JUDGMENT OF THE COURT (Sixth Chamber)
4 February 1999 *

In Case C-103/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tiroler Landesvergabeamt, Austria, for a preliminary ruling in the proceedings pending before that tribunal between

Josef Köllensperger GmbH&Co. KG,

Atzwanger AG

and

Gemeindeverband Bezirkskrankenhaus Schwaz

on the interpretation of Article 2(8) 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),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: P. J. G. Kapteyn (Rapporteur), President of the Chamber, G. Hirsch, G. F. Mancini, H. Ragnemalm and R. Schintgen, Judges,

Advocate General: A. Saggio,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Gemeindeverband Bezirkskrankenhaus Schwaz, by C. C. Schwaighofer and M. E. Sallinger, Rechtsanwälte, Innsbruck,

— the Austrian Government, by W. Okresek, Ministerialrat in the Federal Chancellor's Office, acting as Agent,

— the Commission of the European Communities, by H. van Lier, Legal Adviser, and C. Schmidt, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Austrian Government, represented by M. Fruhmann, of the Federal Chancellor's Office, acting as Agent, and the Commission, represented by H. van Lier and C. Schmidt, at the hearing on 18 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 24 September 1998,

gives the following

Judgment

1 By order of 7 November 1996, received at the Court on 10 March 1997, the Tiroler Landesvergabeamt (Procurement Office of the *Land* of Tyrol) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 2(8) 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).

2 Those questions were raised in proceedings between Josef Köllensperger GmbH&Co. KG ('Köllensperger') and Atzwanger AG ('Atzwanger') and Gemeindeverband Bezirkskrankenhaus Schwaz (Association of Municipalities for the Schwaz District Hospital) concerning the award of a contract for works relating to an extension to the Schwaz District Hospital.

3 Directive 89/665 aims to ensure that the Community directives in the field of public procurement are applied as effectively and rapidly as possible. Since the existing remedies in that field at national and Community level generally did not appear adequate and the individual directives did not provide for any specific remedies, that directive required the Member States to bring into force before 21 December 1991 adequate review procedures in the case of unlawful procedures for the award of public contracts (Articles 1(1) and 5).

4 Under Article 2(8) of Directive 89/665:

'Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a

case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

5 In Austria, Directive 89/665 was transposed at federal level by the Bundesvergabegesetz (Federal Procurement Law, hereinafter 'the BVergG'). That Law provides for two procedures, an arbitration procedure before the Bundesvergabekontrollkommission (Federal Procurement Review Commission) and a procedure before the Bundesvergabeamt (Federal Procurement Office).

6 In the *Land* of Tyrol, the directive was transposed by the Tiroler Gesetz über die Vergabe von Aufträgen (Law of the *Land* of Tyrol on the Award of Contracts, hereinafter 'the TVergG'). That Law gives the Tiroler Landesvergabeamt jurisdiction to review procedures for the award of public supply and public works contracts and concessions.

7 Paragraph 6 of the TVergG states:

'1. The Landesvergabeamt shall be established at the Amt der Tiroler Landesregierung (Office of the Government of the *Land* of Tyrol). It shall consist of:

(a) a person familiar with public procurement matters, as President,

(b) an official of the Amt der Tiroler Landesregierung who has a knowledge of law, as rapporteur,

(c) a member of the judiciary,

(d) a member each to be proposed by the Wirtschaftskammer Tirol (Chamber of Commerce of Tyrol), the Architekten- und Ingenieurkonsultentenkammer für Tirol und Vorarlberg (Chamber of Architects and Consulting Engineers for Tyrol and Vorarlberg), the Kammer für Arbeiter und Angestellte für Tirol (Chamber of Workers and Employees for Tyrol) and the Tiroler Gemeindeverband (Tyrol Association of Municipalities), familiar with public procurement matters.

...

3. The members of the Landesvergabeamt are to be appointed by the *Land* Government for a term of five years. They must be eligible for election to the Landtag. In the case of the members referred to in subparagraphs 1(d) and 2, the *Land* Gov-

ernment must invite the bodies entitled to propose members to make a proposal within a period to be reasonably determined. If a proposal is not made in due time, the appointment is to be made without a proposal. Before appointing the member referred to in subparagraph 1(c), the President of the Oberlandesgericht (Court of Appeal) Innsbruck is to be heard. For each member a substitute is to be appointed in the same manner. Each member shall be represented by his substitute member in the event of being unable to act.

