JUDGMENT OF THE COURT (Third Chamber)

21 October 2010*

In Case C-570/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Anotato Dikastirio tis Kipriakis Dimokratias (Cyprus), made by decision of 27 November 2008, received at the Court on 22 December 2008, in the proceedings

Simvoulio Apokhetefseon Lefkosias

v

Anatheoritiki Arkhi Prosforon,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta, E. Juhász (Rapporteur) and J. Malenovský, Judges,

* Language of the case: Greek.

Advocate General: P. Cruz Villalón,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 March 2010,

after considering the observations submitted on behalf of:

— the Simvoulio Apokhetefseon Lefkosias, by A. Aimilianidis and P. Khristofidis, dikigori,

— the Anatheoritiki Arkhi Prosforon, by K. Likourgos, A. Pantazi-Lamprou and M. Theoklitou, acting as Agents,

— the Czech Government, by M. Smolek, acting as Agent,

— the European Commission, by M. Konstantinidis and I. Chatzigiannis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 June 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns 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), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1) ('Directive 89/665').

2 The reference has been made in proceedings between the Simvoulio Apokhetefseon Lefkosias (Nicosia Sewage Council) ('the Simvoulio'), a legal body governed by public law acting as contracting authority, and the Anatheoritiki Arkhi Prosforon (Tenders Review Authority), an administrative body which examines appeals brought against decisions taken by the contracting authorities in procurement matters, concerning the right of the Simvoulio to appeal to a judicial body against a decision adopted by the Anatheoritiki Arkhi Prosforon.

Legal context

European Union legislation

3 In the first recital in the preamble to Directive 89/665, it is stated that the directives on public procurement do not contain any specific provisions ensuring their effective application.

4 According to the third recital in the preamble to that directive:

'… the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; … for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law'.

5 The fourth recital in the preamble to that directive states:

'… in certain Member States the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established; … therefore, the Member States concerned must remedy this situation'.

6 The seventh recital in the preamble to that directive is worded as follows:

'… when undertakings do not seek review, certain infringements may not be corrected unless a specific mechanism is put in place.'

7 The eighth recital in the preamble to Directive 89/665 states:

'… accordingly, the Commission, when it considers that a clear and manifest infringement has been committed during a contract award procedure, should be able to bring it to the attention of the competent authorities of the Member State and of the contracting authority concerned so that appropriate steps are taken for the rapid correction of any alleged infringement.'

8 Article 1 of that directive 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 [or service] 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.'

9 Article 2(7) and the first subparagraph of Article 2(8) of Directive 89/665 are worded as follows:

'7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

8. 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 [267 TFEU] and independent of both the contracting authority and the review body.'

10 Article 3 of that directive provides that the Commission has a power to intervene when, prior to a contract being concluded, it considers that, during a public contract award procedure, a clear and manifest infringement of relevant European Union provisions has been committed.

National legislation

11 Article 146(1) of the Constitution of Cyprus ('the Constitution') grants the Anotato Dikastirio tis Kipriakis Dimokratias (Supreme Court of the Republic of Cyprus) exclusive jurisdiction to review the lawfulness of the decisions or omissions of the administration.

12 Article 146(2) of the Constitution provides:

'The request for judicial review may be made by any person whose existing legitimate interests, as an individual or as a member of a community, are adversely and directly affected by the decision, act or omission.'

13 Law No 101 (I)/2003 on the award of contracts (supply, works and services) seeks to ensure the compatibility of the Cypriot legislation with the relevant European Union legislation, including Directive 89/665. Article 60 of that law, as amended by Law No 181 (I)/2004, provides:

'Interested parties who believe that they have been wronged by the decision of the Anatheoritiki Arkhi Prosforon shall be entitled to seek a review by the Anotato Dikastirio [tis Kipriakis Dimokratias] in accordance with Article 146 of the Constitution. The contracting authority shall also be entitled to seek a review by the Anotato Dikastirio pursuant to Article 146 of the Constitution where, on the basis of adequate documentary evidence, the decision of the Anatheoritiki Arkhi Prosforon can be regarded as unfair to the aforementioned authority.'

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

14 The Simvoulio acts as a contracting authority in the context of award procedures for public contracts, within the meaning of Law No 101 (I)/2003.

15 The Anatheoritiki Arkhi Prosforon was created in the context of ensuring the compatibility of Cypriot law with European Union legislation on public contracts and, in particular, with Directive 89/665. It is therefore a body responsible for review procedures within the meaning of Article 2(8) of Directive 89/665, is not judicial in character, and exercises its powers on the basis of the abovementioned law.

