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HOF VAN JUSTITIE VAN DE EUROPESE UNIE  
TRYBUNAŁ SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ  
TRIBUNAL DE JUSTIÇA DA UNIÃO EUROPEIA  
CURTEA DE JUSTIȚIE A UNIUNII EUROPENE  
SÚDNY DVOR EURÓPSKEJ ÚNIE  
SODIŠČE EVROPSKE UNIJE  
EUROOPAN UNIONIN TUOMIOISTUIN  
EUROPEISKA UNIONENS DOMSTOL

## JUDGMENT OF THE COURT (Second Chamber)

23 December 2009 \*

(Failure of a Member State to fulfil obligations – Directives 89/665/EEC and 92/13/EEC – Public supply and public works contracts – Review procedure against a contract award decision – Guarantee of effective review – Minimum period to be ensured between notification to the unsuccessful tenderers of the decision to award a contract and the signature of the contract concerned)

In Case C-455/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 17 October 2008,

**European Commission**, represented by G. Zavvos and M. Konstantinidis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Ireland**, represented by D. O'Hagan, acting as Agent,

defendant,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: P. Mengozzi,

Registrar: R. Grass,

having regard to the written procedure,

\* Language of the case: English.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

### **Judgment**

- 1 By its application, the European Commission sought a declaration from the Court that, by adopting Article 49 of Statutory Instrument No 329 of 2006 ('S.I. No 329 of 2006') and Article 51 of Statutory Instrument No 50 of 2007 ('S.I. No 50 of 2007'), Ireland established the rules governing the notification of contracting authorities' and entities' award decisions and their reasoning to tenderers in such a way that by the time tenderers are fully informed of the reasons for the rejection of their offer, the standstill period for the conclusion of the contract has already expired, and that, by so doing, Ireland has failed to fulfil its obligations under Articles 1(1) and 2(1) 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), and Articles 1(1) and 2(1) of 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 (OJ 1992 L 76, p. 14), as interpreted by the Court in its judgment in Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671 and its judgment of 24 June 2004 in Case C-212/02 *Commission v Austria*.

### **Legal context**

#### *Community legislation*

- 2 Article 1(1) of Directive 89/665 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 nation[al] rules implementing that law.'
- 3 Article 2(1) of Directive 89/665 provides:

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

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

4 Article 1(1) of Directive 92/13 provides:

'The Member States shall take the measures necessary to ensure that decisions taken by contracting entities 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(8), on the grounds that such decisions have infringed Community law in the field [of] procurement or national rules implementing that law as regards:

- (a) contract award procedures falling within the scope of Council Directive 90/531/EEC; and
- (b) compliance with Article 3(2)(a) of that Directive in the case of the contracting entities to which that provision applies.'

5 Article 2(1) of that directive provides:

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

either

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

(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

(d) and, in both the above cases, to award damages to persons injured by the infringement.

Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.’

- 6 The above provisions of Directives 89/665 and 92/13 were amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31), which entered into force on 9 January 2008 and the time-limit for the transposition of which expired on 20 December 2009.

*National legislation*

S.I. No 329 of 2006

- 7 Article 49 of S.I. No 329 of 2006, which, Ireland submits, transposes into Irish law Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), states:

'(1) As soon as practicable after reaching a decision about entering into a public contract or framework agreement or admission to a dynamic purchasing system, a contracting authority shall inform candidates and tenderers of the decision by the most rapid means of communication possible (such as by electronic mail or by telefax). If the authority notifies its decision by electronic mail or telefax, it shall confirm the decision in writing if a candidate or tenderer so requests.

...

(3) As soon as possible, and in any event no later than 15 days after the date on which a contracting authority receives a request to do so, the authority shall inform:

- (a) a candidate whose application is rejected of the reasons for the rejection, or
- (b) a tenderer whose tender is rejected of the reasons for the rejection (including, in a case referred to in Regulation 23(9) or (10), the reasons for the authority's decision of non-equivalence or that the works, supplies or service do not meet the authority's performance or functional requirements), or
- (c) a tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.

