OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 16 October 2003 [1]

I — Introduction

1. In this case the Austrian Bundesvergabeamt (Federal Public Procurement Office) has submitted for a preliminary ruling certain questions concerning the interpretation 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, [2] 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 [3] ('Directive 89/665').

2. These questions have arisen in a dispute between Grossmann Air Service and the Republic of Austria.

II — Legal background

A — *Community law*

3. Article 1(1) and (3) of Directive 89/665 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/EE, 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.

...

1 — Original language: Dutch.
2 — OJ 1989 L 395, p. 33.
3 — OJ 1992 L 209, p. 1.

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 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.'

4. Article 2(1)(b) of Article 89/665 provides:

'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;'.

B — *National law*

5. Directive 89/665 was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Public Procurement Law, BGBl. I, 1997/56; 'the BVergG'). The BVergG provides for the creation of a Bundes-Vergabekontrollkommission (Federal Public Procurement Review Commission; 'the B-VKK') and of a Bundesvergabeamt (Federal Public Procurement Office).

6. Under Paragraph 109 of the BVergG, the B-VKK is to be competent, until such time as the contract is awarded, to reconcile any differences of opinion between the awarding body and one or more candidates or tenderers concerning the application of this law or its implementing regulations (subparagraph 1). A request for the B-VKK to take action must be submitted to the directors of the Commission as soon as possible after the difference of opinion comes to light (subparagraph 6). Furthermore, the awarding body may not award the contract until four weeks after it has been informed of the request to take action, failing which the tendering procedure is to be declared void (subparagraph 8).

7. Under Paragraph 113 of the BVergG, the Bundesvergabeamt is responsible on application for carrying out a review procedure (subparagraph 1). To preclude infringe-

ments of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award to adopt interim measures and to set aside unlawful decisions of the contracting authority (subparagraph 2). 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 law or of any regulations issued under it, the contract has not been awarded to the best tenderer (subparagraph 3).

8. Paragraph 115(1) of the BVergG provides that where a trader claims to have an interest in the conclusion of a contract within the scope of this law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement.

III — Factual and procedural background

9. On 27 January 1998 the Federal Ministry for Finances invited bids in respect of the provision for the Austrian Federal Government and its delegations of non-scheduled passenger transport services by air in jet and propellor aircraft. Grossmann Air Service subsequently submitted a bid.

10. However, on 3 April 1998 the contract award procedure was discontinued. On 28 July 1998 bids were once again invited for these transport services. Although Grossmann Air Service requested the relevant tender documents, it did not submit a further bid.

11. By letter of 8 October 1998 the Austrian Government informed Grossmann Air Service of its intention to award the contract to Lauda Air Luftfahrt AG ('Lauda Air'). This letter was received by Grossmann Air Service on 9 October 1998. The contract with Lauda was entered into on 29 October 1998.

12. By an application dated 19 October 1998, which was posted on 23 October 1998 and received by the Bundesvergabeamt on 27 October 1998, Grossmann Air Service applied for review of the decision of the contracting authority to award the air services to Lauda Air and claimed that the decision should be set aside. It submitted that the invitation to tender had from the beginning been 'tailored' to one bidder, namely Lauda Air, and that the other candidates had had no chance of winning the contract from the outset.

13. By decision dated 4 January 1999 the Bundesvergabeamt dismissed that application under Paragraph 115(1) and Paragraph 113(2) and (3) of the BVergG.

14. The Bundesvergabeamt took the view that Grossmann Air Service had failed to demonstrate adequately its interest in respect of the totality of the contract. It did not have available to it the requisite larger types of aircraft and was therefore unable to provide all the services requested. Moreover, it had not submitted a bid in the second invitation to tender. Furthermore, once the contract had been awarded the Bundesvergabeamt was no longer competent to annul it.

15. Grossmann Air Service subsequently brought a complaint against that decision before the Verfassungsgerichtshof (Constitutional Court). By decision of 10 December 2001 (B 405/99-9) the Verfassungsgerichtshof set aside the decision of the Bundesvergabeamt on grounds of a breach of the constitutionally guaranteed right to proceedings before the ordinary courts. The Verfassungsgerichtshof also ruled that the mere fact that the alleged unlawfulness of the invitation to tender was not raised by Grossmann Air Service at an earlier stage of the contract award procedure was not necessarily sufficient to find that there was no legal interest in the review procedure.

