JUDGMENT OF THE COURT (Third Chamber)

14 February 2008 *

In Case C-450/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'État (Council of State) (Belgium), made by decision of 24 October 2006, received at the Court on 6 November 2006, in the proceedings

Varec SA

v

État belge,

intervener:

Diehl Remscheid GmbH & Co.,

THE COURT (Third Chamber),

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

* Language of the case: French.

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Varec SA, by J. Bourtembourg and C. Molitor, avocats,

— the Belgian Government, by A. Hubert, acting as Agent, assisted by N. Cahen, avocat,

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

— the Commission of the European Communities, by B. Stromsky and D. Kukovec, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2007,

gives the following

Judgment

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

2 The reference was made in proceedings between Varec SA ('Varec') and the Belgian State, represented by the Minister for Defence, concerning the award of a public contract for the supply of track links for 'Leopard' tanks.

Legal context

Community legislation

3 Article 1(1) of Directive 89/665 provides:

'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.'

4 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) repeals Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), and provides that the references to that repealed directive are to be construed as references to Directive 93/36. Similarly, 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) repeals Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5), and provides that references to Directive 71/305 are to be construed as references to Directive 93/37.

5 Article 2(8) of Directive 89/665 provides:

'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 [234 EC] 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.'

6 According to Article 7(1) of Directive 93/36, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1; 'Directive 93/36'):

'The contracting authority shall, within 15 days of the date on which the request is received, inform any eliminated candidate or tenderer of the reasons for rejection of his application or his tender and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.

However, contracting authorities may decide that certain information on the contract award, referred to in the preceding subparagraph, shall be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers.'

7 Article 9(3) of Directive 93/36 provides:

'Contracting authorities who have awarded a contract shall make known the result by means of a notice. However, certain information on the contract award may, in

certain cases, not be published where release of such information would impede law enforcement or otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of particular enterprises, public or private, or might prejudice fair competition between suppliers.'

8 Article 15(2) of Directive 93/36 provides:

'The contracting authorities shall respect fully the confidential nature of any information furnished by the suppliers.'

9 The provisions of Articles 7(1), 9(3) and 15(2) of Directive 93/36 have been substantially reproduced in Article 6, the fifth subparagraph of Article 35(4), and Article 41(3) respectively 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).

National legislation

10 Article 87 of the Decree of the Regent of 23 August 1948 establishing the procedure before the Administrative Section of the Conseil d'État (*Moniteur belge* of 23 to 24 August 1948, p. 6821), provides:

'Parties, their advisers and the government commissioner may inspect the case-file at the registry.'

11 According to the third and fourth subparagraphs of Article 21 of the Coordinated Laws on the Conseil d'État of 12 January 1973 (*Moniteur belge* of 21 March 1973, p. 3461):

'Where the defendant fails to lodge the administrative file within the prescribed period, without prejudice to Article 21a, the facts alleged by the applicant shall be deemed to have been proven, unless they are manifestly inaccurate.

Where the administrative file is not in the possession of the defendant, he shall inform the Chamber seised of the action accordingly. The Chamber may order that the administrative file be lodged, on penalty of a fine in accordance with Article 36.'

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

12 On 14 December 2001, the Belgian State initiated a contract award procedure in respect of the supply of track links for 'Leopard' tanks. Two tenderers submitted bids, namely Varec and Diehl Remscheid GmbH & Co. ('Diehl').

13 When examining those tenders, the Belgian State considered that the tender submitted by Varec did not satisfy the technical selection criteria and that that tender was unlawful. By contrast, it took the view that the tender submitted by Diehl satisfied all the selection criteria, that it was lawful and that its prices were normal. Consequently, the Belgian State awarded the contract to Diehl by decision of the Minister for Defence of 28 May 2002 ('the award decision').

14 On 29 July 2002, Varec brought an action for annulment of the award decision before the Conseil d'État. Diehl was granted leave to intervene.

15 The file delivered to the Conseil d'État by the Belgian State did not include Diehl's tender.

16 Varec requested that that tender be added to the file. The same request was made by the *Auditeur* of the Conseil d'État who was responsible for drawing up a report ('the Auditeur').

17 On 17 December 2002, the Belgian State added Diehl's tender to the file, explaining that neither the plans of the whole of the proposed track link nor those of its constituent parts were included. It stated that these had been returned to Diehl in accordance with the specification and at Diehl's request. It further stated that that was why it could not place those documents on the file and that, if it was essential that they be included, it would be necessary to ask Diehl to provide them. The Belgian State also observed that Varec and Diehl are in dispute about the intellectual property rights to the plans in question.

18 By letter of the same date, Diehl informed the Auditeur that the version of its tender that was placed on the file by the Belgian State contained confidential data and information, and that it was objecting on the ground that third parties, including Varec, would be able to peruse those confidential data and information relating to business secrets included in the tender. According to Diehl, certain passages in Annexes 4, 12 and 13 to its tender contain specific data concerning the detailed revisions of the relevant manufacturing plans and also the industrial process.

