit tenders;

(c) in the case of negotiated procedures, the contracting entity consults suppliers, contractors or service providers of its choice and negotiates the terms of the contract with one or more of them.'

4 By virtue of Article 2(1) of Directive 93/38, the latter is to apply to 'contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

...'

5 Described in Article 2(2) of the directive, the activities falling within the scope of that act — and referred to in Article 2(1) — are the following:

'(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:

(i) drinking water; or

(ii) electricity; or

(iii) gas or heat;

or the supply of drinking water, electricity, gas or heat to such networks;

(b) the exploitation of a geographical area for the purpose of:

(i) exploring for or extracting oil, gas, coal or other solid fuels, or

(ii) the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;

(c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent

authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;

(d) the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.'

6 Under Article 4(1) of Directive 93/38:

'When awarding supply, works or service contracts, or organising design contests, the contracting entities shall apply procedures which are adapted to the provisions of this Directive.'

7 Article 6(1) of the directive states that it is not to 'apply to contracts or design contests which the contracting entities award or organise for purposes other than the pursuit of their activities as described in Article 2(2) or for the pursuit of such activities in a non-member country, in conditions not involving the physical use of a network or geographical area within the Community'.

8 Lastly, according to Article 20(1) of Directive 93/38, '[c]ontracting entities may choose any of the procedures described in Article 1(7), provided that, subject to

paragraph 2, a call for competition has been made in accordance with Article 21'. Article 20(2) sets out the precise circumstances in which contracting authorities may use a procedure without a prior call for competition.

The relevant provisions of domestic law

The federal law of 1997 on public procurement contracts

9 Directive 93/38 was transposed into Austrian law by the federal Law of 1997 on the award of public procurement contracts (Bundesgesetz über die Vergabe von Aufträgen [Bundesvergabegesetz] 1997, BGBl. I, 56/1997, 'the BVergG'). Under Paragraph 84(1), (2) and (4) of Chapter 5 of that Law, headed 'Specific provisions relating to awarding authorities in the water, energy, transport and telecommunications sectors':

'(1) Public awarding authorities, to the extent that they carry out an activity within the meaning of subparagraph 2, ... shall be governed exclusively by the provisions of this chapter.

(2) The activities covered by subparagraph 1 are the following:

1. the provision or operation of fixed networks ...

2. the exploitation of a geographical area for the purpose of ...

3. the operation of fixed networks providing a service to the public in the field of transport by railway, automated systems, tramway, bus, trolley bus, or cable;

4. the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.

...

(4) As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service. ...'

10 Paragraph 113 of the BVergG 1997 sets out the powers of the Bundesvergabeamt (federal procurement office). It provides:

'(1) The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the provisions of the following chapter.

(2) For the purpose of eliminating infringements of this federal law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:

1. to adopt interim measures and

2. to set aside unlawful decisions of the contracting authority.

(3) After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer. ...'

The federal law of 2002 on the award of public procurement contracts

11 The BVergG 1997 was repealed and replaced, as from 1 September 2002, by a new federal law on the award of public procurement contracts (Bundesgesetz über die Vergabe von Aufträgen, BGBl. I, 99/2002, 'the BVergG 2002'). Paragraph 120 of that law very largely recapitulates the wording of Paragraph 84 of the BVergG 1997. Unlike Paragraph 84, however, Paragraph 120(2)(3) of the BVergG 2002 provides, in respect of the transport sector, that the operation as well as the provision of fixed networks providing a service to the public in the field of transport by railway, automated systems, tramway, bus, trolley bus, or cable, are among the activities referred to in subparagraph 1 and to which apply, therefore, the specific rules laid down in Directive 93/38.

12 So far as concerns the powers conferred on the Bundesvergabeamt, the BVergG 2002 is again largely based on the provisions of the BVergG 1997, Paragraph 162 of the BVergG 2002 reproducing, in particular, with certain amendments, the wording of Paragraph 113 of the BVergG 1997.

13 Paragraph 188 of the BVergG 2002, concerning the entry into force of that law and the repeal of the BVergG 1997, states in subparagraph 1 that the BVergG 2002 is not applicable to procedures for public procurement contracts begun before the date of its entry into force. As a result, Paragraph 188(3) of that law provides that if actions

have been brought before the Bundesvergabeamt before 1 September 2002, that body is as a rule bound to carry out its consideration of those actions on the basis of the provisions of the BVergG 1997, in the version published in BGBl. I, 136/2001.

