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JUDGMENT OF THE COURT (Third Chamber)
30 September 2010 (*)
(Directive 89/665/EEC – Public procurement – Review procedures – Actions for damages – Unlawful award – National rule on liability based on a presumption that the contracting authority is at fault)

In Case C-314/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberster Gerichtshof (Austria), made by decision of 2 July 2009, received at the Court on 7 August 2009, in the proceedings

**Stadt Graz**

v

**Strabag AG,**
**Teerag-Asdag AG,**
**Bauunternehmung Granit GesmbH,**
intervening party:
**Land Steiermark,**

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, E. Juhász, G. Arestis, T. von Danwitz and D. Šváby, Judges,
Advocate General: V. Trstenjak,
Registrar: K. Malacek, Administrator,
having regard to the written procedure and further to the hearing on 24 June 2010,
after considering the observations submitted on behalf of:
Stadt Graz, by K. Kocher, Rechtsanwalt,
Strabag AG, Teerag-Asdag AG and Bauunternehmung Granit GesmbH, by W. Mecenovic, Rechtsanwalt,
Land Steiermark, by A.R. Lerchbaumer, Rechtsanwalt,
the Austrian Government, by M. Fruhmann, acting as Agent,
the European Commission, by B. Schima and C. Zadra, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

**Judgment**

This reference for a preliminary ruling concerns the interpretation of Articles 1(1) and 2(1)(c) and (7) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1) ('Directive 89/665').

The reference has been made in the course of proceedings between Stadt Graz (City of Graz, Austria) and Strabag AG, Teerag-Asdag AG and Bauunternehmung Granit GesmbH (collectively, 'Strabag and Others'), following the unlawful award of a public procurement contract by Stadt Graz.

**Legal context**

*European Union ('EU') law*

The third and sixth recitals in the preamble to Directive 89/665 state:

'… the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; … 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;

…

… it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement'.

Article 1(1) of that directive provides:

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

Article 2(1) and (5) to (7) of Directive 89/665 provides:

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

take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

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

award damages to persons harmed by an infringement.

…

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.'

*National law*

EU law on public procurement was transposed, in Land Steiermark (Styria, Austria), by the Law of 1998 on public procurement (Steiermärkisches Vergabegesetz 1998, 'the StVergG').

Paragraph 115(1) of the StVergG provides:

'In the event of the culpable infringement of this law or its implementing regulations by organs of a contracting authority, an unsuccessful candidate or tenderer may claim a right to be refunded the costs incurred in preparing its application or tender and other costs borne as a result of its participation in the tender procedure against the contracting authority, which is answerable for the conduct of the organs of the contracting entity. A claim for damages, including compensation for loss of profit, should be made before the ordinary courts.'

Paragraph 1298 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, 'the ABGB') provides:

'The party that claims to have been prevented from fulfilling its contractual or statutory obligations without being at fault has the burden of proving this. Where, as a result of a contractual agreement, it is liable only for gross negligence, it must also prove that that condition is not fulfilled.'

Paragraph 1299 of the ABGB provides:

'The party which publicly performs a function, art, profession or occupation or the party which voluntarily assumes a task requiring artistic knowledge or an unusual level of dedication thereby demonstrates that he has the necessary dedication and the requisite unusual knowledge; he must therefore be answerable where such dedication or knowledge is lacking. However, where the party which assigned the task was aware of his inexperience or could have been so aware by taking normal care, the assigning party is liable for the latter's shortcomings.'

**The factual background to the dispute in the main proceedings and the questions referred for a preliminary ruling**

In 1998, Stadt Graz announced an EU-wide invitation to tender by open procedure for the manufacture and supply of bituminous hot mix asphalt, in accordance with the StVergG. The notice of invitation to tender, published in the *Official Journal of the European Communities* and in the *Grazer Zeitung*, named 'Graz, Austria' as the place of performance and specified, under a heading entitled 'Brief description (type of performance, general features, purpose of the building or construction)', the supply of bituminous hot mix asphalt for 1999. It also specified, under the heading 'period for performance', 'start: 1 March 1999; end: 20 December 1999'.

Fourteen tenders were submitted. The best bidder was Held & Frank Bau GmbH ('HFB'), a construction undertaking. According to the order for reference, if that undertaking had been excluded, the joint-tender submitted by Strabag and Others would have been successful.

HFB had enclosed with its tender a letter in which it stated, 'by way of supplement', that its new asphalt mixing plant, which was to be constructed in the coming weeks in the municipality of Großwilfersdorf, would be operational from 17 May 1999. Strabag and Others were unaware of that letter.

