

OPINION OF ADVOCATE GENERAL

LÉGER

delivered on 11 November 2004¹

1. Does the fact that a person has been involved in the preparatory work for a public contract preclude him, and the undertaking connected to him, from participating in that contract? Is such a rule, which seeks to prevent a person from being able to gain an advantage from the fact that he has participated in the preparations for a public contract and which would place him in a situation contrary to free competition in the procedure for the award of that contract, proportionate to the objective which it seeks to attain? These are essentially the questions which the Conseil d'État (Council of State) (Belgium) refers to the Court in these joined cases.

93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively² and Directive 98/4/EC amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.³

3. These two directives⁴ take account of the necessary amendments which were made following the conclusion by the European Community of the agreement on public contracts within the framework of the World Trade Organisation ('the WTO').⁵ Under Article VI(4) thereof:

I — Legal background

A — Community legislation

2. Community substantive law on the procedure for the award of public contracts consists of Directive 97/52/EC amending Directives 92/50/EEC, 93/36/EEC and

'Entities shall not seek or accept, in a manner which would have the effect of precluding

1 — Original language: French.

2 — European Parliament and Council Directive of 13 October 1997 (OJ 1997 L 328, p. 1).

3 — European Parliament and Council Directive of 16 February 1998 (OJ 1998 L 101, p. 1).

4 — Hereinafter referred to as 'the directives on public contracts'.

5 — Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.⁶

B — National legislation

6. The directives were transposed into Belgian law by the Law of 24 December 1993 on public procurement and certain contracts for works, supplies and services.⁸

4. These directives opened up the award of public contracts within the Community to competition and at the same time coordinated the procedures for awarding them. The main objectives of these directives are to ensure that the award of public contracts, both generally and in specific sectors, is transparent and observes the principle of free competition.⁶

7. Article 32 of the Royal Decree of 25 March 1999⁹ amends Article 78 of the Royal Decree of 8 January 1996 on the public procurement of works, supplies and services and on public works concessions. Article 26 of the Royal Decree of 25 March 1999 amends Article 65 of the Royal Decree of 10 January 1996 on the public procurement of works, supplies and services in the water, energy, transport and telecommunications sectors. The two provisions lay down in an identical manner, one, an absolute prohibition on tendering for a public contract by persons who have been responsible for the research, testing, study or development of works, supplies or services and, two, a prohibition on tendering by any undertaking connected¹⁰ to a person who has been

5. Thus, Directive 89/665/EEC⁷ ('the review directive') was adopted in the field of public contracts. It governs the review procedures in this field. The aim is to ensure that decisions taken by contracting entities in breach of Community law on public contracts may be reviewed appropriately and rapidly.

⁸ — *Moniteur belge* of 22 January 1994.

⁹ — *Moniteur belge* of 9 April 1999, p. 11690.

¹⁰ — For the purposes of Article 65(2) of the Royal Decree, 'undertaking connected' means any undertaking over which a person mentioned in paragraph 1 thereof can, directly or indirectly, exercise a dominant influence, and any undertaking which can exercise a dominant influence over that person or which, like the latter, is subject to the dominant influence of another undertaking by virtue of its ownership, financial participation or the rules which govern it. Dominant influence is to be presumed where an undertaking, directly or indirectly, with regard to another undertaking, holds more than half of the paid-up capital of the undertaking, is entitled to a majority of the votes attached to the shares issued by the undertaking, or may nominate more than half of the members of the body responsible for the administration, management or supervision of the undertaking.

⁶ — See Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 18 in fine.

⁷ — 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 (O) 1989 L 395, p. 33). A similar directive was adopted in respect of public contracts in specific sectors, that is to say Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (O) 1992 L 76, p. 14).

responsible for preparatory work in connection with the public contract in question. However, the undertaking may reverse this presumption by providing information showing that its dominant influence has not affected the contract.

and industry and also to respect for the right to property as guaranteed by Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Belgian State disputes these assertions.

II — Main proceedings and questions referred to the Court

A — *Case C-21/03*

8. Fabricom SA ('Fabricom') is an undertaking which covers all works in the sector of transport of energy and fluids. It is regularly required to submit tenders for public contracts, particularly in the water, energy, transport and telecommunications sectors.