16 On 14 February 2006, following an action brought by an undertaking, the Anatheoritiki Arkhi Prosforon annulled the decision by which the Simvoulio had accepted the tender submitted by a competing undertaking. By an appeal brought before the competent chamber of the Anotato Dikastirio tis Kipriakis Dimokratias on 31 March 2006, the Simvoulio sought the annulment of the abovementioned decision of the Anatheoritiki Arkhi Prosforon.

17 During the proceedings, the plenary formation of the Anotato Dikastirio tis Kipriakis Dimokratias gave judgment on 17 December 2007 in the context of another case concerning public contracts, holding that Article 146 of the Constitution should be interpreted as meaning that it does not grant a legitimate interest to the contracting authorities to seek the review of an annulment decision adopted by the Anatheoritiki Arkhi Prosforon, and that Article 60 of Law No 101 (I)/2003 should be not be applied.

18 The view of the Anotato Dikastirio tis Kipriakis Dimokratias, which now constitutes settled case-law, is based on the consideration that the decision of the Anatheoritiki Arkhi Prosforon does not constitute a decision of the administration, independent of the proceedings in which the contracting authority concerned is itself involved. That decision does not therefore concern an interest evoked by the contracting authority, but the public interest in the lawful conduct of the general procedures governing public contracts. The contracting authority and the Anatheoritiki Arkhi Prosforon are, for the purposes of the proceedings in question, elements of the same administration, so that it is appropriate to apply the general principle that an administrative body cannot claim a legitimate interest against another body of the same administration and, in essence, bring proceedings against it.

19 The chamber of the Anotato Dikastirio tis Kipriakis Dimokratias, before which the main proceedings were brought by the Simvoulio, observes that the abovementioned view of the plenary formation of that court was adopted solely on the basis of Article 146 of the Constitution, without the question of the application and interpretation of European Union law having been raised.

20 However, that chamber notes that Article 60 of Law No 101 (I)/2003, which transposes into national law the European Union legislation on public contracts, applies independently of the interpretation of Article 146 of the Constitution, which must consequently be interpreted consistently with European Union law. In light of the fact that an interpretation of the first subparagraph of Article 2(8) of Directive 89/665 for the purposes of answering the question raised in the main proceedings has not yet been the subject of the Court's case-law, the chamber considers that it is essential, in order to ensure uniform interpretation and application of European Union law, to make a reference to the Court for a preliminary ruling.

21 That chamber also points out that, in accordance with the Court's case-law, the existence of the abovementioned decision of the plenary formation of the Anotato Dikastirio tis Kipriakis Dimokratias does not prevent it from exercising a discretionary power to assess the need to make a reference to the Court for a preliminary ruling (Case 166/73 *Rheinmühlen Düsseldorf* [1974] ECR 33, paragraph 4).

22 In the light of those considerations, the chamber of the Anotato Dikastirio tis Kipriakis Dimokratias seised of the main proceedings decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Does Article 2(8) of Directive 89/665 … recognise contracting authorities as having a right to judicial review of cancellation decisions by bodies responsible for review procedures which are not judicial bodies?'

Consideration of the question referred for a preliminary ruling

23 By its question, the referring court asks, in essence, whether Article 2(8) of Directive 89/665 must be interpreted as meaning that it requires the Member States to provide, also for contracting authorities, a right to seek judicial review of the decisions of non-judicial bodies responsible for review procedures concerning the award of public contracts.

24 In the light of a – first of all – literal examination of the provisions of Directive 89/665, it should, for the purposes of answering that question, be noted, first, that, in the fourth and seventh recitals in the preamble to that directive, 'Community undertakings' are explicitly referred to as parties for the purposes of seeking a review of the procedures for the award of public contracts.

25 It should be noted, secondly, that Article 1(3) of Directive 89/665, which states that review procedures are available 'at least to any person having or having had an interest in obtaining a public contract', defines the class of persons which must be allowed a right of review on the basis of that directive.

26 Thirdly, it should be noted, in support of the considerations in paragraph 25 of this judgment, that, as is apparent from the seventh recital in the preamble to Directive 89/665, the European Union legislature was aware of the possibility that certain infringements may not be corrected when undertakings do not seek review of unlawful or erroneous decisions, it being understood that such decisions might also be adopted by bodies responsible for the review procedures that were not judicial bodies. However, in order to remedy such a situation, Article 3 of Directive 89/665 provides for the Commission to have a general power to intervene in accordance with the procedure established in that provision.

