JUDGMENT OF THE COURT (Sixth Chamber)

12 December 2002 *

In Case C-470/99,

REFERENCE to the Court under Article 234 EC by the Vergabekontrollsenat des Landes Wien (Austria) for a preliminary ruling in the proceedings pending before that court between

Universale-Bau AG,

Bietergemeinschaft: **1. Hinteregger & Söhne Bauges.mbH Salzburg,**
2. ÖSTU-STETTIN Hoch- und Tiefbau GmbH,

and

Entsorgungsbetriebe Simmering GmbH,

on the interpretation of Article 1(a), (b) and (c) 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), and Council Directive

* Language of the case: German.

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),

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen, C. Gulmann, V. Skouris (Rapporteur), and F. Macken, Judges,

Advocate General: S. Alber,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Universale-Bau AG, by M. Neidhart, Direktor der Rechtsabteilung, and J. Mauch, Vorstandsdirektor Ingenieur,

— the Bietergemeinschaft 1. Hinteregger & Söhne Bauges.mbH Salzburg, 2. ÖSTU-STETTIN Hoch- und Tiefbau GmbH, by J. Olischar and M. Kratky, Rechtsanwälte,

— Entsorgungsbetriebe Simmering GmbH, by T. Wenger, Rechtsanwalt,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Netherlands Government, by M. Fierstra, acting as Agent,

— the Commission of the European Communities, by M. Nolin, acting as Agent, and by R. Roniger, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Entsorgungsbetriebe Simmering GmbH, represented by C. Casati, Rechtsanwalt, of the Austrian Government, represented by M. Fruhmann, acting as Agent, and of the Commission, represented by H. van Lier, acting as Agent, assisted by R. Roniger, at the hearing on 12 September 2001,

after hearing the Opinion of the Advocate General at the sitting on 8 November 2001,

gives the following

Judgment

1 By order of 12 November 1999, received at the Court on 7 December 1999, the Vergabekontrollsenat des Landes Wien (Public Procurement Review Chamber of the *Land* of Vienna) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 1(a), (b) and (c) 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), and 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, hereinafter 'Directive 89/665').

2 Those questions were raised in the course of proceedings between Universale-Bau AG (hereinafter 'Universale'), and the consortium of undertakings ('Bietergemeinschaft') formed by Hinteregger & Söhne Bauges.mbH and ÖSTU-STETTIN Hoch- und Tiefbau GmbH (hereinafter 'the consortium'), and Entsorgungsbetriebe Simmering GmbH (hereinafter 'EBS'), concerning a procedure for the award of a public works contract.

Relevant provisions

Community legislation

3 It is apparent from the first and second recitals in the preamble to Directive 89/665 that the mechanisms, which existed at the date of its adoption at both national and Community levels, for ensuring the effective application of Community directives in relation to public procurement, were not always adequate to ensure compliance with the relevant Community provisions, particularly at a stage when infringements could still be corrected.

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

5 Article 1(1) and (3) of Directive 89/665 provide:

'1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on

the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works 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.'

6 As is apparent from the first recital in its preamble, Directive 93/37, for reasons of clarity and better understanding, consolidated Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5), as subsequently amended.

7 In the words of its second recital, 'the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts'.

8 The 10th recital in the preamble to Directive 93/37 states that, 'to ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community; whereas the information contained in these notices must enable contractors established in the Community to determine whether the proposed contracts are of interest to them; whereas, for this purpose, it is appropriate to give them adequate information on the works undertaken and the conditions attached thereto; whereas, more particularly, in restricted procedures advertisement is intended to enable contractors of Member States to express their interest in contracts by seeking from the contracting authorities invitations to tender under the required conditions'.

9 Further, it is apparent from the 11th recital in the preamble to Directive 93/37 that 'additional information concerning contracts must, as is customary in Member States, be given in the contract documents for each contract or else in an equivalent document'.

10 Article 1(a) to (c) of Directive 93/37 provides:

'For the purposes of this Directive:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, 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.

...

(c) a "work" means the outcome of building or civil engineering works, taken as a whole that is sufficient of itself to fulfil an economic and technical function.'

11 Article 7(2) of Directive 93/37 provides:

'The contracting authorities may award their public works contracts by negotiated procedure, with prior publication of a contract notice and after having selected the candidates according to publicly known qualitative criteria, in the following cases:

...'

12 Article 13(2)(e) of Directive 93/37, which applies to restricted and negotiated procedures provides:

'The contracting authorities shall simultaneously and in writing invite the selected candidates to submit their tenders. The letter of invitation shall be accompanied by the contract documents and supporting documents. It shall include at least the following information:

...

