

OPINION OF ADVOCATE GENERAL

STIX-HACKL

delivered on 16 December 2004¹

I — Introduction

II — Legal framework

A — *Community law*

2. Article 1(1) provides:

1. This reference for a preliminary ruling concerns the legal question of whether a withdrawal of a contract award procedure is amenable to review. In particular, the question arises as to whether 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 contracts² (hereinafter 'the Directive') obliges the Member States to make it possible to have set aside a withdrawal of an invitation to tender, or at least a contracting authority's decision to withdraw an invitation to tender.

'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 and 77/62/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. Article 2(1), which sets out the means of review the Member States are to provide for, states *inter alia*:

1 — Original language: German.

2 — OJ 1989 L 395, p. 33.

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

curement Law, hereinafter ‘BVergG’) is based on a distinction between decisions which may be challenged separately and those which may not. A decision which is not separately open to challenge may be challenged only in conjunction with the next decision that follows which is separately open to challenge.

...

- (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;

5. Under Paragraph 20(13)(a)(aa) of the BVergG, the following decisions may be challenged separately in an open award procedure: the invitation to tender, other determinations during the period for the submission of tenders and the award decision. Withdrawal of the invitation to tender after the opening of tenders is not therefore a decision separately open to challenge.

...’

B — *National law*

4. The review procedure system under the Bundesvergabegesetz 2002³ (Federal Pro-

6. Paragraph 105 makes provision in respect of withdrawal after the expiry of the period for the submission of tenders. Subparagraph 2 thereof permits the contracting authority to withdraw the invitation to tender on serious grounds which objectively justify withdrawal. Withdrawal for the sole purpose of enabling a new invitation to tender to be issued in order to reduce the price of the tender is not objectively justified.

³ — BGBl. I No 99/2002.

7. Under Paragraph 162(2)(2) of the BVergG, the Bundesvergabeamt has jurisdiction, until the contract is awarded, for the purpose of correcting infringements of the BVergG and the regulations adopted under it, to annul decisions taken unlawfully by the contracting authority within the limits of the points of complaint relied on by the applicant.

8. Under Paragraph 166(2)(1) of the BVergG, an application for review is inadmissible where it is not directed against a decision that may be challenged separately.

9. The national court is of the view that under the system of the BVergG, any unlawfulness vitiating the withdrawal of the invitation to tender cannot be pleaded in a review procedure in connection with a subsequent decision open to separate challenge since withdrawal terminates the contract award procedure and therefore no further decisions are taken by the contracting authority during that contract award procedure.

10. The national court is further of the view that under the system of the BVergG, it is therefore not possible, in an open award procedure, for any withdrawal of the invitation to tender after the opening of tenders to

be re-examined in a review procedure and, where appropriate, set aside. Under the system of the BVergG, the Bundesvergabeamt has jurisdiction, after withdrawal of an invitation to tender, (merely) to establish whether the withdrawal was unlawful on account of an infringement of the BVergG. Such a declaratory decision by the Bundesvergabeamt constitutes the prerequisite for the claiming of damages by contractors against the contracting authority on account of unlawfulness of the withdrawal.

III — The facts, the main proceedings and the questions referred

11. By notice of 26 September 2003, the Bundesimmobiliengesellschaft mbH ('BIG') published an invitation to tender for the demolition work lot in the contract award procedure '14 Angerzellgasse, 6020 Innsbruck, Academic Grammar School, new primary school building and three sports halls' by an open award procedure ('the first contract award procedure').