19 In his report of 23 February 2006, the Auditeur concluded that the award decision should be annulled on the ground that 'in the absence of the defendant's cooperation in the sound administration of justice and fair proceedings, the only possible sanction is the annulment of the administrative measure whose lawfulness is not established where documents are excluded from *inter partes* proceedings'.

20 The Belgian State challenged that conclusion and requested the Conseil d'État to rule on the issue of respecting the confidentiality of Diehl's tender documents containing information relating to business secrets which had been placed on the file in the proceedings before that court.

21 In those circumstances, the Conseil d'État decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 1(1) of [Directive 89/665], read with Article 15(2) of [Directive 93/36] and Article 6 of [Directive 2004/18], be interpreted as meaning that the authority responsible for the appeal procedures provided for in that article must ensure confidentiality and observance of the business secrets contained in the files communicated to it by the parties to the case, including the contracting authority, whilst at the same time being entitled to apprise itself of such information and take it into consideration?'

Admissibility

22 Varec submits that in order to resolve the dispute before the Conseil d'État it is not necessary for the Court to answer the question referred for a preliminary ruling.

23 In that regard, it must be observed that, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. Similarly, 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. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, in particular, Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27; Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33; and Case C-419/04 *Conseil général de la Vienne* [2006] ECR I-5645, paragraph 19).

24 Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). 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, in particular, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19; and *Conseil général de la Vienne*, paragraph 20).

25 It must be pointed out that that is not the case here. If the Conseil d'État follows the form of order proposed by the Auditeur, it will have to annul the award decision which is before it, without examining the substance of the dispute. On the other hand, if the provisions of Community law which the Conseil d'État seeks to have interpreted justify the confidential treatment of the documents of the file at issue in the main proceedings, it will be in a position to examine the substance of the dispute. For those reasons it may be concluded that the interpretation of those provisions is necessary for the resolution of the dispute in the main proceedings.

Merits

26 In the question referred to the Court, the Conseil d'État refers both to Directive 93/36 and to Directive 2004/18. Since Directive 2004/18 has replaced Directive 93/36, it is necessary to establish which of the two directives is relevant to the examination of the question referred.

27 It must be borne in mind that, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying, in principle, to situations existing before their entry into force (see Case C-201/04 *Molenbergnatie* [2006] ECR I-2049, paragraph 31 and the case-law cited).

28 The dispute in the main proceedings concerns the right to the protection of confidential information. As the Advocate General noted in point 31 of her Opinion, such a right is in essence a substantive right, even if its application can have procedural consequences.

29 The right crystallised when Diehl submitted its tender in the award procedure at issue in the main proceedings. Since that date was not specified in the order for reference, it is appropriate to conclude that it falls between 14 December 2001, the date of the call for tenders, and 14 January 2002, the date of the opening of bids.

30 Directive 2004/18 had not yet been adopted at that time. It follows that the provisions of Directive 93/36 must be taken into consideration for the purposes of the dispute in the main proceedings.

31 There is no provision in Directive 89/665 which expressly governs the protection of confidential information. It is necessary, in that respect, to refer to that directive's general provisions, and in particular to Article 1(1).

32 Article 1(1) provides that the Member States are to take the measures necessary to ensure that, as regards contract award procedures falling within the scope of, inter alia, Directive 93/36, decisions taken by the contracting authorities may be reviewed effectively on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

33 Since the objective of Directive 89/665 is to ensure compliance with Community law in the field of public procurement, Article 1(1) of that directive must be interpreted in the light of the provisions of Directive 93/36 as well as of other provisions of Community law in the field of public procurement.

34 The principal objective of the Community rules in that field is the opening-up of public procurement to undistorted competition in all the Member States (see, to that effect, Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 44).

35 In order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures.

36 Furthermore, both by their nature and according to the scheme of Community legislation in that field, contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators. Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them.

37 Accordingly, Article 15(2) of Directive 93/36 provides that the contracting authorities are obliged to respect fully the confidential nature of any information furnished by the suppliers.

38 In the specific context of informing an eliminated candidate or tenderer of the reasons for the rejection of his application or tender, and of publishing a notice of the award of a contract, Articles 7(1) and 9(3) of Directive 93/36 give the contracting authorities the discretion to withhold certain information where its release would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers.

39 Admittedly, those provisions relate to the conduct of the contracting authorities. It must nevertheless be acknowledged that their effectiveness would be severely undermined if, in an appeal against a decision taken by a contracting authority in relation to a contract award procedure, all of the information concerning that award procedure had to be made unreservedly available to the appellant, or even to others such as the interveners.