(e) the criteria for the award of the contract if these are not given in the notice.'

13 Article 30(1) and (2) of Directive 93/37 provides:

'1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the case referred to in paragraph 1(b), the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of importance.'

Austrian legislation

14 Paragraph 48(2) of the Wiener Landesvergabegesetz (Law of the *Land* of Vienna on public procurement, *LGBl.* No 36/1995, hereinafter 'the WLVergG'), provides:

'The contract must be awarded to the tender which is technically and economically the most advantageous in the light of the criteria stated in the contract notice...'

15 Paragraph 96(1) and (2) of the WLVergG, entitled 'Pre-litigation procedure', provides:

'(1) If a contractor considers that a decision taken by a contracting authority before the award of a contract infringes this Law and he has been or risks being harmed thereby, he shall formally communicate in writing to the contracting authority a statement of reasons and his intention to institute review proceedings.

(2) On receipt of the communication under subparagraph 1, the contracting authority shall either rectify the alleged infringement without delay and inform the contractor thereof or communicate in writing to the complainant why the alleged infringement does not exist.'

16 Paragraph 97 of the WLVergG, entitled 'Application for review', is as follows:

'(1) An application for review prior to the award of a contract shall be admissible only if the contractor has formally notified the contracting authority of the alleged infringement and of his intention to apply for review (Paragraph 96(1)) and the contracting authority has not informed him within two weeks that the infringement has been rectified.

(2) Review may be applied for by:

1. a contractor who claims a business interest in the conclusion of a supply, works, works concession or service contract or a contract in the water, energy, transport or telecommunications sectors, in respect of a ground of nullity under Paragraph 101;

2. a tenderer who claims that the contract was not awarded to him in spite of the inapplicability of the grounds of elimination within the meaning of Paragraph 47 and contrary to Paragraph 48(2).

3. The application under subparagraph 2 shall contain:

1. the precise designation of the award procedure concerned and of the decision challenged;

2. the precise designation of the contracting authority;

3. a precise statement of the facts;

4. particulars of how the applicant risks being or already has been harmed;

5. the grounds on which the allegation of infringement is based;

6. a specific request for a declaration of nullity or amendment;

7. in cases under subparagraph 1, evidence that the contracting authority was notified in a pre-litigation procedure in accordance with Paragraph 96 of the alleged infringement and of the intention to apply for review, and reference to the contracting authority's failure to rectify the infringement within the specified time-limit.

(4) The review procedure does not have suspensory effect on the contract award procedure to which it relates.

...'

17 In addition, Paragraph 98 of the WLVergG, entitled 'Time-limits', provides:

'Applications for review on the ground of the following alleged infringements shall be lodged with the Vergabekontrollsenat within the following time-limits:

1. as regards applications which are refused, two weeks, and where Paragraph 52 applies, three days after notification of the refusal;

2. as regards provisions in the notification by which contractors are invited to apply to take part in a restricted or negotiated procedure or as regards provisions of the invitation to tender, two weeks, and where Paragraph 52 applies, one week before expiry of the date for submitting applications or tenders;

3. as regards the award of a contract, two weeks after the publication of the award in the *Official Journal of the European Communities* or, where the award is not published, six months after the award of the contract.

...'

The main proceedings and the questions referred for a preliminary ruling

18 It is apparent from the order for reference that EBS issued a public invitation to tender for the award, under a restricted procedure, of a public works contract (terrassing, large-scale and specialist works) for the construction of the second biological treatment phase of the principal sewage treatment plant of Vienna.

19 In the invitation to tender, which was published in the *Amstblatt der Stadt Wien* of 17 March 1999, it was stated, under the heading 'Criteria for the award of the contract', that the contract would be awarded to the economically most favourable tender according to the criteria set out in the invitation to tender.

20 In the explanatory notes concerning applications to take part, EBS stated the criteria for ranking those applications in the following manner:

'For the ranking of the applications to take part, the technical operating capacity over the last five years of the candidate, of each member of the consortium of contractors and of the sub-contractors indicated will be taken into account.

The five highest ranked candidates shall be invited to submit a tender.

The evaluation of the applications submitted shall be made according to a scoring procedure.

The following works shall be analysed in the following order:

1. sewage treatment plants,

2. prestressed components,

3. large-scale foundations supported by columns in gravel,

4. oscillating pressure compaction,

5. high pressure soil consolidation.'

21 EBS also stated to the candidates, in the said explanatory notes, that the required references would be evaluated according to a 'scoring' method lodged with a notary and that it had lodged with a notary on 9 April 1999, that is prior to the receipt of the first application to take part, the detailed rules of that method.