On 5 May 1999, Strabag and Others brought review proceedings before the Vergabekontrollsenat des Landes Steiermark (the procurement review body of Land Steiermark) in which they stated that HFB did not possess a hot mix asphalt plant in Land Steiermark, which made it technically impossible for it to perform the contract at issue. They claimed that HFB's tender should therefore be excluded.

At the same time, Strabag and Others submitted an application for interim measures, which was granted by the Vergabekontrollsenat des Landes Steiermark by Order of 10 May 1999 prohibiting Stadt Graz from awarding the contract pending the decision on the substance.

By decision of 10 June 1999, the Vergabekontrollsenat des Landes Steiermark dismissed the action brought by Strabag and Others in its entirety, including the applications for review proceedings and for the exclusion of HFB from the contract. It stated that HFB was authorised to manufacture asphalt and that the requirement that the

hot mix plant exist at the time of the opening of the tenders would be disproportionate to the subject-matter of the contract and contrary to commercial practice.

On 14 June 1999, Stadt Graz awarded the contract to HFB.

By decision of 9 October 2002, following an action brought by Strabag and Others, the Verwaltungsgerichtshof annulled the decision of the Vergabekontrollsenat des Landes Steiermark on the ground that HFB's tender did not conform to the invitation to tender because, although the performance period ran from 1 March to 20 December 1999, HFB was unable to make use of its new asphalt mixing plant until 17 May 1999.

The Unabhängiger Verwaltungssenat für die Steiermark (Independent Administrative Tribunal of Land Steiermark) which, in 2002, took over the powers of the Vergabekontrollsenat des Landes Steiermark, held, by a decision of 23 April 2003, that, as a result of an infringement of the StVergG, the award of the contract by Stadt Graz had not been lawful.

Strabag and Others have brought an action against Stadt Graz before the ordinary courts for damages in the amount of EUR 300 000. In support of their action, they claim that HFB's tender should have been excluded on the ground of an irreparable defect and that their tender should consequently have been accepted. Stadt Graz erred by failing to hold that HFB's tender was incompatible with the terms of the invitation to tender. According to Strabag and Others, the decision of the Vergabekontrollsenat des Landes Steiermark cannot exonerate Stadt Graz, which acted at its own risk.

Stadt Graz claims, for its part, that it was bound by the decision of the Vergabekontrollsenat des Landes Steiermark and that, if that decision is unlawful, such unlawfulness is attributable to Land Steiermark, which is responsible for the Vergabekontrollsenat des Landes Steiermark. Its own organs, by contrast, were not at fault.

The court at first instance held, by an interlocutory decision, that the action for damages brought by Strabag and Others was well founded, concluding that Stadt Graz had erred by not carrying out a review of the tenders and by awarding the contract to HFB, despite the clear defect in the latter's tender, during the period allowed for bringing an appeal against the decision of the Vergabekontrollsenat des Landes Steiermark.

That decision was upheld on appeal. The appeal court stated, however, that its decision was amenable to an ordinary appeal on a point of law, given the lack of case-law from the Oberster Gerichtshof concerning the contracting authority's liability for fault where, as in the present case, at the date of the award of the contract to the best bidder, the contracting authority's position is upheld by a decision of the Vergabekontrollsenat des Landes Steiermark.

The appeal court held that, although the ordinary courts are bound by the decision of the Unabhängiger Verwaltungssenat für die Steiermark of 23 April 2003 finding the award unlawful and a causal link had been established between the unlawful behaviour of Stadt Graz and the damage suffered by Strabag and Others, it was still necessary to examine whether Stadt Graz was at fault concerning its decision to award the contract, on 14 June 1999, to HFB without taking into consideration the fact, which was not referred to in the decision of the Vergabekontrollsenat des Landes Steiermark of 10 June 1999, that the letter accompanying HFB's tender indicated that it was unable to comply with the performance periods of the contract at issue.

Stadt Graz lodged before the Oberster Gerichtshof a review on a point of law against the judgment given on appeal.

First, the Oberster Gerichtshof has doubts as to the conformity of Paragraph 115(1) of the StVergG with Directive 89/665. Referring to the judgments in Case C-275/03 *Commission* v *Portugal* [2004] and Case C-70/06 *Commission* v *Portugal* [2008] ECR I-1, it is uncertain whether all national legislation which, in any way, makes the tenderer's right to damages conditional on a finding that the contracting authority is at fault must be held to be incompatible with that directive, or only national legislation which imposes on the tenderer the burden of proving that fault.