9. By an application brought before the Conseil d'État on 25 June 1999, Fabricom seeks annulment of Article 26 of the Royal Decree of 25 March 1999. It asserts that this provision is contrary to the principle of equality between tenderers, the principle of the effectiveness of a judicial review as guaranteed by the review directive, the principle of proportionality, freedom of trade

10. Taking the view that the resolution of the case before it requires an interpretation of certain provisions of the directives concerning public contracts, the Conseil d'État decided to stay proceedings and to refer the following three questions to the Court for a preliminary ruling pursuant to Article 234 EC:

1. Do Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [OJ 1993 L 199, p. 84], and in particular Article 4 (2) thereof, and Directive 98/4/EC of 16 February 1998 of the European Parliament and of the Council amending Directive 93/38/EEC, in conjunction with the principle of proportionality, freedom of trade and industry and respect for the right to property guaranteed in particular by Protocol No 1 of 20 March 1952 to the Convention for the Protection of Human Rights and Fundamental Freedoms, preclude any person who has been instructed to carry out research, experiments, studies or development in connection with a public contract for works, supplies or services from being permitted to apply to participate in or to submit a tender

for that contract where that person has not been given an opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition?

states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition?

B — *Case C-34/03*

2. Would the answer to the preceding question be different if those directives, considered in conjunction with that principle, freedom and right, were interpreted as referring only to private undertakings or to undertakings which have provided services for valuable consideration?

11. Fabricom also seeks, by an application brought before the Conseil d'État on 8 June 1999, annulment of Article 32 of the Royal Decree of 25 March 1999. The arguments put forward by Fabricom and the Belgian State are essentially the same as those set out in Case C-21/03.

3. May Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, and in particular Articles 1 and 2 thereof, be interpreted as meaning that a contracting entity may refuse, up to the end of procedure for the examination of tenders, to allow an undertaking connected to any person who has been instructed to carry out research, experiments, studies or development in connection with supplies or services to participate in the procedure or to submit a tender, even though, when questioned on that point by the awarding authority, the undertaking

12. In that case too the Conseil d'État decided to apply Article 234 EC, to stay proceedings and to refer the following three questions to the Court for a preliminary ruling:

'1. Do Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, and in particular Article 3(2) thereof [OJ 1992 L 209, p. 1], Council Directive 93/36/EC of 14 June 1993 coordinating procedures for the award of public supply contracts [OJ 1993 L 199, p. 1], and in particular

Article 5(7) thereof, 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], in particular Article 6 (6) thereof and Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning procedures for the award of public service contracts, public supply contracts and public works contracts, in particular Articles 2(1)(b) and 3(1)(b) thereof, in conjunction with the principle of proportionality, freedom of trade and industry and respect for the right to property guaranteed in particular by Protocol No 1 of 20 March 1952 to the Convention for the Protection of Human Rights and Fundamental Freedoms, preclude any person who has been instructed to carry out research, experiments, studies or development in connection with a public contract for works, supplies or services from being permitted to apply to participate in or to submit a tender for that contract where that person has not been given an opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition?

2. Would the answer to the preceding question be different if those directives, considered in conjunction with that principle, freedom and right, were interpreted as referring only to private undertakings or to undertakings which have provided services for valuable consideration?

3. May Council Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, and in particular Articles 2(1)(a) and 5 thereof, be interpreted as meaning that a contracting authority may refuse, up to the end of the procedure for the examination of tenders, to allow an undertaking connected to any person who has been instructed to carry out research, experiments, studies or development in connection with supplies or services to participate in the procedure or to submit a tender, even though, when questioned on that point by the awarding authority, the undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition?

13. By order of 4 March 2003, the President of the Court decided to join the two cases, on account of the objective connection between them.

III — Analysis

14. Since the three questions referred by the Conseil d'État are similar in the two cases referred to the Court, I propose to consider

each of the questions relating to Case C-34/03 in turn. I shall indicate whether it appears that the solution adopted must be different as regards the specific sectors concerned in Case C-21/03.

A — *First and second questions: exclusion from the tendering procedure of a person who participates in the preparatory stages of a public contract*

15. The first and second questions referred by the national court are so closely connected that it would appear appropriate to consider them together. I shall therefore answer the first and second questions together and then answer the third.

17. By its first question, the Conseil d'État seeks to ascertain whether the directives on public contracts prevent any person who has participated in the preparatory stages of a public contract from being precluded from submitting a tender for that public contract where that person has not been given an opportunity to prove that that circumstance has not distorted competition between the tenderers for that public contract. As regards the second question, the Conseil d'État asks the Court whether its answer to the first question differs according to whether or not the directives refer only to private persons or persons providing services for valuable consideration.