22 Universale and the consortium of undertakings (hereinafter together 'the applicants in the main proceedings') made known their interest in taking part in the restricted procedure, without first of all seeking review of the conditions or terms of the invitation to tender. After being informed by EBS, by letter of 7 July 1999, that they were not amongst the five best-ranked candidates and were therefore not invited to submit a tender, they challenged the award procedure before the Vergabekontrollsenat.

23 In its application dated 3 August 1999, Universale sought a declaration by the Vergabekontrollsenat that the contracting authority's decision to engage in a restrictive procedure was unlawful and void; alternatively, that the limitation of the number of invited contractors to the five best-ranked candidates was unlawful and void; alternatively, that the 'scoring' method applied did not observe the principles of transparency and reconstructability and that therefore the contracting authority's decision on the ranking of applications to take part was unlawful and void; finally, alternatively, that if the 'scoring' method had been correctly applied, the applicants should have been ranked among the five best candidates and that the contracting authority's ranking was therefore unlawful and void.

24 In its application dated 20 September 1999, the consortium of undertakings sought a declaration that the decision not to include it among the five best-ranked candidates was unlawful and, alternatively, that the restricted procedure was unlawful.

25 The applicants in the main proceedings also applied for an interlocutory order restraining EBS from awarding the contract.

26 In the order for reference, the Vergabekontrollsenat states, on the one hand, that under the WLVergG, it has jurisdiction to determine applications for review of

procedures for the award of public supply, works, and service contracts and, on the other hand, that under Paragraph 6(1) of the Allgemeines Verwaltungsverfahrensgesetz of 1991 (Code of Administrative Procedure, *BGBl.* No 1991/51), in the version of *BGBl.* I No 1998/158 (hereinafter 'the AVG'), it is bound to confirm, of its own motion, that it has jurisdiction. It adds that, under Paragraph 6(2) of the AVG, the parties' consent can neither found nor vary the jurisdiction of an administrative authority and that, therefore, the fact that EBS stated in its invitation to tender that the WLVergG was applicable cannot suffice to establish the jurisdiction of the Vergabekontrollsenat.

27 Therefore, in order to decide whether it has jurisdiction, the Vergabekontrollsenat has to establish, first of all, whether EBS is a 'contracting authority' within the meaning of Article 1(b) of Directive 93/37.

28 The Vergabekontrollsenat notes that it is clear from the judgment of the Court in Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraph 21, that an entity must satisfy the three conditions set out in the second subparagraph of Article 1(b) of Directive 93/37 to be regarded as a body governed by public law within the meaning of that provision.

29 After finding that EBS has legal personality and is majority-controlled by the city of Vienna, that is a regional or local authority, the Vergabekontrollsenat concludes that EBS satisfies the conditions set out in the second and third indents of the second subparagraph of Article 1(b) of Directive 93/37.

30 With regard to the condition laid down in the first indent of that provision, the Vergabekontrollsenat stated that it was apparent from EBS's statutes at the time of its establishment that it operated, on a commercial basis, sewage treatment installations. It states that such activities were not reserved or allotted to the public sector and that there was no indication in the said statutes that EBS was

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

31 According to the findings of the Vergabekontrollsenat, a substantial change took place when EBS was made responsible for the operation of the city of Vienna's principal sewage treatment plant. In particular, in 1985 EBS entered into a lease with the city of Vienna, under which it undertook to manage the said sewage plant with staff supplied by the city of Vienna, which undertook to reimburse EBS the expenses occasioned by such personnel. Under two contracts made between the city of Vienna and EBS on 8 and 18 July 1996, the city of Vienna further undertook to transfer to EBS an appropriate global amount to cover the operating expenses. In that regard the Vergabekontrollsenat explains that EBS did not carry on that branch of its activities for profit. It was in fact an activity of general interest which the city of Vienna delegated to EBS and which was managed in such a way as to cover the expenses. The Vergabekontrollsenat concludes therefore that that activity is not of an industrial or commercial character.

32 According to the Vergabekontrollsenat, the possibility that it was an evasive manœuvre can be ruled out since EBS was established in 1976 as a sanitation undertaking whereas the transfer of the management of the main sewage treatment plant did not take place until 1 January 1986. In particular, it considers that such a time-scale, as well as the fact that the Republic of Austria was not, at that time, a member of the European Union and that EBS was not, in any event, covered by Directive 71/305, which was then in force, which used the term 'legal persons governed by public law', indicate the absence of any intention of evasion.

33 Nevertheless, since EBS was not responsible for satisfying needs in the general interest having a character other than industrial or commercial at the time of its establishment, but after changes in its sphere of activities, the Vergabekontrollsenat raises the question whether EBS satisfies the condition set out in the first indent of the second subparagraph of Article 1(b) of Directive 93/37.