The Oberster Gerichtshof points out, in that regard, that Paragraph 1298 of the ABGB reverses the burden of proof, with the effect that the contracting authority as a body is presumed to be at fault. Furthermore, the contracting authority is not entitled to rely on a lack of individual abilities, since its liability is equated with that of an expert, as provided for under Paragraph 1299 of the ABGB. Nevertheless, if Stadt Graz was indeed bound, actually and extensively, by the procedurally final decision of the Vergabekontrollsenat des Landes Steiermark, it would be able to discharge the burden of proof to the required legal standard.

Secondly, on the assumption that Directive 89/665 does not preclude national legislation such as that at issue in the main proceedings, the referring court, which – like the Verwaltungsgerichtshof and the appeal court in the present case – disputes the view that the contracting authority is bound by a decision such as that given by the Vergabekontrollsenat des Landes Steiermark on 10 June 1999, wonders, however, whether the assumption that the contracting authority is not bound by such a decision and could have – or even should have – awarded the contract to another tenderer is not inconsistent with the objective, stated in Article 2(7) of that directive, of ensuring that decisions taken by bodies responsible for review procedures are effectively enforced.

Thirdly, on the assumption that that second question is answered in the affirmative, the referring court states that Strabag and Others complain, as does the appeal court, that Stadt Graz awarded the contract to HFB without taking into account the fact, which was not mentioned by the Vergabekontrollsenat des Landes Steiermark in its decision of 10 June 1999, that, according to information provided by HFB itself, HFB was unable to perform that contract within the period fixed by the invitation to tender. In those circumstances, the referring court is uncertain, in the light of Article 2(7) of Directive 89/665, whether, even if the contracting authority was bound by the decision taken by a body such as the Vergabekontrollsenat des Landes Steiermark, it could have – or even should have – determined whether that decision was correct and/or whether it was

based on an exhaustive assessment.

In those circumstances, the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

Do Articles 1(1) and 2(1)(c) of … [Directive 89/665] … or other provisions of that directive preclude a national rule under which claims for damages for the contracting authority's infringement of Community procurement law are subject to the requirement of fault, including where that rule is applied in accordance with a presumption that fault lies with the contracting authority as a body and its reliance on a lack of individual abilities, hence on a lack of personal fault, is excluded?

If Question 1 is answered in the negative:

Is Article 2(7) of … [Directive 89/665] … to be interpreted as meaning that, for the purposes of the obligation thereunder to ensure the effective enforcement of decisions taken in review procedures, the decision of a procurement review body binds all parties to the procedure, thus also including the contracting authority?

If Question 2 is answered in the affirmative:

Is it permissible under Article 2(7) of … [Directive 89/665] … for the contracting authority to disregard a final decision of a procurement review body, or is it even obliged to disregard it and, if so, under what conditions?'

**The questions referred**

*Question 1*

By Question 1, the referring court asks, in essence, whether Directive 89/665 must be interpreted as precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable, where the application of that legislation rests on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities, hence on the defence that it cannot be held accountable for the alleged infringement.

In that regard, it should first of all be noted that Article 1(1) of Directive 89/665 requires the Member States to take the measures necessary to ensure the existence of procedures which are effective, and, in particular, as rapid as possible, for the review of decisions of contracting authorities which have 'infringed' EU law in the field of public procurement or national rules implementing that law. The third recital in the preamble to that directive notes, for its part, the need for the existence of effective and rapid remedies in the case of 'infringements' of those laws.

With regard, in particular, to the award of damages by way of legal remedy, Article 2(1)(c) of Directive 89/665 provides that the Member States are to ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to award such damages to persons harmed by an infringement.

However, Directive 89/665 lays down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law concerning public procurement (see, inter alia, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 47, and Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 45). If there is no specific provision governing the matter, it is therefore for the domestic law of each Member State to determine the measures necessary to ensure that the review procedures effectively award damages to persons harmed by an infringement of the law on public contracts (see, by analogy, *GAT*, paragraph 46).

Although, therefore, the implementation of Article 2(1)(c) of Directive 89/665 in principle comes under the procedural autonomy of the Member States, limited by the principles of equivalence and effectiveness, it is necessary to examine whether that provision, interpreted in the light of the general context and aim of the judicial remedy of damages, precludes a national provision such as that at issue in the main proceedings from making the award of damages conditional, in the circumstances set out in paragraph 30 of this judgment, on a finding that the contracting authority's infringement of the law on public contracts is culpable.