40 In such circumstances, the mere lodging of an appeal would give access to information which could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure concerned. Such an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors' business secrets.

41 In such an appeal, the respondent would be the contracting authority and the economic operator whose interests are at risk of being damaged would not necessarily be a party to the dispute or joined to the case to defend those interests. Accordingly, it is all the more important to provide for mechanisms which will adequately safeguard the interests of such economic operators.

42 In a review, the body responsible for the review procedure assumes the obligations laid down by Directive 93/36 with regard to the contracting authority's respect for the confidentiality of information. The 'effective review' requirement provided for in Article 1(1) of Directive 89/665, read in conjunction with Articles 7(1), 9(3) and 15(2) of Directive 93/36, therefore imposes on that body an obligation to take the measures necessary to guarantee the effectiveness of those provisions, and thereby to ensure that fair competition is maintained and that the legitimate interests of the economic operators concerned are protected.

43 It follows that, in a review procedure in relation to the award of public contracts, the body responsible for that review procedure must be able to decide that the information in the file relating to such an award should not be communicated to the parties or their lawyers, if that is necessary in order to ensure the protection of fair competition or of the legitimate interests of the economic operators that is required by Community law.

44 The question arises whether that interpretation is consistent with the concept of a fair hearing in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR').

45 As the order for reference shows, Varec claimed before the Conseil d'État that the right to a fair hearing means that both parties must be heard in any judicial procedure, that the adversarial principle is a general principle of law, that it has a foundation in Article 6 of the ECHR, and that that principle means that the parties are entitled to a process of inspecting and commenting on all documents or observations submitted to the court with a view to influencing its decision.

46 The Court notes that Article 6(1) of the ECHR provides inter alia that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal …'. The European Court of Human Rights has consistently held that the adversarial nature of proceedings is one of the factors which enables their fairness to be assessed, but it may be *balanced* against other rights and interests.

47 The adversarial principle means, as a rule, that the parties have a right to a process of inspecting and commenting on the evidence and observations submitted to the court. However, in some cases it may be necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest (see *Rowe and Davis* v *The United Kingdom* [GC] No 28901/95, §61, ECHR 2000-II, and *V* v *Finland* No 40412/98, §75, ECHR 2007-…).

48 One of the fundamental rights capable of being protected in this way is the right to respect for private life, enshrined in Article 8 of the ECHR, which flows from the common constitutional traditions of the Member States and which is restated in Article 7 of the Charter of fundamental rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) (see, in particular, Case C-62/90 *Commission* v *Germany* [1992] ECR I-2575, paragraph 23, and Case C-404/92 P *X* v *Commission* [1994] ECR I-4737, paragraph 17). It follows from the case-law of the European Court of Human Rights that the notion of 'private life' cannot be taken to mean that the professional or commercial activities of either natural or legal persons are excluded (see *Niemietz* v *Germany*, judgment of 16 December 1992, Series A No 251-B, §29; *Société Colas Est and Others* v *France*, No 37971/97, §41, ECHR 2002-III; and also *Peck* v *The United Kingdom* No 44647/98, §57, ECHR 2003-I). Those activities can include participation in a contract award procedure.

49 The Court of Justice has, moreover, acknowledged that the protection of business secrets is a general principle (see Case 53/85 *AKZO Chemie and AKZO Chemie UK* v *Commission* [1986] ECR 1965, paragraph 28, and Case C-36/92 P *SEP* v *Commission* [1994] ECR I-1911, paragraph 37).

50 Finally, the maintenance of fair competition in the context of contract award procedures is an important public interest, the protection of which is acknowledged in the case-law cited in paragraph 47 of this judgment.

51 It follows that, in the context of a review of a decision taken by a contracting authority in relation to a contract award procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.

52 The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute (see, by analogy, Case C-438/04 *Mobistar* [2006] ECR I-6675, paragraph 40) and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial.

53 To that end, the body responsible for the review must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets (see, by analogy, *Mobistar*, paragraph 40).

54 Having regard to the extremely serious damage which could result from improper communication of certain information to a competitor, that body must, before communicating that information to a party to the dispute, give the economic operator concerned an opportunity to plead that the information is confidential or a business secret (see, by analogy, *AKZO Chemie and AKZO Chemie UK* v *Commission*, paragraph 29).

55 Accordingly, the answer to the question referred must be that Article 1(1) of Directive 89/665, read in conjunction with Article 15(2) of Directive 93/36, must be interpreted as meaning that the body responsible for the reviews provided for in Article 1(1) must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration. It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, so as to ensure that the proceedings as a whole accord with the right to a fair trial.

Costs

56 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 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, read in conjunction with Article 15(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, must be interpreted as meaning that the body responsible for the reviews provided for in Article 1(1) must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration. It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, so as to ensure that the proceedings as a whole accord with the right to a fair trial.

[Signatures]