34 In addition, the Vergabekontrollsenat points out that clause I of the contract made between EBS and the city of Vienna on 8 July 1996 stipulates that EBS is to carry out the enlargement of the main sewage treatment plant and to enter into the necessary contracts in its own name and on its own account. No specific condition is laid down as regards the detailed performance of that undertaking. Clauses II and III of the contract none the less impose on EBS a specified method of operating the main sewage treatment plant, without however specifying the actual form of the project.

35 Furthermore, it is apparent from a decision of the Buildings Department of 30 December 1998 that EBS has obtained permission to build on a site of which the city of Vienna is the proprietor. In a letter of 8 September 1999, EBS stated that the sewage treatment plant in question is to be built in its name and on its account, writing in particular: 'We will have ownership of the sewage plant in question. The sewage plant will be transferred in the event of termination of the lease and management contract entered into for an indefinite period with the city of Vienna. In that case the city of Vienna is obliged to buy back our sewage plant. It must pay us the current market value of the sewage plant'.

36 In those circumstances, the Vergabekontrollsenat inquires whether, in light of the abovementioned agreements between EBS and the city of Vienna which, as a regional or local authority, is in any event a 'contracting authority', the contract at issue in the case before it is a public works contract within the meaning of the combined provisions of Article 1(a) and (c) of Directive 93/37.

37 Next, if it is appropriate for it to declare that it has jurisdiction to hear the dispute before it, the Vergabekontrollsenat inquires whether the provisions of Paragraphs 96 to 98 of the WLVergG are compatible with Directive 89/665 inasmuch as they provide that an application for review of a particular provision in the invitation to tender is admissible only if made within a certain time-limit. In that regard, it states that, if no application for review of a specific provision of the invitation to tender is brought, or if such an application is brought out of time, it is not then

possible to review the contracting authority's decision as to whether that provision of the invitation to tender infringes the WLVergG or Directive 89/665 and that that question is relevant to the dispute before it, because EBS expressly relies upon the fact that the application for review was brought out of time.

38 Finally, the Vergabekontrollsenat states that, in the context of the dispute before it, it is also called upon to decide whether it was correct for the applications of the applicants in the main proceedings to take part to be not accepted as a result of the 'scoring' method adopted by the contracting authority, the detailed rules of which were only made known after expiry of the time-limit for applications and the award of the contract. The Vergabekontrollsenat makes clear that it cannot be excluded that the results of that method had a decisive influence on the contracting authority's decision.

39 Having regard to all those considerations, the Vergabekontrollsenat des Landes Wien decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does a legal person constitute a "contracting authority" within the meaning of Article 1(b) of Directive 93/37/EEC even if it was *not* established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, but *now* meets such needs?

2. If Entsorgungsbetriebe Simmering GesmbH is not a contracting authority, does the planned construction of the second biological treatment phase of the principal sewage plant, Vienna, constitute the execution, by whatever means, of a work corresponding to the requirements specified by the contracting

authority, and thus a "*public works contract*" within the meaning of Article 1(a), read in conjunction with Article 1(c), of Directive 93/37/EEC?

3. If Question 1 or Question 2 is answered in the affirmative, does Directive 89/665/EEC preclude a national provision which fixes a time-limit for the review of an individual decision of the contracting authority so that on expiry of that time-limit the decision can no longer be challenged in the course of the ongoing contract award procedure? Is it necessary, for the persons concerned to plead every defect, failure to do so entailing loss of their right to do so?

4. If Question 1 or Question 2 is answered in the affirmative, is it sufficient for the body inviting tenders to determine that the applications will be evaluated according to a method lodged with a notary, or is it necessary for the evaluation criteria already to have been communicated in the call for candidates or the tender documents?'

The first question

40 By its first question, the Vergabekontrollsenat is asking, in essence, whether an entity which was not established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, but which has subsequently taken responsibility for such needs, which it has subsequently been actually meeting, fulfils the condition required by the first indent of the second subparagraph of Article 1(b) of Directive 93/37 so as to be capable of being regarded as a body governed by public law within the meaning of that provision.

Admissibility

41 On a preliminary point, it is appropriate to point out that, as is apparent from the order for reference, the Vergabekontrollsenat seeks clarification as to whether an entity such as EBS is a 'contracting authority' within the meaning of Article 1(b) of Directive 93/37, in order to determine whether it has jurisdiction in connection with the applications for review of a decision by that company made by the applicants in the main proceedings.