14 By virtue of the second sentence of that provision, however, that rule is not applicable where proceedings are stayed or a reference made for a preliminary ruling. In those two cases, the Bundesvergabeamt is as a matter of fact required, after ruling on the matter giving rise to the stay of proceedings or after receiving the reference for a preliminary ruling, to conduct the proceedings on the basis of the BVergG 2002.

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

15 The disputes in the main proceedings are based on similar facts. They arise out of the decision by which the ÖBB — a company wholly owned by the Austrian State and responsible, under Paragraph 1(3) of the federal law on railways of 1992 (Bundesbahngesetz 1992, BGBl. 825/1992), for the carriage of persons and goods and for the construction and maintenance of the infrastructures necessary for that purpose — rejected the tenders made by the companies which are the applicants in the main proceedings and awarded to competitors of those companies the works contracts at issue in the two cases. Strabag and Kostmann in essence challenge the use by the ÖBB of the negotiated procedure for the award of contracts.

Case C-462/03

16 By communication of 29 December 2000 the ÖBB published in the *Official Journal of the European Communities* a contract notice relating to reinforced concrete works and construction of railways and railway bridges.

17 Fourteen construction undertakings, including Strabag and Kostmann, submitted tenders for that contract. The tenders made by those two undertakings were, however, rejected. Having been informed by fax of 5 July 2002 of the name of the tenderer selected by the ÖBB, Strabag decided to bring an action before the Bundesvergabeamt against the decision awarding the contract, seeking, first, to have that decision annulled pursuant to Paragraph 113(2) of the BVergG 1997 and, second, to have provisional measures adopted consisting, in this case, of an injunction addressed to the contracting authority for the purpose of preventing the contract in question's being concluded before a ruling should have been given on the merits of the action.

18 By an initial decision of 22 July 2002, that is to say, the very day of the conclusion of the contract between the ÖBB and the successful tenderer, the Bundesvergabeamt gave a favourable decision on the application for provisional measures and made the injunction sought by Strabag.

19 By a further decision of 30 August 2002 that body, ruling on the merits of the case, nevertheless held that the award had been made in accordance with the domestic

and Community rules on public procurement contracts, so that it was no longer possible to uphold the application to have that contract annulled. In the same decision, le Bundesvergabeamt none the less found that recourse to the negotiated procedure for the award of the contract was unlawful. In that respect, it based its decision on the fact that the infrastructure project at issue in the case in the main proceedings constituted 'provision' of a network of public transport and could therefore not be regarded as an activity covered by Paragraph 84(2)(3) of the BVergG 1997. According to the Bundesvergabeamt, such a finding of unlawfulness would not, however, require a question to be referred to the Court of Justice seeking interpretation of the Community legislation, since the provisions of domestic law concerned are plain and on this point faithfully reflect the terms of Directive 93/38, in particular, those of Article 2(2)(c) thereof.

20 Following the adoption of that last decision, Strabag first brought an action challenging it before the Verfassungsgerichtshof (Constitutional Court), claiming, inter alia, that the Bundesvergabeamt had been wrong to dismiss the reference for a preliminary ruling presented by the applicant. Second, Strabag asked the Bundesvergabeamt to find, pursuant to Paragraph 113(3) of the BVergG 1997, that as a result of infringement of that law, the contract had not been awarded to the best tenderer. On that point, the company argued on the basis of the finding made by that same body, that the ÖBB's choice of the negotiated procedure for the award of public procurement contracts had been incorrect. That latter request, made on 30 August 2002, was received at the Bundesvergabeamt on 2 September 2002, that is to say, the day after the entry into force of the BVergG 2002.

21 Taking the view that in those circumstances it was faced with a question demanding an interpretation of Community law in the light, particularly, of the new wording of the provision of the BVergG 2002 concerning the transport sector, viz., Paragraph 120(2)(3) of that law and having regard to the differences, both terminological and linguistic, between the situations referred to in Article 2(2)(a) and (d) of Directive

93/38 on the one hand and those mentioned in Article 2(2)(b) and (c) on the other, the Bundesvergabeamt has decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) On a proper construction of Article 2(2)(c) of Directive 93/38/EEC, so far as transport is concerned, and contrary to the other situations covered by Article 2 (2) of the directive, is it "merely" the operation of networks that must be considered to be a sectoral activity?

