JUDGMENT OF THE COURT (First Chamber)

18 November 1999 *

In Case C-275/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Klagenævnet for Udbud (Denmark) for a preliminary ruling in the proceedings pending before it between

Unitron Scandinavia A/S,

3-S A/S, Danske Svineproducenters serviceselskab,

and

Ministeriet for Fødevarer, Landbrug og Fiskeri,

on the interpretation of Article 2(2) 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),

* Language of the case: Danish.

THE COURT (First Chamber),

composed of: L. Sevón, President of the Chamber, P. Jann (Rapporteur) and M. Wathelet, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Ministeriet for Fødevarer, Landbrug og Fiskeri, by P. Biering, of the Copenhagen Bar,

— the Commission of the European Communities, by H.C. Støvlbæk, of its Legal Service, acting as agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 8 July 1999,

gives the following

Judgment

1 By order of 15 July 1998, received at the Court on 20 July 1998, the Klagenævnet for Udbud (hereinafter 'the Procurement Review Board') referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 2(2) 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).

2 Those questions were raised in proceedings between, on the one hand, Unitron Scandinavia A/S ('Unitron') and 3-S A/S, Danske Svineproducenters Serviceselskab ('3-S') and, on the other, the Ministeriet for Fødevarer, Landbrug og Fiskeri (Ministry of Agriculture, Food and Fisheries; 'the Ministry') concerning the award of a public contract for eartags for pigs.

Legal background

3 Article 1(b) of Directive 93/36 provides:

'For the purposes of this Directive:

...

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, and associations formed by one or several of such authorities or bodies governed by public law;

"a body governed by public law" means any body:

— established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

— having legal personality, and

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

4 Article 2(2) of Directive 93/36 provides:

'When a contracting authority within the meaning of Article 1(b) grants to a body other than a contracting authority — regardless of its legal status — special or exclusive rights to engage in a public service activity, the instrument granting this right shall stipulate that the body in question must observe the principle of non-discrimination by nationality when awarding public supply contracts to third parties.'

5 The Procurement Review Board was established by Danish Law No 344 of 6 June 1991, subsequently amended several times, in the context of the implementation 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), since 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).

The dispute in the main proceedings

6 In accordance with Council Directive 92/102/EEC of 27 November 1992 on the identification and registration of animals (OJ 1992 L 355, p. 32), eartags must be applied to pigs in order to enable their provenance to be determined. The Danish legislation transposing that directive provides that, after their approval by the Veterinary Department of the Ministry, the tags are to be supplied by Danske Slagterier (Danish abattoirs; 'DS'), which is a private undertaking.

7 In order to limit the number of approved eartags for pigs, the Veterinary Department and DS established a tendering procedure. In November 1996, DS, which was entrusted with its implementation, sent tendering documents to a number of potential suppliers and, at the conclusion of the procedure, entered into supply contracts for three years from 1 April 1997 with Allflex dan-mark ApS and Daploma A/S.

8 Unitron and 3-S are producers of eartags for pigs. In a complaint submitted to the Procurement Review Board, they argued that DS serves a public interest and in reality acts on behalf of the Ministry, so that it should be treated as a contracting authority within the meaning of Article 1(b) of Directive 93/36. In the alternative, the applicants in the main proceedings maintain that DS should have followed the procedure laid down by Article 2(2) of Directive 93/36.

9 By decision of 22 January 1998, the Procurement Review Board first held that DS was effectively the purchasers of the eartags from the suppliers and that the value of that contract exceeded the threshold under Article 5 of Directive 93/36.

10 It then held that the Ministry's award to an undertaking of the management of the eartag system should probably have been the subject of a tendering procedure in

accordance with Directive 93/36. It found, however, that that question was not the issue in the procedure pending before it.

11 Finally, having held that DS was not a contracting authority within the meaning of Article 1(b) of Directive 93/36, the Procurement Review Board dismissed the applicants' argument that that directive had to be applied to DS by analogy.

12 As regards the alternative plea based on Article 2(2) of Directive 93/36, the Procurement Review Board points out that that provision essentially reproduces the content of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), which was adopted at a time when there was as yet no directive in existence concerning public contracts for services.

13 Since public contracts for services formed the subject-matter of Directive 92/50, the Procurement Review Board is uncertain as to the present scope of Article 2(2) of Directive 93/36, since it essentially reproduces a text prior to Directive 92/50.

14 In those circumstances, the Procurement Review Board decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Does Article 2(2) of Council Directive 93/36/EEC coordinating procedures for the award of public supply contracts still have an independent meaning after the adoption of Council Directive 92/50/EEC relating to the coordina-

tion of procedures for the award of public service contracts (as both amended by European Parliament and Council Directive 97/52/EC)?

2. If Question 1 is answered in the affirmative, does the provision accordingly mean that, where a contracting authority entrusts the administration of a pig eartagging scheme to a private undertaking which is not a contracting authority, the contracting authority should stipulate, on the one hand, that the undertaking should comply with the prohibition against discrimination on the ground of nationality in public supply contracts which the undertaking awards to third parties and, on the other hand, that the procurement of goods linked to the scheme should be put out to public tender if the value of the goods to be procured exceeds the threshold value in Council Directive 93/36?'