42 In that regard, it must be recalled that, according to settled case-law, it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. However, it is the Member States' responsibility to ensure that those rights are effectively protected in each case. Subject to that reservation, it is not for the Court to involve itself in the resolution of questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system (see, in particular, Case C-446/93 *SEIM* [1996] ECR I-73, paragraph 32, and Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 40).

43 However, the Court has power to explain to the national court points of Community law which may help to solve the problem of jurisdiction with which that court is faced (see, in particular, *SEIM*, cited above, paragraph 33, and Joined Cases C-10/97 to C-22/97 *IN.CO.GE.'90 and Others* [1998] ECR I-6307, paragraph 15).

44 Furthermore, the character of EBS as a contracting authority affects the replies to the third and fourth questions referred, whose admissibility is not disputed.

45 Therefore, the question must be answered.

Substance

46 In the dispute in the main proceedings, it is common ground that, since EBS took over the operation of the main sewage treatment plant, under the contract made in 1985 with the city of Vienna, that company satisfies a need in the general interest not having an industrial or commercial character. Therefore, its treatment as a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 93/37 depends on the answer to be given to the question whether the condition set out in the first indent of that provision precludes an entity from being regarded as a 'contracting authority' where it was not established for the purposes of satisfying needs in the general interest having a character other than industrial or commercial, but has undertaken such tasks as a result of a subsequent change in its sphere of activities.

Observations submitted to the Court

47 EBS submits that it cannot be regarded as a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 93/37, on the ground that it is clear from the actual wording of the first indent of that provision that the sole deciding factor is the task which it was given at the date of its establishment. It adds that the fact that it has, subsequently, taken responsibility for tasks in the general interest having a character other than industrial or commercial does not affect its status since it continues to carry out industrial and commercial assignments.

48 The Commission also maintains that EBS cannot be regarded as a 'contracting authority' within the meaning of Article 1(b) of Directive 93/37, because the change in its activities stems neither from an amendment to that effect of its objects as defined in its statutes, nor from a legal obligation.

49 In contrast, the applicants in the main proceedings, as well as the Austrian and Netherlands Governments, submit that it is EBS's current activity which is to be taken into consideration and not its purpose at the date of its establishment, and they assert that a different interpretation would mean that, notwithstanding the fact that an entity corresponded as a matter of fact to the definition of 'contracting authority' in Directive 93/37, it would not be required, in awarding public works contracts, to observe the requirements of that directive. In addition, they maintain that a functional interpretation of the term 'contracting authority' is the only one capable of preventing possible evasion, since, otherwise, Directive 93/37 could easily be circumvented by transferring tasks in the general interest having a character other than industrial or commercial not to an entity newly established for that purpose, but to an existing one which previously had another object.

Findings of the Court

50 The Court has already had occasion to clarify the scope of the term 'body governed by public law' in Article 1(b) of Directive 93/37, in the light, in particular, of the purpose of that directive.

51 Thus the Court has held that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to

contracting authorities established in another Member State (see, in particular, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16, and Case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraph 41).

52 It has deduced therefrom that the aim of Directive 93/37 is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones (see, in particular, both cases cited above, *University of Cambridge*, paragraph 17, and *Commission* v *France*, paragraph 42).

53 The Court has therefore held that it is in the light of those objectives that the concept of 'body governed by public law' in the second subparagraph of Article 1(b) of Directive 93/37 must be interpreted in functional terms (see, in particular, *Commission* v *France*, cited above, paragraph 43).

54 Thus, at paragraph 26 of the judgment in *Mannesmann Anlagenbau Austria and Others*, cited above, in relation to the treatment of an entity which had been established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, but which also carried on commercial activities, the Court held that the condition laid down in the first indent of the second subparagraph of Article 1(b) of Directive 93/37 does not entail that the body concerned may be entrusted only with meeting needs in the general interest, not having an industrial or commercial character.

55 In particular, as is clear from paragraph 25 of the judgment in *Mannesmann Anlagenbau Austria and Others*, cited above, the Court has held that it is immaterial that, in addition to the specific task of meeting needs in the general

interest, the entity concerned is free to carry out other activities, but, on the other hand, decided that it is a critical factor that it should continue to attend to the needs which it is specifically required to meet.

56 It follows therefrom that, for the purposes of deciding whether a body satisfies the condition set out in the first indent of the second subparagraph of Article 1(b) of Directive 93/37, it is necessary to consider the activities which it actually carries on.

57 In that regard, it should be pointed out that the effectiveness of Directive 93/37 would not be fully upheld if the application of the scheme of the directive to a body which satisfies the conditions set out in the second subparagraph of Article 1(b) thereof, could be excluded owing solely to the fact that the tasks in the general interest having a character other than industrial or commercial which it carries out in practice were not entrusted to it at the time of its establishment.