(2) What activities are covered by the expression "operation of networks providing a service to the public in the field of transport by railway" under Article 2(2)(c) of Directive 93/38/EEC? To what extent, in particular, are measures in the sphere of infrastructure to be included therein? And to what extent are such measures to be classed under the expression "provision of networks"?

(3) In so far as in the sphere of transport (by railway) it is exclusively the operation of networks that falls within the ambit of Directive 93/38/EEC (if the answer to the first question should be "Yes"): is a review authority bound to refrain from applying a provision of domestic law according to which, contrary to the wording of Directive 93/38/EEC, the "provision of networks providing a service to the public in the field of transport by railway" constitutes a sectoral activity also?'

22 As has been observed in paragraph 15 above, the facts occasioning this second case are similar to those which gave rise to Case C-462/03. Following the publication by the ÖBB of various contract notices for works involving excavation, earthworks, levelling and concreting and the construction of bridges, shafts, tunnels and underground passages linked to the construction or double-track extension of certain railways, Kostmann submitted tenders for the purpose of obtaining the award of those contracts.

23 On being informed by the ÖBB that its tender for the first contract had not been successful and that that contract had been awarded to a competitor undertaking, by letter of 13 December 2000 Kostmann requested the Bundesvergabeamt to find, pursuant to Paragraph 113(3) of the BVergG 1997, that the contract had not been awarded to the best tenderer because, in its view, of the unwarranted use, contrary to that law, of the negotiated procedure.

24 The lawfulness of recourse to that last procedure is also at issue in the dispute between Kostmann and the ÖBB with regard to the other contract notices published by the ÖBB, in connection with the actions for annulment brought by Kostmann before the Bundesvergabeamt by letters of 13 December 2000 and 13 January 2001, that is to say, just a few days after the publication of those calls in the *Official Journal of the European Communities*. In those cases also the contracts were awarded to undertakings in competition with the applicant in the main proceedings after, in some of them, the latter's request for provisional measures had been rejected.

25 The arguments advanced before the Bundesvergabeamt in those various proceedings are, essentially, the same as those giving rise to Case C-462/03. The ÖBB defend

having resorted to the negotiated procedure by inferring from the fact that the infrastructure projects that occasioned the various contract notices fall within the sector referred to in Article 2(2)(c) of Directive 93/38, and in the corresponding provision of the BVergG 1997, that the contracting authority might freely have recourse to an open, restricted or negotiated procedure. In contrast, Kostmann maintains that the ÖBB were bound to use the ordinary rules of public procurement, in particular, those laid down by 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), which states that the negotiated procedure is to be considered to be exceptional, for the infrastructure works at issue in the main proceedings are not among the activities within the sector referred to in Article 2(2)(c) of Directive 93/38.

26 Considering, in those circumstances, that the terms of that last directive call for interpretation, the Bundesvergabeamt has decided to stay proceedings and to refer to the Court for a preliminary ruling three questions, worded identically to those set out in paragraph 21 above.

27 By order of the President of the Court of 16 January 2004 Cases C-462/03 and C-463/03 were joined for the purposes of the written and oral procedure and of the judgment.

On the admissibility of the questions referred

28 In the observations it has submitted to the Court, the Commission of the European Communities expresses, as a preliminary point, some doubts as to the admissibility of the questions referred. It argues here that those questions are purely hypothetical,

for the ÖBB are a contracting entity exercising one of the activities specifically mentioned in Article 2(2)(c) of Directive 93/38 and the infrastructure projects at issue in the main proceedings are directly linked to that activity. The question whether the provision of railway networks falls in a general way within the ambit of Article 2(2)(c) is therefore quite irrelevant to the cases in the main proceedings.

29 It ought to be borne in mind that, in accordance with 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. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought 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 (see, inter alia, Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraphs 18 and 19; Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraphs 21 and 22, and Case C-380/01 *Schneider* [2004] ECR I-1389, paragraphs 21 and 22).

30 In the present case, it is not apparent that the questions referred by the national court fall within one of those hypotheses.