12. BIG, 100% of the shares in which are owned by the Federal Government, was formed to bring the Federal Government's building and property management into line. The objects of the business include: the making or holding available of premises for

purposes of the Federal Government exclusively or jointly with third parties and, to that end, having specific regard to the needs of the Federal Government, in particular the acquisition, use, management, letting and disposal of real property and premises, the construction and maintenance of buildings, the provision of central building management services and the performance of other ancillary and secondary transactions connected with the objects of the business, the latter transactions excluding, however, all those governed by the provisions of the Kreditwesengesetz (Law on banking and credit business).

pate in a negotiated procedure without prior publication of a contract notice for the demolition work (sports hall, Angerzellgasse) as part of the building project for the construction of a primary school with an after-school facility and three underground sports halls ('the second contract award procedure'). Koppensteiner also submitted a tender in the second contract award procedure. The same work was put out to tender in both contract award procedures, although in the second contract award procedure the invitation to tender contained the additional stipulation that 'rough separation of the various demolition waste will be possible on the site'. In the case of the second contract award procedure, the estimated contract value was now EUR 90 000.

13. The first contract award procedure related to a building contract with an estimated contract value of EUR 8 600 000. The estimated contract value of the demolition work lot covered by the procedure is EUR 95 000.

14. By letter from BIG of 29 October 2003, Koppensteiner GmbH ('Koppensteiner') and others were informed that, pursuant to Paragraph 105 of the BVergG, the invitation to tender was being withdrawn on serious grounds after the expiry of the time-limit for the submission of tenders.

16. On 13 November 2003 Koppensteiner applied for the withdrawal of the invitation to tender in the first contract award procedure to be set aside and for an injunction against the issue of an invitation to tender in further contract award procedure; in the alternative, it sought a declaration that the withdrawal was unlawful. With respect to the second contract award procedure, Koppensteiner applied *inter alia* for it to be set aside.

15. On 6 November 2003 Koppensteiner was invited by telephone by BIG to partici-

17. By decision of the Bundesvergabebamt of 20 November 2003, BIG was ordered to refrain from opening the tenders in the second contract award procedure for the duration of the review procedure or until 13 January 2004 at the latest.

18. It appears from the file that on 28 January 2004 BIG awarded the contract in the second contract award procedure to another undertaking. This undertaking has already carried out the demolition works.

19. Before the Bundesvergabebamt, BIG argued in essence that the reason for the withdrawal was the fact that, despite careful estimation of the contract value, all the prices of the tenders were considerably in excess of the estimated contract value. The estimated contract value of the demolition work lot was EUR 95 000 in the first contract award procedure and EUR 90 000 in the second contract award procedure. The lowest tender in the first contract award procedure was approximately EUR 304 150 and thus considerably too high.

20. On the basis of the Court's judgment in *Hospital Ingenieure Krankenhaustechnik*, Koppensteiner argued inter alia that a 'decision of the contracting authority to withdraw the invitation to tender [must] be open to a review procedure, and ... be capable of being annulled where appropriate, on the ground that it has infringed Community law on public contracts ...'.⁴

21. Koppensteiner further argued that 'by application *mutatis mutandis* of Paragraph 100(2) of the BVergG and of the standstill period laid down as a rule in that provision, the withdrawal decision must be open to challenge by the tenderers by application *mutatis mutandis* of the provisions governing the award decision'. The withdrawal decision was to be regarded as analogous to an award decision since it was a decision by the contracting authority not to award the contract to any tenderer.

22. On 12 January the Bundesvergabebamt referred the following questions to the Court for preliminary ruling:

'(1) Are the provisions of Article 1 in conjunction with Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 so unconditional and sufficiently precise that, in the event of withdrawal of the invitation to tender after the opening of tenders, an individual is entitled to rely on those provisions directly before the national courts and to seek a review of the withdrawal?

(2) If Question 1 must be answered in the negative, is Article 1 in conjunction with Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 to

⁴ — See the operative part of the judgment in Case C-92/00 *Hospital Ingenieure* [2002] ECR I-5553.

be interpreted as meaning that Member States are obliged to make a contracting authority's decision, prior to withdrawal of the invitation to tender, that it will withdraw the invitation to tender (withdrawal decision analogous to the award decision) amenable to review in any case, and the applicant is entitled to have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once withdrawal has taken place, of obtaining an award of damages?"