58 The same concern to ensure the effectiveness of the second subparagraph of Article 1(b) of Directive 93/37 also militates against drawing a distinction according to whether the statutes of such an entity were or were not amended to reflect actual changes in its sphere of activity.

59 In addition, the wording of the second subparagraph of Article 1(b) of Directive 93/37 contains no reference to the legal basis of the activities of the entity concerned.

60 It is appropriate, furthermore, to point out that, in relation to the definition of the expression 'body governed by public law' in the second subparagraph of Article 1(b) of Directive 92/50, which is in terms identical to those contained in the second subparagraph of Article 1(b) of Directive 93/37, the Court has already

held that the existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal form of the provisions in which those needs are mentioned being immaterial in that regard (Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraph 63).

61 It follows that the fact that, in the main proceedings, the extension of EBS's sphere of activities did not give rise to an amendment to the provisions of its statutes concerning its objects is irrelevant.

62 Although EBS's assumption of responsibility for needs in the general interest not having an industrial or commercial character has not been formally incorporated in its statutes, it is none the less set out in the contracts which EBS made with the city of Vienna and is therefore capable of being objectively established.

63 It is therefore appropriate to reply to the first question that a body which was not established to satisfy specific needs in the general interest not having an industrial or commercial character, but which has subsequently taken responsibility for such needs, which it has since actually satisfied, fulfils the condition required by the first indent of the second subparagraph of Article 1(b) of Directive 93/37 so as to be capable of being regarded as a body governed by public law within the meaning of that provision, on condition that the assumption of responsibility for the satisfaction of those needs can be established objectively.

The second question

64 In light of the reply to the first question, there is no need to reply to the second question, since it was referred to the Court only in the event of a negative reply to the first question.

The third question

65 By its third question, the referring court is asking, in essence, whether Directive 89/665 precludes national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity.

Observations submitted to the Court

66 The applicants in the main proceedings claim that the short periods prescribed for the commencement of applications for review by Paragraphs 97 and 98 of the WLVergG do not allow interested parties to check the grounds of a contracting authority's negative decision and, if appropriate, to ascertain the wrongful nature of the reasons advanced. Thus, it would be practically impossible for a reasoned application having some chance of success to be commenced within those periods.

67 Universale adds that candidates from other Member States cannot, as a general rule, comply with the time-limit of two weeks laid down in Paragraph 98 of the WLVergG, which is contrary to the fundamental principles of Community policy in the public procurement sector, namely, first, that of awarding public procurement contracts without discrimination and, secondly that of access for undertakings to a common market with large-scale opportunities strengthening the competitiveness of European undertakings.

68 In contrast, EBS submits that Directive 89/665 itself establishes a swift and effective procedure, calling for short time-limits after the expiry of which

contracting authorities should be able to be sure that they can proceed with the procedure for awarding contracts. The necessity for short time-limits has clearly been shown in the main proceedings.

69 EBS emphasises, in particular, that nothing prevented the applicants in the main proceedings from the timeous expression of their reservations with regard to the invitation to tender, since it had mentioned to them, both that it would apply a 'scoring' procedure to select the candidates who would be invited to tender and that it would not disclose the precise nature of the decision-making process. EBS adds that the application for review of the decision to invite certain candidates to tender had to be decided very quickly, otherwise it could not have pursued the procedure for the award of the contract. EBS points out finally that a time-limit of two weeks for applications for review of administrative decisions continues to be the general rule, citing as an example Paragraph 63(5) of the AVG, which provides that any decision of an administrative authority must be challenged within a time-limit of two weeks.

70 The Austrian and Netherlands Governments and the Commission maintain, in essence, that Directive 89/665 leaves it to Member States to lay down the specific detailed rules governing applications for review of public procurement procedures. They deduce therefrom that the Member States have discretion to fix the time-limits for applications for review, on the dual condition that the purposes of Directive 89/665 are not circumvented and that the fundamental principles of Community law are observed. The Austrian Government submits further that the time-limits for applications for review at issue in the main proceedings prevent public procurement procedures from being delayed more than necessary and reduce the risk of improper recourse to litigation, which are both in accordance with the objectives of Directive 89/665.

Findings of the Court

71 It should be noted, first of all, that, whilst the objective of Directive 89/665 is to guarantee the existence, in all Member States, of effective remedies for

infringements of Community law in the field of public procurement or of the national rules implementing that law, so as to ensure the effective application of the directives on the coordination of public procurement procedures, it contains no provision specifically covering time-limits for the applications for review which it seeks to establish. It is therefore for the internal legal order of each Member State to establish such time-limits.