16. It must be borne in mind at the outset that, although the Court may not, in a procedure under Article 234 EC, rule upon the compatibility of provisions of domestic law with Community law or interpret domestic legislation or regulations, it does have jurisdiction to supply the national court with a ruling on the interpretation of Community law so as to enable that court to determine whether such compatibility exists in order to decide the case before it.¹¹

1. Arguments of the parties

18. The plaintiff in the main proceedings, Fabricom, contends that Articles 26 and 32 of the Royal Decree of 25 March 1999 ('the provisions of Belgian law') are contrary to Community law,¹² and, in particular, that

11 — See, inter alia, Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 8; Case C-28/99 *Verdonck and Others* [2001] ECR I-3399, paragraph 28; and Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 48.

12 — It should be noted that Fabricom submitted a complaint concerning these provisions of Belgian law to the Commission. The Commission responded by stating that it was unable to establish an infringement of Community law.

they are contrary to the principle of non-discrimination laid down in the directives on public contracts and also to the case-law established in *Telaustria and Telefonadress*,¹³ which also underlies this principle. As Fabricom points out, non-discrimination is applicable to all tenderers, including those who have participated in the preparatory stage of the contract. The latter should be excluded from participating in a public contract only if it appears clearly and specifically that by such participation alone they have gained an advantage which distorts normal competition.

19. Thus, in Fabricom's submission, the irrebuttable presumption set out in the provisions at issue has an effect which is disproportionate to the objective which they pursue, namely to ensure fair competition between tenderers. Fabricom cites the case-law of the Court,¹⁴ according to which Community law precludes a particular tender being eliminated as a matter of course and on the basis of a criterion which is applied automatically.¹⁵

20. Fabricom is supported by the Austrian and Finnish Governments, which point out in their observations that the exclusion of an

undertaking in the particular case of participation in preparatory works must be preceded by a full and differentiated examination of the kind of preparatory works concerned, in particular as regards access to the contract specifications. Exclusion is possible only if the undertaking has obtained, through its preparatory activity, specific information relating to the contract which gives it a competitive advantage.

21. On the other hand, the Commission contends that the provisions of Belgian law seek to avoid possible discrimination and a competitive advantage to the person who has participated in the preparatory works when he submits his tender for the same contract. If the person who carries out the preparatory work could also be the successful tenderer, he might steer the preparation of the public contract in a direction favourable to him.

2. Analysis

22. Several judgments of the Court have already established the principles which, in Community law, govern the selection of tenderers for public contracts.¹⁶ As I have already mentioned, the directives on public contracts, each of which covers a specific

13 — Case C-324/98 [2000] ECR I-10745.

14 — See, inter alia, Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233.

15 — In this case, this criterion is that of participation in the preparatory works by the tenderer.

16 — See inter alia Case 31/87 *Beentjes* [1988] ECR 4635, and *Lombardini and Mantovani*, loc. cit.

field, aim to promote the development of effective competition.¹⁷ The implementation and the attainment of that objective can be effective only if the economic operators participating in the public contract are able to do so on an equal footing, without any discrimination whatsoever.

25. It is also common ground that general principles, such as free competition, equal treatment and non-discrimination, are applicable to the award of public contracts. Consequently, it is not possible to discriminate between tenderers at any stage of the public contract award procedure.

23. Consequently, Advocate General Ruiz-Jarabo Colomer rightly observed in the joined cases of *Lombardini and Mantovani*¹⁸ that 'to this end, a system based on objectivity at all levels, in terms of both substance and form, is indispensable. Firstly, by setting objective criteria for participation in the tender and award of contracts. Secondly, by making provision for open procedures in which transparency is the norm.'

26. Therefore we must see whether the directives on public contracts and the general principles of Community law allow a person who has participated in a contract to be excluded from submitting a tender for that contract. To that end, I shall examine, in accordance with methods of interpretation employed by the Court,¹⁹ the wording, scheme and objectives of the directives on public contracts in order to reply to the national court.

24. It is common ground that the directives on public contracts contain no specific provisions governing inability to participate in public tendering procedures. In particular, the directives contain no provisions to the effect that a person may not participate in a tender for a public contract where he has previously participated in the planning of the contract concerned.