IV — Admissibility

23. BIG and the Austrian Government have raised doubts as to the admissibility of, respectively, the second question and both questions. The Austrian Government submitted that it was not possible to annul the withdrawal, since it was legally and factually impossible to make a further award in the contract award procedure in question. After the contract had been awarded, the Bundesvergabeamt had no jurisdiction to set aside the withdrawal, but only to declare the withdrawal unlawful. BIG submitted that the second question, relating to a decision to withdraw the invitation to tender, was inadmissible because such a decision was no longer possible in the main proceedings.

24. The Court has consistently held that it may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.⁵

25. On the one hand, it is to be observed that the national court has furnished the Court with all the material necessary to enable it to give a useful answer to the questions submitted to it.

26. On the other hand it must be considered whether the questions referred by the national court has referred remain material to the decision to be reached in the main proceedings, given the termination of the second contract award procedure by the award of the contract.

5 — See Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39, Case C-390/99 *Canal Satellite Digital* [2002] ECR I-607, paragraph 19, and Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 22 et seq.

27. The question arises as to whether this has changed the actual facts of the main action, and whether the questions referred, which relate to the withdrawal and not to the other applications in the main proceedings, have thus become inadmissible.

30. *Siemens* was therefore a case in which the withdrawal challenged in the main proceedings had been set aside in the meantime. However, it is common ground that that is not the case here.

28. As follows from the judgment in *Siemens*,⁶ which also concerned a reference by the Bundesvergabeamt, in assessing the admissibility of questions referred for preliminary ruling the Court takes into account developments after the order making the reference.

31. By contrast with *Siemens*, in the present proceedings the question as to the legal effect of the subsequent invitation to tender or of the contract concluded in the second contract award procedure has not been expressly raised.

29. That case concerned the effects of a decision by the Bundesvergabeamt which the Verfassungsgerichtshof (Constitutional Court) set aside while the reference for a preliminary ruling was pending. The Court concluded that when the decision was set aside, the questions relating to its effects became purely hypothetical. However, the Court held the question concerning the possible invalidity of unlawful contract awards to be admissible.

32. The questions referred relate to whether the withdrawal is amenable to review, and thus to the first contract award procedure. For that reason, it cannot be assumed that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose or is hypothetical, since the decision as to the legality of the withdrawal challenged in the main proceedings concerns the first contract award procedure and not the second. To be precise, only the latter is affected by the award of the contract. This formal approach, that is to say, considering the two contract award procedures separately, is to be preferred, at least in the context of assessing admissibility.

6 — Case C-314/01 *Siemens* [2004] ECR I-2549, paragraph 38 et seq.

33. In any event, it may be that the contract concluded at the end of the second contract award procedure is invalid on account of unlawful acts the contracting authority may have committed.

would arise, for example, if the question were whether in particular cases, possibly that of an ostensible setting-aside, there was none the less an obligation to terminate a contract award procedure by awarding the contract.

34. Accordingly, the questions referred still relate to the actual facts of the main action despite the change in the underlying facts.

37. Finally, the questions would be inadmissible if they related to a part of a contract award procedure that was not the subject of the dispute before the national court,⁷ or concerned another contract award procedure altogether. However, that is likewise not the case here.

35. In addition, it may equally be that the answer to the questions referred is important in relation to the lawfulness of the second contract award procedure. Even if this were not so under national law, the necessary relevance might arise under Community law. Thus, should the Directive require the withdrawal to be set aside, that might have consequences beyond the mere declaration that the withdrawal was unlawful. However, this need not be considered further at this point.

38. The national court has explained the reasons that led it to conclude that an answer to the questions referred is necessary in order to enable it to decide the dispute pending before it.

36. For the sake of completeness it is to be observed that the question as to whether the withdrawal is amenable to review arises regardless of what the contracting authority may or must do after the withdrawal has been annulled (set aside etc.). The latter issue

39. Accordingly, there are sufficient grounds to indicate that an answer to the questions is necessary to enable a decision to be reached in the dispute in the main proceedings.