16. The Bundesvergabeamt subsequently submitted the following questions for a preliminary ruling.

Questions submitted for a preliminary ruling

'(1) Is Article 1(3) 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 to be interpreted as meaning that the review procedure must be available to any undertaking which has submitted a bid, or applied to participate, in a public procurement procedure?

In the event that the answer to Question 1 is no:

(2) Is the abovementioned provision to be understood as meaning that an undertaking only has or had an interest in a particular public contract if — in addition to its participating in the public procurement procedure — it takes all steps available to it under

national law to prevent the contract from being awarded to another bidder?

(3) Is Article 1(3) 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 conjunction with Article 2(1)(b) thereof, to be interpreted as meaning that an undertaking must be afforded the opportunity in law to seek review of an award procedure regarded by it as unlawful or discriminatory even where it is not capable of performing the totality of the services for which bids were invited and, for that reason, did not submit a bid in that award procedure.'

Explanation of the questions submitted for a preliminary ruling

17. In respect of the first two questions submitted the national court has observed that Grossmann Air Service allowed a period of 14 days to elapse between notification of the decision concerning the award (9 October 1998) and lodgement of its application for review with the Bundesvergabeamt (23 October 1998) without requesting the B-VKK to take action and thus to make the four-week period laid down in Paragraph 109(8) of the BVergG start to run or, in the event that such action were unsuccessful, to request that the Bundesvergabeamt adopt interim measures and set aside the decision concerning the award. Therefore, the national court considers that it is important to establish whether the application requirements under Paragraph 115(1) of the BVergG, in conjunction with Paragraph 109(1)(1), 109(6) and 109(8) thereof, are, when interpreted in the light of Article 1(3) of Directive 89/665, to be understood as meaning that any bidder who wishes to be awarded a particular pending public contract has an interest in the conclusion of a contract falling within the scope of the BVergG simply by virtue of that fact or that the fact that not all remedies available in national law have been exhausted means that this interest has been lost.

18. In respect of the third question the Bundesvergabeamt observes that it is clear from the Verfassungsgerichtshof's decision of 10 December 2001 that it considers that discriminatory specifications may be removed in review procedures pursuant to Article 2(2)(b) of Directive 89/665. An interpretation whereby the availability of review procedures to challenge discriminatory tender specifications is subject to the applicant's ability to satisfy those specifications could run counter to the objective (of Community law) to ensure complete and effective protection in respect of invitations to tender. Therefore, an undertaking providing air services which credibly demonstrates an interest in the conclusion

of a contract for air services and regards itself as discriminated against by the form in which those air services are put out to tender — as an all-in contract — has a legal interest within the meaning of Paragraph 115(1) of the BVergG and is thus entitled to seek review of the allegedly unlawful specifications because it would otherwise be unable to prove the unlawfulness — in its view — of the invitation to tender and any harm that it may have suffered as a result.

19. Against that background, the question arises as to whether review procedures within the meaning of Article 1(3) of Directive 89/665 are also available to a trader where it applies to the review body because of specifications which it considers to be discriminatory within the meaning of Article 2(1)(b) of Directive 89/665 and claims that it has been or risks being harmed as a result, even though it is unable to provide the service in the form set out in the invitation to tender and therefore did not submit a bid in that contract award procedure.

Procedure before the Court

20. The order for reference was lodged at the Registry of the Court on 20 June 2002. Written observations were submitted by Grossmann Air Service, the Austrian Government and the Commission. They provided further clarification of their view at the hearing on 10 September 2003.

IV — Appraisal

21. In view of the recent case-law of the Court the first two questions need not be dealt with in any great detail. These questions essentially seek to ascertain whether a trader having or having had an interest in obtaining a contract for the purposes of Article 1(3) of Directive 89/665 may therefore avail himself of the review procedures provided for in that directive to have a decision concerning an award declared unlawful, even though not all the remedies available under national law have been exhausted, in order to prevent the contract being awarded to a third party.

22. These question were raised recently inter alia in *Hackermüller* [4] and more particularly in *Fritsch and Others*. [5]

23. Both cases raised the question whether any trader who wishes to be considered for the award of a public contract may institute

4 — Case C-249/01 *Hackermüller and BIG* v *WED* [2003] ECR I-6319.