27. Directives 92/50,²⁰ 93/36²¹ and 93/37,²² as amended by Directive 97/52, and also Directive 93/38,²³ as amended by Directive 98/4, all establish in one of their initial provisions the rule that the contract-

19 — See inter alia Case C-208/98 *Berliner Kindl Brauerei* [2000] ECR I-1741; Case C-372/98 *Cooke* [2000] ECR I-8683; and Case C-341/01 *Plato Plastik Robert Frank* [2004] ECR I-4883.

20 — See Article 3(2).

21 — See Article 5(7).

22 — See Article 6(6).

23 — See Article 4(2).

17 — *Fratelli Costanzo*, loc. cit.

18 — See the Opinion in the case cited above (point 25).

ing authorities must ensure that there is no discrimination between tenderers.²⁴

28. Furthermore, the 10th recital in the preamble to Directive 97/52 and the 13th recital in the preamble to Directive 98/4 state that contracting authorities may request advice for the purpose of drawing up public contracts, provided that that does not distort competition.²⁵ It is interesting to note that these are the terms of the agreement on public contracts concluded within the framework of the WTO.

29. Thus, as Community law currently stands and as regards technical advice for the preparation of a public contract, there is nothing in the provisions of the directives on public contracts to preclude contracting entities from seeking or accepting advice which may be used in the preparation of specifications for a specific procurement by a person who may submit a tender. Community law precludes such action only where it has the effect of harming effective competition.²⁶

24 — Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.

25 — 'Whereas contracting entities may seek or accept advice which may be used in the preparation of specifications for a specific procurement, provided that such advice does not have the effect of precluding competition'.

26 — A view also supported by the Austrian and Finnish Governments in their observations.

30. This brief account of the provisions of the directive relating to the principles governing the procedures for the award of public contracts prompts me to make the following observations. First, it is clear from a textual interpretation that the directives allow the contracting authorities to seek advice from various sources for the preparation of a public contract, provided that such advice does not harm competition. However, the directives do not provide that the participation of a person in the preparatory stage of the public contract is incompatible with the subsequent submission of a tender for the same contract.

31. It is appropriate, at this stage, to interpret these articles of the directives on public contracts in the light of the other provisions contained in these directives and also of the general principles of Community law and fundamental rights. In particular, it is appropriate to examine them in the light of the other provisions which lay down objective participation and award criteria.

32. Although the directives do not provide for the possibility of eliminating, on grounds of ineligibility, a potential tenderer who has participated in the preparatory work, they do set out a list of criteria for selecting possible candidates for the award of a contract. When transposing the directives on public contracts, the Member States may lay down in the list of criteria other grounds for rejecting an application, provided that this is done in order to attain the objective pursued by the directive.

33. The references now contained in the directives on public contracts concerning the possibility for the contracting authorities to seek or accept advice which may be used in the preparation of specifications for a specific contract are not aimed at predetermining the persons eligible to compete for that public contract. I share the Commission's view that these provisions do not have as their objective to extend the possibilities of seeking or accepting advice in connection with the preparation of specifications for a public contract but to prevent such action from resulting in harm to fair competition. These references therefore express a distrust of a person who is involved both in the process of preparing the specifications for the public contract and in the award stage.

34. As we know, the directives standardise the procedures for awarding public contracts in order to ensure effective competition in this field. As I observed in the textual and structural interpretation of the directives, the directives do not cover all the details of the contract award procedures but leave the Member States a margin of discretion in implementing them. The Court has had occasion to state²⁷ that the directives on public contracts therefore do not lay down a uniform and exhaustive body of Community rules and that within the framework of the common rules which they contain, the Member States remain free to maintain or adopt substantive and procedural rules in regard to public works contracts on condi-

tion that they comply with all the relevant provisions of Community law.²⁸

35. Therefore, in the present case this freedom of the Member States continues to be delimited, first, by the objectives of the directives on public contracts and, second, by the general principles of Community law. It is apparent from the Court's case-law that the basic rules of the EC Treaty and the general principles of Community law may also define the extent of the obligations on the Member States in situations falling within the scope of the directives but in respect of which no obligation is specifically provided for. Accordingly, the Court added that the principle of equal treatment, which lies at the heart of the directives concerning the award of public contracts, implies an obligation of transparency in order to enable verification that it has been complied with.²⁹

36. That is why, as regards the ground on which a person may be ineligible to tender for a public contract, as the directives make no specific provision, the Member States may adopt rules which have the effect of safeguarding the objectives established by the directives. This can be the case, for example, as regards the ineligibility of a

28 — As the Court confirms in *Beentjes*, loc. cit., paragraph 20.