27 Therefore, the wording of the provisions of Directive 89/665 does not suggest that the European Union legislature intended the contracting authorities to be regarded as parties for the purposes of seeking a review in the context of the procedures for awarding public contracts. Article 2(8) of that directive must, therefore, be considered as constituting a specific requirement, including specific guarantees, imposed on the Member States where the authorities responsible for review procedures are

not judicial bodies and it does not amend the class of persons who have a right of review on the basis of that directive.

28 That finding is confirmed by the objective of Directive 89/665.

29 The first and third recitals in the preamble to that directive set out the directive's objective, upon its adoption, by reference to the objective of the directives containing substantive provisions on public contracts. Since the objective of the latter directives is the opening-up of public contracts to competition within the European Union under conditions of transparency and non-discrimination, and those directives do not contain specific provisions allowing their effective application to be guaranteed, Directive 89/665 fulfils that role by requiring the Member States to establish effective and rapid review procedures.

30 Therefore, the rationale of Directive 89/665 is to allow, by the establishment of appropriate review procedures, the effective application of the substantive provisions of European Union law on public contracts, which seek to ensure, for traders established in the Member States, the opening-up to competition which is undistorted and as wide as possible (see, to that effect, Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173, paragraphs 38 and 39 and case-law cited).

31 The considerations set out in paragraph 29 of this judgment are, moreover, supported by the provisions of 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 with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31). That directive, although not applicable ratione temporis to the facts of the main proceedings, nevertheless contains elements which are useful for the interpretation of the system established by Directive 89/665, in so far as it does not amend that system, but seeks, in the words of the third recital in the preamble thereto, to provide for that directive 'the essential

clarifications which will allow the results intended by the Community legislature to be attained'.

32 herefore, the 'tenderers concerned' and the 'economic operators' are referred to, in particular in the 4th, 6th, 7th, 14th and 27th recitals in the preamble to Directive 2007/66, as persons covered by the effective judicial protection intended by that directive and as parties who may bring review proceedings.

33 Furthermore, it should be noted that Article 1 of Directive 89/665, as amended by Directive 2007/66, is now entitled 'Scope and availability of review procedures', whereas Article 2 thereof is entitled 'Requirements for review procedures'. This therefore confirms the conclusion that the obligation imposed on the Member States under Article 2(8), now Article 2(9), of Directive 89/665, to provide for judicial review of decisions of bodies responsible for review procedures that are not judicial in character, constitutes a specific requirement of that directive and does not bring the contracting authorities within its scope of application.

34 In addition, Article 3 of Directive 89/665, as amended by Directive 2007/66, is now entitled 'Corrective mechanism' and confirms the Commission's general power to intervene in cases of serious infringements of European Union law.

35 It follows that Article 2(8) of Directive 89/665 does not require Member States to provide a procedure for judicial review also for contracting authorities.

36 In the light, however, of the obligation imposed on the Member States by Article 1(3) of Directive 89/665 to ensure the right to review is available 'at least' to all the persons defined in that article, and in the light also of the procedural independence enjoyed by the Member States, it should be held that the Member States are not prevented from including contracting authorities within the class of persons to whom the review procedures within the meaning of the abovementioned provision are available, in cases where contracting authorities' decisions are annulled by non-judicial bodies.

37 The argument that such an interpretation would be likely to lead to a lack of uniformity in the application of European Union law cannot be accepted, in so far as Directive 89/665, as is apparent, in particular, from Article 1(3) thereof, does not seek to completely harmonise the relevant national legislation.

38 Consequently, the answer to the question referred is that Article 2(8) of Directive 89/665 must be interpreted as not requiring the Member States to provide, also for contracting authorities, a right to seek judicial review of the decisions of non-judicial bodies responsible for review procedures concerning the award of public contracts. However, that provision does not prevent the Member States from providing, in their legal systems, for such a legal remedy for contracting authorities.

Costs

39 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 (Third Chamber) hereby rules:

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, as amended by Council Directive 92/50/EEC of 18 June 1992, must be interpreted as not requiring the Member States to provide, also for contracting authorities, a right to seek judicial review of the decisions of non-judicial bodies responsible for review procedures concerning the award of public contracts. However, that provision does not prevent the Member States from providing, in their legal systems, such a review procedure in favour of contracting authorities.

[Signatures]