Admissibility

15 As a preliminary point, it must be observed that, as the Advocate General has rightly found in paragraphs 17 and 18 of his Opinion, the Procurement Review Board is a court or tribunal within the meaning of Article 177 of the Treaty.

16 In the Ministry's submission, the Court should refuse to reply to the questions, since, whatever interpretation is given to the provision at issue, the legal position of the applicants will not thereby be altered.

17 If, on the one hand, Article 2(2) of Directive 93/36 had to be interpreted as merely requiring the Ministry to insist that DS comply with the principle of non-discrimination, that interpretation would change nothing as regards Unitron and 3-S, which are both established in Denmark. If, on the other hand, it had to be

interpreted as imposing a tendering obligation in accordance with that directive, the Ministry submits that that interpretation could not benefit the applicants either, since a fresh tendering procedure in accordance with Directive 93/36 took place after the tendering procedure which formed the subject-matter of the main proceedings, causing any infringement which there might have been to disappear.

18 It is sufficient to observe, on this point, that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, *inter alia*, Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 59). A request from a national court may be refused by the Court of Justice only where it is obvious that the interpretation of a Community rule or assessment of its validity which is sought bears no relation to the facts or purpose of the main action, or if the Court of Justice does not have before it the factual or legal material necessary to give a useful answer to the questions (see, in particular, *Bosman*, paragraph 61; Case C-60/98 *Butterfly Music* v *CEMED* [1999] ECR I-3939, paragraph 13).

19 That is not the case here. It is not impossible that the answers to the questions referred might cause the Procurement Review Board to annul the tendering procedure at issue in the main proceedings or to hold that it was irregular. It is not for the Court of Justice to assess the possible consequences in national law of the fact that a new tendering procedure in accordance with Directive 93/36 took place after the main proceedings were brought.

20 The questions referred to the Court are therefore admissible.

Question 1

21 The first point to note is that Directive 93/36 was adopted after Directive 92/50.

22 Secondly, the second recital in the preamble to Directive 93/36 shows that that directive is intended, in particular, to align the provisions on the awarding of public supply contracts on the provisions of Directive 92/50. The latter were thus expressly taken into consideration when Directive 93/36 was adopted.

23 It follows that the provisions of Directive 92/50 cannot influence the scope of the provisions of Directive 93/36, including those which already appeared in Directive 77/62.

24 As regards, more particularly, Article 2(2) of Directive 93/36, that interpretation is confirmed by the fact that that provision does not govern only those situations in which Directive 92/50 is applicable. It cannot therefore be maintained that Directive 92/50 has deprived that provision of its purpose.

25 The answer to the first question must therefore be that Article 2(2) of Directive 93/36 is independent in scope from the provisions of Directive 92/50.

Question 2

26 The national court's findings show that DS is not a contracting authority within the meaning of Article 1(b) of Directive 93/36.

27 It follows that the obligation under Article 6(1) of Directive 93/36 to apply the tendering procedures defined in Article 1(d), (e) and (f) of that directive does not apply to a body such as DS.

28 Moreover, Directive 93/36 contains no provision comparable to Article 3(3) of Directive 92/50 or Article 2(1) 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), which requires contracting authorities to ensure compliance with the provisions of those directives in the case of certain contracts awarded by bodies other than contracting authorities.

29 On the contrary, under Article 2(2) of Directive 93/36, where a contracting authority grants to a body which is not a contracting authority special or exclusive rights to engage in a public service activity, the only requirement is that the measure whereby that right is granted must stipulate that, in relation to the public supply contracts which it awards to third parties in the context of that activity, the body in question must comply with the principle of non-discrimination on grounds of nationality.

30 A systematic interpretation of that provision therefore shows that the contracting authority is not required to demand that the body in question comply with the tendering procedures laid down by Directive 93/36.

31 It should be noted, however, that the principle of non-discrimination on grounds of nationality cannot be interpreted restrictively. It implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that it has been complied with.

32 The answer to the second question must therefore be that Article 2(2) of Directive 93/36 is to be interpreted as follows:

— It requires a contracting authority which grants to a body other than such a contracting authority special or exclusive rights to engage in a public service activity to require of that body, in relation to the public supply contracts which it awards to third parties in the context of that activity, that it comply with the principle of non-discrimination on grounds of nationality.

— It does not, however, require in those circumstances that the contracting authority demand that, in awarding such public supply contracts, the body in question comply with the tendering procedures laid down by Directive 93/36.

Costs

33 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Klagenævnet for Udbud by order of 15 July 1998, hereby rules:

1. **Article 2(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts is independent in scope from the provisions of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.**

2. **Article 2(2) of Directive 93/36 must be interpreted as follows:**

— **It requires a contracting authority which grants to a body other than such a contracting authority special or exclusive rights to engage in a public service activity to require of that body, in relation to the public supply**

contracts which it awards to third parties in the context of that activity, that it comply with the principle of non-discrimination on grounds of nationality.

— It does not, however, require in those circumstances that the contracting authority demand that, in awarding such public supply contracts, the body in question comply with the tendering procedures laid down by Directive 93/36.

Sevón Jann Wathelet

Delivered in open court in Luxembourg on 18 November 1999.

R. Grass L. Sevón

Registrar President of the First Chamber