72 None the less, since there are detailed procedural rules governing the remedies intended to protect rights conferred by Community law on candidates and tenderers harmed by decisions of contracting authorities, they must not compromise the effectiveness of Directive 89/665.

73 It is therefore appropriate to determine whether, in light of the purpose of that directive, national legislation such as that at issue in the main proceedings does not adversely affect rights conferred on individuals by Community law.

74 In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in its preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community levels, to ensure the effective application of the directives relating to public procurement, in particular at a stage when infringements can still be corrected. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible.

75 The full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringement of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements.

76 Moreover, the setting of reasonable limitation periods for bringing proceedings must be regarded as satisfying, in principle, the requirement of effectiveness under Directive 89/665, since it is an application of the fundamental principle of legal certainty (see, by analogy, in relation to the principle of the effectiveness of Community law, Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 28, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 33).

77 In light of the foregoing considerations, it must be held, first, that the conditions governing time-limits such as those at issue in the main proceedings appear to be reasonable with regard both to the objectives of Directive 89/665, as set out in paragraph 74 of this judgment, and to the principle of legal certainty.

78 Secondly, there can be no doubt that penalties such as prescription are such as to ensure that unlawful decisions of contracting authorities, from the moment they become known to those concerned, are challenged and corrected as soon as possible, which is also in accordance both with the objectives of Directive 89/665 and with the principle of legal certainty.

79 The answer to the third question must therefore be that Directive 89/665 does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the time-limit in question is reasonable.

The fourth question

80 By its fourth question, the referring court is asking whether Directive 93/37 prohibits, in the context of a restricted procedure, the contracting authority from selecting those candidates who will be invited to tender according to methods of evaluation which have not been set out in the contract notice or in the tender documents, even if documents specifying those methods have been lodged with a notary.

Observations submitted to the Court

81 The applicants in the main proceedings claim that the procedure followed by EBS of not revealing to the candidates either the detailed rules of the 'scoring' procedure or the importance of the different criteria for ranking the applications to take part is incompatible with the principles of transparency and objectivity. They add that the respective importance of the different ranking criteria must, in any event, appear in the contract notice, so as to exclude any arbitrariness in the contracting authority's decision and to enable the candidates to scrutinise the lawfulness thereof and to make use of their right of review.

82 In contrast, EBS and the Austrian Government submit that a procedure such as depositing with a notary documents specifying the detailed rules for evaluating the applications to take part is sufficient guarantee of compliance with the principles of non-discrimination and objectivity. They submit that, whilst it is clear from those principles that the contracting authority must prescribe in advance the procedure which it will use to choose the candidates and that such method of selection may not be subsequently changed, they do not thereby require the contracting authorities to divulge the precise details of the rules for evaluating the candidatures.

83 EBS makes clear that, in the main proceedings, it set out the principal criteria for ranking the applications to take part in the order of their importance, and that it was precisely to encourage lawful and fair competition that it did not make known in advance to the candidates the precise detailed rules for evaluating the applications. EBS in fact sought the five construction undertakings which were objectively the best for the works contract in issue, and not undertakings which adapt their tenders to the contracting authority's views, which usually show through in the choice of evaluation methods.

Findings of the Court

84 At the outset, it is appropriate to state that, in the main proceedings, it is common ground that EBS ordained from the beginning the value which would be attributed to each of the selection criteria which it intended using, but provided no indication in that respect in the invitation to tender, merely lodging the documents relating to the 'scoring' procedure with a notary.

85 It is also clear that in this case the national court does not seek to ascertain whether a contracting authority is obliged, under Community law, to lay down prior to the contract notice the rules as to the ranking of the selection criteria which it intends to use, but that it is asking the Court only about compliance with the requirements for advertisement under Directive 93/37 in a situation where the contracting authority has laid down such rules in advance.

86 The fourth question must therefore be understood as asking whether Directive 93/37 is to be interpreted as meaning that, where, in the context of a restricted procedure, the contracting authority has laid down in advance the rules as to the

weighting of the criteria for selecting the candidates who will be invited to tender, it is obliged to state them in the contract notice or the tender documents.

87 In order to reply to the question thus rephrased, it is appropriate to point out, from the outset, that Directive 93/37 contains no specific provision relating to the requirements for prior advertisement concerning the criteria for selecting the candidates who will be invited to tender in the context of a restrictive procedure.

88 The title of Directive 93/37 and the second recital in its preamble show that its aim is simply to coordinate national procedures for the award of public works contracts, although it does not lay down a complete system of Community rules on the matter (Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 33).