...

(5) A contracting authority shall not enter into a public contract with a successful tenderer unless at least 14 days have elapsed since the date on which tenderers were informed of the contract award decision in accordance with paragraph (1).'

S.I. No 50 of 2007

- 8 Article 51 of S.I. No 50 of 2007, the purpose of which, Ireland submits, is to transpose into Irish law Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), provides:

'(1) As soon as possible after reaching a decision about

- (a) entering into a framework agreement or awarding a regulated contract, or
- (b) admission to a dynamic purchase system,

a contracting entity shall notify candidates and tenderers of the decision by the most rapid available means of communication, such as electronic mail or fax.

...

(4) A contracting entity that has rejected a candidate's application shall, as soon as practicable and in any case within 15 days after receiving a request to do so, inform the candidate of the reasons for the rejection.

(5) A contracting entity that has rejected a tenderer's tender shall

(a) when notifying the tenderer in accordance with paragraph (1), indicate the principal reason, or reasons, why the tender is not the selected tender;

(b) as soon as practicable, and in any case within 15 days after receiving a request from a tenderer that has made an admissible tender, inform that tenderer of

(i) the characteristics and relative advantages of the selected tender, and

(ii) the name of the successful tenderer or parties to the framework agreement.

...

(8) A contracting entity may not enter into a regulated contract with a successful tenderer unless at least 14 days have elapsed since the date on which tenderers were informed, in accordance with paragraph (1), of the decision to award the contract to that tenderer.'

### **Pre-litigation procedure**

9 It is clear from the contents of the file submitted to the Court that Directives 89/665 and 92/13 were transposed into Irish law by Statutory Instrument No 309 of 1994 ('S.I. No 309 of 1994') and by Statutory Instrument No 104 of 1993, respectively.

10 By letter of 17 May 2001, the Commission asked the Irish authorities for information relating to the implementation of Directive 89/665 which, according to the judgment in *Alcatel Austria and Others*, requires the Member States to establish effective review procedures that are as rapid as possible to ensure the setting aside of any decision taken unlawfully by a contracting authority at the stage where infringements can still be rectified.

11 The Irish authorities replied, by letter of 27 July 2001, that the body designated to review appeals against contracting authorities' unlawful decisions was the High Court, which had the power, among others, to declare the disputed contract void. According to those authorities, although S.I. No 309 of 1994 lacks a specific provision concerning the notification of the contract award decision, there is a 'general policy' to notify the unsuccessful tenderers of that decision at the same

time as the successful tenderer is notified of it. Despite the voluntary nature of that notification and the lack of a standstill period between that notification and the conclusion of the contract, unsuccessful tenderers have ample time to initiate appropriate review procedures.

- 12 By letter of 18 October 2002, the Commission gave Ireland formal notice to submit, within two months, its observations with regard to the three specific obligations arising from the judgment in *Alcatel Austria and Others*, that, first, the contract award decision must be distinct from the conclusion of the contract and amenable to review by a court, second, that decision must be notified to all the participants in the procedure and, third, a reasonable period must be prescribed between that decision and the conclusion of the contract so as to allow tenderers to commence proceedings concerning the decision.
- 13 Since the Commission considered the Irish authorities' reply of 7 January 2004 to be unsatisfactory, it issued, by letter of 1 April 2004, a reasoned opinion in which it invited Ireland to take the measures necessary to comply with the opinion within two months from its notification.
- 14 In its reply of 6 August 2004, Ireland stated that it envisaged amending its law in accordance with the arguments set out in the reasoned opinion and, at a meeting held on 5 November 2004, specified that it would do so as part of the transposition of Directives 2004/17 and 2004/18.
- 15 The final draft of the legislation envisaged, in so far as it concerned the transposition of Directive 2004/18, was communicated to the Commission on 22 September 2005. On 17 July 2006, Ireland notified the Commission of S.I. No 329 of 2006 as legislation transposing Directive 2004/18.
- 16 Since it considered that those measures did not comply with the requirements of the judgment in *Alcatel Austria and Others*, and that no measures had been adopted to give effect to the same requirements arising from *Commission v Austria* regarding the special sectors covered by Directive 2004/17, the Commission sent Ireland an additional letter of formal notice on 15 December 2006.
- 17 Ireland replied to the additional letter of formal notice on 13 March 2007. That reply was considered unsatisfactory by the Commission, inasmuch as the Irish authorities acknowledged the need to amend their legislation but referred to no concrete measures which they intended to take or any timetable for adopting such measures.
- 18 By letter of 1 February 2008, the Commission served Ireland with an additional reasoned opinion, in which it concluded that Ireland had failed to fulfil its obligations in the terms of the action, as set out in paragraph 1 of the present judgment.