29 — See Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31; *Telaustria and Telefonadress*, loc. cit., paragraph 61; and Order in Case C-59/00 *Vestergaard* [2001] ECR I-9505.

27 — Joined Cases 27/86 to 29/86 *CEI and Others* [1987] ECR 3347, paragraph 15.

person who has participated in the preparation of a public contract to submit a tender. Such exclusion seeks to safeguard the principal objective of effective competition. However, does such a rule preserve the principle of non-discrimination also laid down by the directive? The rule thereby established also has the effect of eliminating certain tenderers.

principle of equality between tenderers. However, the Court has consistently held that the principal objective of the Community legislation cannot be compromised. In this case, it is necessary to consider whether the principal objective of these directives is safeguarded by a law such as that at issue and, if so, whether the law runs counter to the principle of equal treatment which is connected to the application of these directives. Therefore, the question is whether the national legislation does what is necessary to ensure that the objective of the directives is implemented in a proper and proportionate manner.

37. In its judgment in *Commission v Denmark*,³⁰ the Court held that the duty to observe the principle of equal treatment lies at the very heart of the directives on public contracts. Accordingly, the system whereby tenderers apply on an equal footing, which must underlie the award of public contracts, means that any person who wishes to be awarded a public contract must know beforehand what he must or must not do in order to be awarded it. Specifically, if participation in the preparatory work for a public contract has the effect of excluding the participating person who would wish to tender for that public contract, every potential tenderer must be aware of these consequences and be free to decide to participate in the preparatory stage or to submit a tender for that public contract.³¹

39. I share the Commission's view³² that in order to prevent conflicts of interest the rule on ineligibility at issue does in fact contribute to fair competition between potential tenderers and prevents the contracting authorities from discriminating between them. Such a provision would appear to be an appropriate means of attaining the objective laid down by the directives on public contracts.

38. Consequently, account must be taken both of the aim of guaranteeing effective competition and of compliance with the

40. Finally, it has to be considered whether that ineligibility is proportionate to the objective pursued by these directives. I believe that it is.

41. First, it should be reiterated that everyone is free to decide whether to take part in

30 — Case C-243/89 [1993] ECR I-3353, paragraph 33.

31 — Observation of the principle of transparency also contained in the directives on public contracts gives rise to an obligation on the contracting authorities to provide tenderers with information so that they are aware of the procedures for participating in the tender for a public contract.

32 — See observations, paragraph 27.

the preparatory stage of a public contract or to submit a tender for it. Depending on the interests concerned, a choice will be made to participate in one or the other stage of the public tender. I should also point out that this ineligibility is limited solely to the individual tender concerned.

44. From that point of view, a measure which lays down an ineligibility rule such as that contained in Belgian law is consistent with the general principles of Community law and corresponds to an objective of general interest.³⁴

42. The ineligibility rule seeks to prevent a situation in which competition is distorted from arising on account of the information held by a tenderer as a result of his participation in the preparation of that contract. It is virtually impossible to envisage any means of ensuring that the information and experience acquired during the preparatory stage will not operate to the advantage of the person concerned when he submits a tender. The knowledge acquired is for the most part subjective and difficult to identify, sometimes even for the person in question.³³

45. By its second question the national court asks the Court whether a different answer must be given if the directives on public contracts are to be interpreted as prohibiting from tendering for a public contract only private persons who have been instructed to carry out research, experiments, studies or development in connection with the subject-matter of that contract and also persons who have provided services for valuable consideration.

43. Thus, in the interests of legal certainty, and above all in the interests of transparency, which is the fundamental principle of the directives on public contracts, it is necessary to prevent any possibility of a privileged position which would distort competition.

46. I agree with all the interveners who expressed a view on this question before the Court that there is nothing to justify discrimination against private undertakings or undertakings which have supplied services for valuable consideration by comparison with the public undertakings with which they are competing for the same public contracts. In the past the Court's case-law has established that European law concerning public contracts applies in the same way irrespective of whether a public contract is awarded to a private person or to a person in which

33 — Often a person does not intentionally take advantage of the knowledge and information acquired during his participation in the preparatory work. Whether or not his intention is honest or dishonest has no bearing on the advantage it confers on that person by comparison with other tenderers.

34 — See, to that effect, Case C-280/93 *Germany v Council* [1994] ECR I-4973.

the public authorities have an interest.³⁵ In my view, this also applies to the condition relating to ineligibility.