In that regard, it should first be noted that the wording of Article 1(1), Article 2(1), (5) and (6), and the sixth recital in the preamble to Directive 89/665 in no way indicates that the infringement of the public procurement legislation liable to give rise to a right to damages in favour of the person harmed should have specific features, such as being connected to fault – proved or presumed – on the part of the contracting authority, or not being covered by any ground for exemption from liability.

That assessment is supported by the general context and aim of the judicial remedy of damages, as provided for in Directive 89/665.

According to settled case-law, while the Member States are required to provide legal remedies enabling the annulment of a decision of a contracting authority which infringes the law relating to public contracts, they are entitled in the light of the objective of rapidity pursued by Directive 89/665 to couple that type of review with reasonable limitation periods for bringing proceedings, so as to prevent the candidates and tenderers from being able, at any moment, to invoke infringements of that legislation, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements (see, to that effect, inter alia, Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 74 to 78; *Santex*, paragraphs 51 and 52; Case C-241/06 *Lämmerzahl* [2007] ECR I-8415, paragraphs 50 and 51; and Case C-406/08 *Uniplex (UK)* [2010] ECR I-0000, paragraph 38).

Furthermore, the second subparagraph of Article 2(6) of Directive 89/665 reserves to the Member States the right to limit the powers of the body responsible for the review procedures, after the conclusion of a contract following its award, to the award of damages.

Against that background, the remedy of damages provided for in Article 2(1)(c) of Directive 89/665 can constitute, where appropriate, a procedural alternative which is compatible with the principle of effectiveness underlying the objective pursued by that directive of ensuring effective review procedures (see, to that effect, inter alia, *Uniplex (UK)*, paragraph 40) only where the possibility of damages being awarded in the event of infringement of the public procurement rules is no more dependent than the other legal remedies provided for in Article 2(1) of Directive 89/665 on a finding that the contracting authority is at fault.

As the European Commission states, it makes little difference in that regard that, by contrast with the national legislation referred to in *Commission* v *Portugal*, the legislation at issue in the main proceedings does not impose on the person harmed the burden of proving that the contracting authority is at fault, but requires the latter to rebut the presumption that it is at fault, while limiting the grounds on which it can rely for that purpose.

The reason is that that legislation, too, creates the risk that the tenderer who has been harmed by an unlawful decision of a contracting authority is nevertheless deprived of the right to damages in respect of the damage caused by that decision, where the contracting authority is able to rebut the presumption that it is at fault. However, as emerges from the present order for reference and as was confirmed at the hearing, such a possibility is not excluded in the present case, given that Stadt Graz is able to rely on the fact that the legal error it is alleged to have made is excusable, on account of the intervention of the decision of the Vergabekontrollsenat des Landes Steiermark of 10 June 1999 which dismissed the action brought by Strabag and Others.

At the very least, that tenderer runs the risk, under that legislation, of only belatedly being able to obtain damages, in view of the possible duration of civil proceedings seeking a finding that the alleged infringement is culpable.

However, in both cases, the situation would be contrary to the aim of Directive 89/665, set out in Article 1(1) thereof and in the third recital in the preamble thereto, which is to guarantee judicial remedies which are effective and as rapid as possible against decisions taken by contracting authorities in infringement of the law on public contracts.

It should also be noted that, even allowing for the possibility that, in the present case, Stadt Graz might have taken the view in June 1999 that it was required, because of the objective of efficiency relating to procedures for the award of public contracts, to take immediate steps to comply with the decision of the Vergabekontrollsenat des Landes Steiermark of 10 June 1999 without awaiting the expiry of the period for bringing an appeal against that decision, the fact remains – as the Commission noted at the hearing – that a declaration that an application for damages, brought by the unsuccessful tenderer following the annulment of that decision by an administrative court, is well founded cannot – contrary to the wording, context and objective of the provisions of Directive 89/665 which establish the right to such damages – depend, for its part, on a finding that the contracting authority involved is at fault.

In the light of the foregoing considerations, the reply to Question 1 is that Directive 89/665 must be interpreted as precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable, including where the application of that legislation rests on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities, hence on the defence that it cannot be held accountable for the alleged infringement.

*Questions 2 and 3*

In the light of the answer to Question 1, there is no need to answer the other two questions referred.

**Costs**

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

**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, must be interpreted as precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable, including where the application of that legislation rests on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities, hence on the defence that it cannot be held accountable for the alleged infringement.**

[Signatures]

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* Language of the case: German.