- 19 Ireland replied to the additional reasoned opinion by a letter of 17 March 2008, in which it stated that, as the matters at issue were thenceforth dealt with in Directive 2007/66, it would comply with the reasoned opinion by making the necessary revisions to its legislation prior to the time-limit for transposing that directive, namely 20 December 2009.
- 20 Since it was not satisfied with that response, the Commission decided to bring the present action.

### **The action**

#### *Arguments of the parties*

- 21 The Commission submits that it follows from paragraphs 34 and 43 of the judgment in *Alcatel Austria and Others* that Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 require the Member States to establish effective review procedures that are as rapid as possible to enable unsuccessful tenderers to have any decision taken unlawfully by the contracting authority set aside at the stage where infringements can still be rectified. Similar obligations arise from the corresponding articles of Directive 92/13 (see *Commission v Austria*, paragraph 23). It follows that a reasonable period must elapse between the time when the contract award decision is communicated to unsuccessful tenderers and the conclusion of the contract with the successful tenderer, in order, in particular, to allow an application to be made for interim measures prior to such conclusion.
- 22 However, neither Article 49 of S.I. No 329 of 2006 nor Article 51 of S.I. No 50 of 2007 satisfies those requirements. Those provisions do not ensure that tenderers are fully informed of the reasons for the refusal of their tender so as to put them in a position, in sufficient time before the expiry of the standstill period for the conclusion of the contract with the successful tenderer, to consider whether the decision awarding the contract is valid.
- 23 Whilst it is true that Directive 2007/66 deals with those questions by codifying and detailing the requirements in the field, that is irrelevant because the Irish legislation covered by the present action does not comply with Directives 89/665 and 92/13. Those directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty, which demand that where a directive is intended to create rights for individuals, the beneficiaries of those rights can ascertain their full extent.
- 24 Ireland admits that the requirements arising from Directives 89/665 and 92/13, as interpreted by the Court in *Alcatel Austria and Others* and *Commission v Austria*, have not been incorporated into its national law. It submits, however, that it would not be appropriate to declare that it has failed to fulfil its obligations in the manner alleged, since the precise extent of those obligations had not been clearly defined



at the time when it adopted the measures necessary for the transposition of Directives 2004/17 and 2004/18 into Irish law. In addition, Ireland submits that Directive 2007/66 deals directly with the questions raised in the present action, and it proposed to adopt the measures necessary to transpose the latter directive into Irish law prior to 20 December 2009.

- 25 Ireland adds that it has taken steps to ensure that the measures required by the Commission are henceforth carried out in practice. It observes that it informed the Commission that all public purchasers are registered on the national public procurement website. All those purchasers, as well as members of a wide network of public procurement managers and other procurement officials have been reminded of the need to have award decisions reasoned with sufficient information to enable a tenderer to decide within the standstill period preceding the conclusion of the contract whether an award appears valid or there are justifiable grounds for seeking a review. That information was notified to the Commission by letter of 14 March 2008.