5 — Case C-410/01 *Fritsch and Others* v *Asfinag* [2003] ECR I-6413.

review procedures pursuant to Article 1(3) of Directive 89/665. It is evident from *Hackermüller* that this is not so and that a Member State may lay down the additional requirement that the person concerned has been or risks being harmed by the infringement he alleges.

24. The second question is answered explicitly in *Fritsch*. This case also raised the question whether the national legislature can make a tenderer's interest in obtaining a specific contract, and therefore its right to institute the review procedures established by that directive, subject to the condition that it has beforehand applied to a conciliation commission such as the B-VKK. The Court's answer to this question was in the negative. It held that such a condition is contrary to the directive's objective of speed and effectiveness. However, it acknowledged that Article 1(3) of Directive 89/665 expressly allows Member States to determine the detailed rules according to which they must make the review procedures available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement, but that did not mean that they may give the term 'interest in obtaining a public contract' an interpretation which may limit the effectiveness of that directive. That is the case where a trader is considered as having lost its interest on the ground that it failed first to apply to a conciliation commission, such as the B-VKK.

25. In the abovementioned cases the candidates participated in the contract award procedure. It is evident from the order for reference that this is not so in the present case. However, I concur with the Commission's view that participation in the award procedure is in principle a precondition for demonstrating an interest in obtaining a contract and possible harm caused by the allegedly unlawful award. It is difficult for a person who has not participated in the award procedure to maintain that he has an interest in challenging an allegedly unlawful decision concerning an award.

26. The third question, however, relates to a somewhat different situation. In that case it does not make sense for potential candidates to tender for a contract because the specifications for the services to be provided are laid down in such a way that they are unable to satisfy them from the outset. The question is then whether, in such a situation, the opportunity must be left open

to apply for review of discriminatory specifications.

27. In my view, the answer to the question should be in the affirmative. In its recent case-law the Court has placed a broad interpretation on the words 'decisions taken by the contracting authorities' used in Article 1(1) of Directive 89/665. [6] Moreover, it is clear from the wording of Article 2(1)(b) of the directive that the courts' powers in review procedures must include inter alia the power to 'set aside... decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications...'. Therefore, it appears to me to be beyond dispute that the remedies intended by Directive 89/665 also extend to the review of decisions specifying the services requested in a contract award procedure.

28. However, such a remedy would have little practical value if it were not open to undertakings which had been excluded from participating in the contract award procedure from the outset by the relevant discriminatory specifications. Furthermore, in such a situation it may be excessive to ask that the effort to bid be made and the associated costs be incurred merely in order to retain the right to apply for review of discriminatory tender conditions. Therefore, these undertakings too must in principle be regarded as having an interest in the award of a public contract and consequently as entitled to apply for review.

29. The specifications for the requested services are relevant to the main proceedings underlying this case. Since the various elements of the requested air transport services had been brought together to create a single package, the number of candidates that could provide the overall package was greatly reduced and potential candidates for one or more parts of that package were excluded from the outset. It follows from what was stated in the preceding paragraph that they too must be regarded as persons having an interest in the award of the contract and therefore as entitled to apply for review. However, this is subject to the condition that they would have been able to participate in this procedure had it not been for these allegedly discriminatory conditions.

30. Finally, I further note that the interest of legal certainty requires that this opportunity to apply for review be used at the earliest possible stage. The lodgement of an application for review after the contract has been awarded should be regarded as belated. However, this is a matter for the national court.

6 — Case C-92/00 *HI* v *Stadt Wien* [2002] ECR I-5553.

V — Conclusion

31. In the light of the foregoing, I would recommend that the Court answer the questions submitted as follows:

— Article 1(3) 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, is to be interpreted as meaning that the review procedure referred to in the directive is open to any person who has submitted a bid or participated in the contract award procedure.

— Article 1(3) of Directive 89/665/EEC precludes a trader which has participated in a procedure for the award of a contract from being regarded as having lost his interest in the award of that contract on the ground that he did not apply to a conciliation commission, such as the B-VKK established under the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997, before instituting a review procedure as referred to in that directive.

— Article 1(3) of Directive 89/665/EEC, in conjunction with Article 2(1)(b) thereof, is to be interpreted as meaning that a trader having an interest in the award of a contract must be afforded the opportunity in law directly to seek review of specifications in the tender conditions regarded by it as unlawful or discriminatory. This opportunity must also be open to those who can show that they would have bid for the contract had it not been for the discriminatory specification referred to.