47. The content of the directive concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts, in conjunction with the principle of proportionality, freedom of trade and industry and respect for the right to property, does not preclude a national rule which provides that any person who has been instructed to carry out research, experiments, studies or development in connection with services, supplies or works is automatically deprived of the opportunity to submit an application to participate in or a tender for those contracts. It is irrelevant whether it is a private or a public person who participated in the preparatory work.

B — Third question: time of exclusion of the tendering undertaking connected to the person participating in the preparatory work

48. By its last question, the Conseil d'État asks the Court whether the review directive³⁶ precludes the contracting authority or

contracting entity from refusing, up to the end of the procedure for examination of tenders, to permit an undertaking connected to any person who has been instructed to carry out research or experiments in connection with the preparatory work for the public contract to participate in the procedure or to submit a tender, although when questioned in that regard by the contracting authority that undertaking states that it has thereby obtained no unfair advantage capable of distorting the normal conditions of competition.

49. The parties agree that the review directive precludes the contracting authority from refusing, up to the end of the procedure for examination of tenders, to allow the participation of an undertaking which, when questioned, states that it has obtained no unfair advantage capable of distorting the normal conditions of competition. I share this view.

50. As we have already seen, the provisions of the national legislation at issue provide that any undertaking connected to a person who has been instructed to carry out preparatory work in connection with the public contract in question may reverse the presumption that it has a competitive advantage by providing information on which it may be established that dominant influence has not affected the contract. However, the awarding authority is not subject to any time-limits and may at any time, and thus up to the end of the award procedure, eliminate the undertaking on account of the unfair advantage which it is

³⁵ — See inter alia Case C-107/98 *Teckal* [1999] ECR I-8121.

³⁶ — It will be recalled that this is Directive 89/665 to which I referred under the heading 'Legal background' in this Opinion.

presumed to have gained, if the evidence provided by the undertaking is deemed insufficient.³⁷

51. In such a situation, a connected undertaking is unable to obtain a declaration by a court, if necessary, that in the particular case the presumption of exclusion equivalent to a reduction in competition is inapplicable, before the contract is awarded. However, it follows from the review directive and the Court's case-law that the Member States must ensure remedies whereby the procedure or decision to award the contract by the contracting authority can be suspended.³⁸ Therefore, it follows that the decision to exclude a connected undertaking must be notified before the decision awarding the public contract and such advance notice must be sufficient to enable that undertaking, if it considers it appropriate, to bring an action and have the exclusion decision annulled if the relevant conditions are met.

52. By allowing the decision to be taken to eliminate a connected undertaking which would wish to tender up to the end of the procedure for examination of the tenders, in such a manner that a review can be sought only at a stage where the infringements can no longer be rectified, as the public contract has been awarded in the meantime, and at a

37 — In the worst-case scenario, the undertaking will learn of its exclusion at the same time as the notification of the award of the public contract to the selected tenderer.

38 — See inter alia Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671.

stage where the applicant is only able to obtain damages, the provisions of Belgian law compromise the effectiveness of the review directive.

53. This is why I consider that Council Directive 89/665/EEC 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 precludes a national rule which allows the contracting entity to exclude, up to the end of the procedure for examination of tenders, an undertaking connected to any person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services from participating in the procedure or submitting a tender; although the undertaking states that it has not obtained an unfair advantage capable of distorting the normal conditions of competition.

54. In my view, the arguments expounded in connection with the questions in Case C-34/03 may be transposed to the identical questions in Case C-21/03, which relate to the directive concerning certain specific sectors such as water, energy, transport and telecommunications.

IV — Conclusion

55. I therefore propose that the Court answer the first and second questions referred by the national court as follows:

- (1) European Parliament and Council Directive 97/52/EC of 13 October 1997, amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively and Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, in conjunction with the principle of proportionality, freedom of trade and industry and respect for the law of property, does not preclude a national rule which provides that any person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services is systematically denied the opportunity to submit an application to participate in or a tender for those contracts. It is irrelevant whether the person who participated in the preparatory work is a private or a public person.

- (2) 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 and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors preclude a national rule which allows the contracting entity to refuse, up to the end of the procedure for examination of tenders, to allow an undertaking connected to any person who has been instructed to carry out research, experiments, studies or development in connection with the works, supplies or services to participate in the procedure or to submit a tender, even though the undertaking states that it has obtained no unfair advantage capable of distorting the normal conditions of competition.