*Findings of the Court*

- 26 As is clear from the Court's case-law, the provisions of Directives 89/665 and 92/13, which are intended to protect tenderers against arbitrary decisions by the contracting authority, seek to reinforce existing arrangements for ensuring effective application of the Community rules on the award of public contracts, in particular where infringements can still be rectified (see, particularly, *Commission v Austria*, paragraph 20). The objective of those directives is to ensure that unlawful decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible (see, particularly, Case C-444/06 *Commission v Spain* [2008] ECR I-2045, paragraph 44).
- 27 The Court has held, in particular, that the Member States are required to ensure that the contracting authority's decision, prior to the conclusion of the contract in a tender procedure, as to the bidder with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages (see, particularly, *Alcatel Austria and Others*, paragraph 43).
- 28 The complete legal protection which must be ensured before the conclusion of the contract presupposes, in particular, the duty to inform the tenderers of the award decision before such conclusion so that they may have a real possibility of initiating review proceedings. That same protection requires provision to be made for the unsuccessful tenderer to examine in sufficient time the question of whether the award decision is valid, which means that a reasonable period must pass between the moment when the contract award decision is notified to the unsuccessful tenderers and the conclusion of the contract, in order to allow them, in particular, to bring an application for interim measures until the conclusion of

the contract (see to that effect, particularly, *Commission v Austria*, paragraphs 21 and 23; *Commission v Spain*, paragraphs 38 and 39; and the judgment of 11 June 2009 in Case C-327/08 *Commission v France*, paragraphs 41 and 56). Therefore, the fact that there is the option of bringing proceedings for the annulment of the contract itself is not such as to compensate for the impossibility of challenging the mere act of awarding the contract concerned, before the contract is concluded (*Commission v Spain*, paragraph 45).

- 29 However, as Ireland admits, S.I. No 329 of 2006 and S.I. No 50 of 2007 do not meet those requirements.
- 30 First, Article 49 of S.I. No 329 of 2006 provides that tenderers must be informed of the decision to award a public contract by the most rapid means of communication possible, as soon as practicable after the contracting authority has made its decision. From the date of such information, the standstill period which must elapse before the conclusion of the contract must be at least 14 days. However, under the terms of the same provision, the contracting authority is required to state the reasons for the rejection of a tender only if it receives an express request to do so, and then only ‘as soon as possible, and in any event no later than 15 days’ after its receipt of the request.
- 31 As Ireland accepts, it follows that the standstill period may already have expired when an unsuccessful tenderer is fully informed of the reasons for the rejection of its tender. Yet, as the Commission maintains, the reasons for the decision to reject the tender must be communicated at the time of the notification of that decision to the tenderers concerned and, in all cases, in sufficient time before the conclusion of the contract, in order to allow the unsuccessful tenderers to bring, in particular, an application for interim measures until such conclusion.
- 32 Secondly, Article 51 of S.I. No 50 of 2007 provides that the unsuccessful tenderers are to be informed, at the time when the award decision is notified, of ‘the principal reason, or reasons, why [their] tender is not the selected tender’. However, as the Commission maintains, the discretion which that provision allows the contracting authority is such that unsuccessful tenderers are at risk of receiving incomplete information and very generally formulated explanations concerning the rejection of their tender, so that they are prevented from examining the validity of the award decision in sufficient time.
- 33 Indeed, since the standstill period preceding the conclusion of the contract with the successful tenderer is 14 days, whereas the period allowed the contracting authority to inform the unsuccessful tenderers of the ‘characteristics and relative advantages of the selected tender’ is 15 days after receiving a request to do so, by the time that tenderers are fully informed of the reasons for the rejection of their tender, the standstill period preceding the conclusion of the contract may already have expired.