4. A member or substitute member of the Landesvergabeamt shall leave office early if he resigns or the appointment is revoked, and a member referred to in subparagraph 1(b) and (c) also on leaving his office or profession. Resignation shall be declared to the *Land* Government in writing ... An appointment is to be revoked if the conditions for appointment are no longer met or if circumstances occur which prevent proper exercise of the office and are likely to do so for a long time. If a member or substitute member leaves office early, a new member or substitute member is to be appointed immediately for the remainder of his term of office.

...

6. The Landesvergabeamt shall have a quorum qualified to decide by vote if all the members have been duly summoned and the President, the rapporteur, the member from the judiciary and at least one other member are present. It shall take its decisions by a simple majority of votes. If the votes are equal, the President's vote shall be decisive. Abstentions shall not be permitted.

7. The members of the Landesvergabeamt shall not be bound by instructions in the exercise of their office. Their decisions shall not be subject to administrative annulment or amendment.

8. The secretarial work of the Landesvergabeamt shall be dealt with by the Amt der Tiroler Landesregierung.'

8 On 6 April 1995 Köllensperger and Atzwanger applied to the Tiroler Landesvergabeamt for review of the award of the contract for works on the extension to the Schwaz District Hospital, seeking its annulment on the ground of infringement of the TVergG.

9 By decision of 27 June 1995 the Landesvergabeamt dismissed the application on the ground that the contract had been awarded to the company which made the best offer. In the Landesvergabeamt's view, it followed that even if the TVergG had been complied with by the contracting authority, the contract would not in any event have been awarded to Köllensperger and Atzwanger.

10 Köllensperger and Atzwanger thereupon complained to the Verfassungsgerichtshof (Constitutional Court).

11 On 12 June 1996 the Verfassungsgerichtshof set aside the Landesvergabeamt's decision on the ground that on the date when it gave its decision, 27 June 1995, its composition did not fulfil the conditions laid down by Article 2(8) of Directive 89/665.

12 According to the Verfassungsgerichtshof, the President of the Landesvergabeamt — an engineer — did not possess the legal and professional qualifications required for members of the judiciary, so that the decision of 27 June 1995 had infringed the applicants' constitutionally guaranteed right to a hearing before the judge specified by the law.

13 On 16 July 1996 the President of the Landesvergabeamt who had held office at the time of the contested decision resigned his office with effect from 12 July, and a new president was appointed by the Tyrol *Land* Government.

14 When the proceedings were resumed before the Landesvergabeamt, Gemeindeverband Bezirkskrankenhaus Schwaz submitted that the composition of that body still did not comply with Directive 89/665.

15 Since the Landesvergabeamt had doubts with respect to the members referred to in Paragraph 6(1)(d) of the TVergG, it decided to refer the following two questions to the Court for a preliminary ruling:

'1. Is Article 2 of Council Directive 89/665/EEC of 21 December 1989 to be interpreted as meaning that the (Tiroler) Landesvergabeamt (Procurement Office of the *Land* of Tyrol), established by the (Tiroler) Landesgesetz über die Vergabe von Aufträgen (Law of the *Land* of Tyrol on the Award of Contracts) of 6 July 1994, *Landesgesetzblatt für Tirol* (Official Journal of the *Land* of Tyrol) LGBl. No 87/1994, is a review body within the meaning of Article 2(8) of the Directive?

2. Does the Gesetz über die Vergabe von Aufträgen (Law on the Award of Contracts) of 6 July 1994, LGBl. No 87/1994, adequately provide for the transposition into national law 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, in relation to the review procedures mentioned in Article 1 thereof?'

Admissibility of the questions referred for a preliminary ruling

16 It must first be considered whether the Tiroler Landesvergabeamt is a court or tribunal within the meaning of Article 177 of the Treaty, and consequently whether the questions are admissible.