89 The Directive nevertheless aims, as is clear from its preamble and 2nd and 10th recitals, to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition between entrepreneurs in the Member States (see, among others, *Lombardini and Mantovani*, cited above, paragraph 34).

90 As the Court has already stated in respect of Directive 71/305, which, as was pointed out in paragraph 6 of this judgment, was consolidated by Directive 93/37, in order to meet that aim, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts (Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 21).

91 The principle of equal treatment, which underlies the directives on procedures for the award of public contracts, implies an obligation of transparency in order to enable verification that it has been complied with (see, in particular, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 61, and Case C-92/00 *HI* [2002] ECR I-5553, paragraph 45).

92 That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed (see *Telaustria and Telefonadress*, cited above, paragraph 62).

93 It follows therefrom that the procedure for awarding a public contract must comply, at every stage, particularly that of selecting the candidates in a restricted procedure, both with the principle of the equal treatment of the potential tenderers and the principle of transparency so as to afford all equality of opportunity in formulating the terms of their applications to take part and their tenders (see, to that effect, in relation to the stage of comparison of tenders, Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 54).

94 It is in that perspective that, in accordance with the 10th and 11th recitals in its preamble, Directive 93/37 lays down advertising requirements in respect of both the criteria for selecting candidates and those for awarding the contract.

95 Thus, in relation, first, to the selection criteria, Article 7(2) of Directive 93/37, which concerns negotiated procedures, requires that the candidates are to be selected according to known qualitative criteria.

96 In relation, secondly, to the criteria for awarding contracts, Article 13(2)(e) of that directive, relating both to negotiated and restricted procedures, provides that they form part of the minimum information which must be mentioned in the letter of invitation to tender, if they do not already appear in the contract notice.

97 Similarly, for all types of procedure, where the award of the contract is made to the most economically advantageous tender, Article 30(2) of Directive 93/37, which applies both to the open procedure and the restricted and negotiated procedures, imposes on the contracting authority the obligation to state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of their importance. Also according to that article, where the contracting authority has set out a ranking in their order of importance of the criteria for the award which it intends to use, it may not confine itself to a mere reference thereto in the contract documents or in the contract notice, but must, in addition, inform the tenderers of the ranking which it has used.

98 As the Court has stated in respect of Article 27(2) of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1), the terms of which are substantially the same as those of Article 30(2) of Directive 93/37, the requirement thus imposed on the contracting authorities is intended precisely to inform all potential tenderers, before the preparation of their tenders, of the award criteria to be satisfied by these tenders and the relative importance of those criteria, thus ensuring the observance of the principles of equal treatment of tenderers and of transparency (see, *Commission* v *Belgium*, cited above, paragraphs 88 and 89).

99 It is therefore clear that the interpretation according to which, where, in the context of a restricted procedure, the contracting authority has laid down prior to the publication of the contract notice the rules for the weighting of the selection

criteria it intends to use, it is obliged to bring them to the prior knowledge of the candidates, is the only interpretation which complies with the objective of Directive 93/37, as explained in paragraphs 88 to 92 of this judgment, since it is the only one which is apt to guarantee an appropriate level of transparency and, therefore, compliance with the principle of equal treatment in the procedures awarding contracts to which that directive applies.

100 Therefore, the answer to the fourth question referred must be that Directive 93/37 is to be interpreted as meaning that where, in the context of a restricted procedure, the contracting authority has laid down in advance the rules for weighting the criteria for selecting the candidates who will be invited to tender, it is obliged to state them in the contract notice or tender documents.

Costs

101 The costs incurred by the Austrian and Netherlands Governments, and by the Commission, which submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 (Sixth Chamber),

in answer to the questions referred to it by the Vergabekontrollsenat des Landes Wien by order of 12 November 1999, hereby rules:

1. **A body which was not established to satisfy specific needs in the general interest not having an industrial or commercial character, but which has subsequently taken responsibility for such needs, which it has since satisfied, fulfils the requirement of the first indent of the second subparagraph of Article 1(b) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts so as to be regarded as a body governed by public law within the meaning of that provision, on condition that the assumption of responsibility for the satisfaction of those needs can be established objectively.**

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, 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, does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any**

irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the time-limit in question is reasonable.

3. **Directive 93/37 is to be interpreted as meaning that where, in the context of a restricted procedure, the contracting authority has laid down in advance the rules for weighting the criteria for selecting the candidates who will be invited to tender, it is obliged to state them in the contract notice or tender documents.**

Puissochet Schintgen Gulmann

Skouris Macken

Delivered in open court in Luxembourg on 12 December 2002.

R. Grass — Registrar

J.-P. Puissochet — President of the Sixth Chamber