31 First, it cannot be maintained that the interpretation sought of Community law bears no relation to the actual facts of the main actions or their purpose, or that the

matter raised is hypothetical, for the Bundesvergabeamt's assessment of the lawfulness of resort to the negotiated procedure for procurement contracts depends, in particular, on the question whether or not the infrastructure projects at issue in the main proceedings fall within the material scope of Directive 93/38.

32 Second, the national court has provided the Court with all the information necessary to enable it to give a useful answer to the questions referred.

33 The questions must therefore be held to be admissible.

On the first and second questions

34 By its two first questions, which may appropriately be dealt with together, the Bundesvergabeamt in substance raises the issue of the material scope of Directive 93/38. It is clear, both from the explanations given in the orders for reference and from the observations submitted to the Court, that by its questions concerning the meaning of the expressions 'operation' and 'provision' of transport networks, that body seeks to ascertain whether the infrastructure projects at issue in the main proceedings are among the activities mentioned in Article 2(2)(c) of the directive and whether the contracting entity may, as a result, derogate from the ordinary rules governing the award of procurement contracts laid down in Directive 93/37 in favour of those contained in Directive 93/38, authorising more extensive use of the negotiated procedure.

35 On this point it is first to be noted, that, according to Article 2(1)(a) of Directive 93/38, the latter applies to contracting entities which are public authorities or public undertakings and which exercise one of the activities referred to in paragraph 2 of that article.

36 Second, Article 4(1) of that directive makes it apparent that when awarding supply, works or service contracts, or organising design contests, the contracting entities are to apply procedures which are adapted to the provisions of the directive.

37 As the Commission has correctly noted in its written observations, reading those two provisions together shows that the applicability of Directive 93/38 depends on the activity exercised by the contracting entity concerned and on the links between that activity and the contract planned by that entity. If the latter carries on one of the activities listed in Article 2(2) of Directive 93/38, and in so doing contemplates, which it is a matter for the national court to verify, the award of a supply, works or service contract or the organisation of a design contest, the provisions of this directive will apply to that contract or contest. If the contracting entity does not carry on one of those activities, the contract or contest will be governed by the rules laid down in the directives concerning the award of public supply, works or service contracts as the case may be.

38 Furthermore, that interpretation is expressly supported both by the very wording of Article 6(1) of Directive 93/38, which states that the directive is not to apply to contracts or design contests which the contracting entities award or organise for purposes other than the pursuit of their activities as described in Article 2(2) of that directive and by reading the 13th recital in the preamble thereto, which states that the directive is not to extend to activities of those entities which either fall outside

the water, energy, transport or telecommunications sectors or which fall within those sectors but are nevertheless directly exposed to competitive forces on markets to which entry is unrestricted.

39 Having regard to the foregoing considerations, the answer to be given to the two first questions referred in each of the cases in the main proceedings is that where a contracting entity exercising one of the activities mentioned in Article 2(2) of Directive 93/38 contemplates, in the exercise of that activity, the award of a supply, works or service contract or the organisation of a design contest, that contract or contest is governed by the provisions of this directive.

On the third question

40 By its third question, which is worded identically in the two cases in the main proceedings, the national body seeks to ascertain, in substance, whether it is bound to refrain from applying a provision of domestic law that, contrary to the tenor of Article 2(2)(c) of Directive 93/38, provides that the provision of networks providing a service to the public in the field of transport by railway also constitutes an activity falling within a sector covered by that directive.

41 That question relies on the premiss that infrastructure works such as those at issue in the main proceedings do not fall within the material ambit of Directive 93/38, given that, according to the Bundesvergabeamt, such work must be treated as

'provision' of transport networks and that such activity does not appear among those expressly listed in Article 2(2)(c) of that directive.

42 Now that premiss is mistaken. As has been noted in paragraph 37 above, the applicability of Directive 93/38 depends on the activity exercised by the contracting entity concerned and on the links between that activity and the contract planned by that entity.

43 In the circumstances there is no need to answer the third question.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the Bundesvergabeamt, the decision on costs is a matter for the latter. 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) rules as follows:

Where a contracting entity exercising one of the activities particularly mentioned in Article 2(2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors contemplates, in the exercise of that activity, the award of a supply, works or service contract or the organisation of a design contest, that contract or contest is governed by the provisions of this directive.

[Signatures]