17 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 177 of the Treaty, 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, as the most recent authority, Case C-54/96 *Dorsch Consult* v *Bundesbaugesellschaft Berlin* [1997] ECR I-4961, paragraph 23, and Case 61/65 *Vaassen (neé Göbbels)* [1966] ECR 261; Case 14/86 *Pretore di Salò* v *Persons unknown* [1987] ECR 2545, paragraph 7; Case 109/88 *Danfoss* [1989] ECR 3199, paragraphs 7 and 8; Case C-393/92 *Almelo and Others* [1994] ECR I-1477; and Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9).

18 The first five criteria are not in doubt. It is apparent from the provisions of Paragraph 6 of the TVergG on its composition and functioning that the Tiroler Landesvergabeamt complies with them.

19 It is not clear, on the other hand, that the condition of independence is satisfied.

20 As the Advocate General observes in point 25 of his Opinion, the TVergG does not contain any specific provisions on challenges to, or withdrawals by, members of the Landesvergabeamt.

21 Moreover, the passage in Paragraph 6(4) of the TVergG concerning removal of members 'if the conditions for appointment are no longer met or if circumstances occur which prevent proper exercise of the office and are likely to do so for a long time' appears prima facie too vague to guarantee against undue intervention or pressure on the part of the executive.

22 On this point, it must be observed, first, that Paragraph 5(2) of the TVergG expressly states that, unless otherwise provided, the Allgemeines Verwaltungsverfahrensgesetz (General Law on Administrative Procedure) 1991 is to apply to review procedures concerning awards of contracts. That Law contains very specific provisions on the circumstances in which members of the body in question must withdraw. Moreover, according to the case-law of the Verfassungsgerichtshof, failure to comply with that obligation constitutes a procedural defect which may be challenged by the parties concerned.

23 Second, Paragraph 6(7) of the TVergG must be considered. By expressly prohibiting the giving of instructions to members of the Tiroler Landesvergabeamt in the performance of their duties, that provision repeats the terms of Article 20 of the Austrian Federal Constitutional Law on the independence of members of collegiate bodies with a judicial element, which include the Landesvergabeamt.

24 Those provisions, taken together, cannot therefore support any conclusion that Paragraph 6(4) of the TVergG does not guarantee the independence of the members of the Landesvergabeamt. It is not for the Court to infer that such a provision is applied in a manner contrary to the Austrian constitution and the principles of a State governed by the rule of law.

25 It follows that the Tiroler Landesvergabeamt must be regarded as a court or tribunal within the meaning of Article 177 of the Treaty and that its questions are admissible.

The questions referred for a preliminary ruling

26 By its questions the Tiroler Landesvergabeamt essentially asks whether provisions such as those which govern its composition and functioning satisfy the conditions set out in Article 2(8) of Directive 89/665.

27 That provision concerns the bodies responsible for review procedures relating to decisions taken by the competent bodies for the award of public contracts within the scope of Directive 89/665.

28 Under the first subparagraph of Article 2(8), the Member States may choose between two solutions in establishing arrangements for the review of public contracts.

29 The first solution is to give jurisdiction over reviews to bodies of a judicial character. The second solution is to give that jurisdiction, at a first stage, to bodies which are not of such a character. In that case, the decisions of those bodies must be capable of being the subject of judicial review or of review by another body which must satisfy the particular requirements of the second subparagraph of Article 2(8) of Directive 89/665, so as to guarantee an adequate review.

30 It follows that if, as in a case such as that in the main proceedings, the body responsible for review procedures is of a judicial character, those guarantee provisions do not apply.

31 Accordingly, the answer to the Landesvergabeamt's questions must be that the conditions set out in Article 2(8) of Directive 89/665 do not apply to provisions such as those governing its composition and functioning.

Costs

32 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 proceedings pending before the national tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Tiroler Landesvergabeamt by order of 7 November 1996, hereby rules:

The conditions set out in Article 2(8) 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 do not apply to provisions such as

those governing the composition and functioning of the Tiroler Landesverga-beamt.

Kapteyn Hirsch Mancini

Ragnemalm Schintgen

Delivered in open court in Luxembourg on 4 February 1999.

R. Grass P. J. G. Kapteyn

Registrar President of the Sixth Chamber