- 34 As is clear from paragraph 31 of the present judgment, the reasons for the decision to reject their tender must be communicated to the tenderers concerned in sufficient time before the conclusion of the contract, in order to allow the unsuccessful tenderers to bring, in particular, an application for interim measures until such conclusion.
- 35 Ireland observes that it will comply with the requirements arising from Articles 1 and 2 of Directives 89/665 and 92/13 as part of the implementation of Directive 2007/66, which must be effected by 20 December 2009 at the latest, that meanwhile it has taken steps to ensure that those requirements are carried out in practice and that it would be inappropriate for the Court to uphold the present action, since the precise extent of the requirements in question was not clearly defined before delivery of the judgment in *Alcatel Austria and Others*.
- 36 However, none of those arguments can lead to the dismissal of the present action.
- 37 In response to the argument based on the transposition of Directive 2007/66 into Irish law, it is sufficient to point out that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State at the end of the period laid down in the reasoned opinion. The Court cannot take account of any subsequent changes (see, particularly, *Commission v Austria*, paragraph 28).
- 38 As regards the argument based on the steps undertaken by Ireland so that the requirements under Directives 89/665 and 92/13 are carried out in practice, it need merely be recalled that, according to established case-law, the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty (see, particularly, Case C-225/97 *Commission v France* [1999] ECR I-3011, paragraph 37), that the incompatibility of national legislation with Community provisions can be remedied for good only by means of binding national provisions having the same legal force as those which must be amended (see, particularly, Case C-160/99 *Commission v France* [2000] ECR I-6137, paragraph 23), and that mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting fulfilment of the obligations owed by the Member States in the context of transposition of a directive (see, particularly, Case C-508/04 *Commission v Austria* [2007] ECR I-3787, paragraph 80).
- 39 As for the argument that the relevant Community legislation lacked clarity before delivery of the judgment in *Alcatel Austria and Others*, it is appropriate to point out that, according to settled case-law, the interpretation which the Court gives to a rule of Community law clarifies and defines, where necessary, the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force (see, particularly, Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, paragraph 21). In other words, a preliminary ruling does not

create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force (see, particularly, Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 35).

- 40 Furthermore, the objective of the pre-litigation procedure provided for in Article 226 EC is precisely to give the Member State concerned an opportunity to comply, as appropriate, with its obligations under Community law (see, particularly, Case C-490/04 *Commission v Germany* [2007] ECR I-6095, paragraph 25).
- 41 As Ireland admits, when the period laid down in the reasoned opinion expired, Irish law still did not satisfy the requirements arising from Articles 1(1) and 2(1) of Directives 89/665 and 92/13, as interpreted by the Court in its judgments in *Alcatel Austria and Others* and in Case C-212/02 *Commission v Austria*.
- 42 Having regard to the foregoing considerations, it must be held that, by adopting Article 49 of S.I. No 329 of 2006 and Article 51 of S.I. No 50 of 2007, Ireland established the rules governing the notification of contracting authorities' and entities' award decisions and their reasoning to tenderers in such a way that by the time that tenderers are fully informed of the reasons for the rejection of their offer, the standstill period preceding the conclusion of the contract may already have expired, and that, by so doing, Ireland has failed to fulfil its obligations under Articles 1(1) and 2(1) of Directives 89/665 and 92/13.

### Costs

- 43 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Ireland has been unsuccessful, Ireland must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by adopting Article 49 of Statutory Instrument No 329 of 2006 and Article 51 of Statutory Instrument No 50 of 2007, Ireland established the rules governing the notification of contracting authorities' and entities' award decisions and their reasoning to tenderers in such a way that by the time that tenderers are fully informed of the reasons for the rejection of their offer, the standstill period preceding the conclusion of the contract may already have expired, and that, by so doing, Ireland has failed to fulfil its obligations under Articles 1(1) and 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as**

**amended by Council Directive 92/50/EEC of 18 June 1992, and Articles 1(1) and 2(1) of 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;**

**2. Orders Ireland to pay the costs.**

[Signatures]