7 — For such circumstances, see Case C-421/01 *Traunfellner* [2004] ECR I-11941, paragraph 38.

40. The questions referred should accordingly be regarded as admissible.

V — The substance of the questions referred

A — Preliminary remarks

41. Both questions concern the withdrawal of the invitation to tender by the contracting authority and related aspects of the legal protection afforded by national review bodies. In essence, the question raised is whether the Directive obliges the Member States to provide for the possibility of having a withdrawal annulled.

42. Whereas the first question relates to the direct applicability of Article 1 in conjunction with Article 2(1)(b) of the Directive, the subject of the second question is the interpretation of those provisions.

43. As the Commission rightly submitted, in principle a question as to how a provision

should be interpreted in the light of a Directive so as to comply with Community law must be considered before the question as to the Directive's direct applicability. The second question relates to whether a decision to withdraw an invitation to tender can be set aside. The wording of the question pre-supposes that there is such a decision in national law, but it appears from the order of the national court that the question seeks to ascertain whether the Directive obliges the Member States at least to provide for such a decision and the possibility of having it set aside where national law does not permit the withdrawal itself to be set aside.

44. However, a closer analysis of the questions in the light of the explanation given in the order for reference shows that the first question concerns the possibility of setting aside the withdrawal itself, whereas the second question concerns — alternative — possible approaches of national law.

45. Against this background, the questions referred should be considered separately under the following headings: whether the withdrawal itself may be set aside; if the withdrawal cannot be set aside, the obligation to provide for a decision to withdraw the invitation to tender; and interpretation in

conformity with Community law and the direct applicability of the relevant provisions of the Directive.

B — The content of Article 2(1) of the Directive

46. Accordingly, the first question is as to whether the Directive obliges the Member States to provide for the possibility of having withdrawal of an invitation to tender annulled, that is to say, that it can be set aside by national review bodies.

47. In answering this question, one must start from the general principle in the case-law that the Directive is aimed at ‘reinforcing existing arrangements ... for ensuring effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified’.⁸

48. As regards whether withdrawal can be set aside, one must start in particular with

the Court’s judgment in *Hospital Ingenieure*.⁹ This judgment has been interpreted in different ways. Although the Court expressly held a withdrawal decision to be a decision subject to the Directive, this has sometimes been understood as meaning that although provision must be made for such a decision to be amenable to review, a declaration of its unlawfulness is sufficient and it is unnecessary to provide also for its being set aside. The justification for this restrictive interpretation is given as being that the Court’s decision has to be considered in the light of the national legal situation in that case. National law conferred on the review bodies neither power to make a declaration of unlawfulness nor power to annul a withdrawal.

49. However, as the relevant passages in the judgment show, in particular paragraphs 48 to 54, by contrast with other judgments the Court did not justify its conclusion by reference to the specific national legal situation.¹⁰

⁸ — Judgment of 24 June 2004 in Case C-212/02 *Commission v Austria*, not published in the ECR, paragraph 20, and Case C-433/93 *Commission v Germany* [1995] ECR I-2303, paragraph 23.

⁹ — *Hospital Ingenieure* (cited above, footnote 4).

¹⁰ — See, for example, Case C-327/00 *Santex* [2003] ECR I-1877.

50. Instead, the Court formulated its judgment in *Hospital Ingenieure* in the abstract and generally. Thus, the statements it made there may be generalised in so far as generally applicable principles may be taken from them.

cover the same 'decisions' by a contracting authority. Accordingly, even if the Court had interpreted the word 'decisions' for the purposes of Article 1(1) only, this would have to be carried through to Article 2(1).

51. Therefore, this reference for a preliminary ruling it must now be clarified whether the Directive lays down not only an obligation to make a declaration of unlawfulness, which also exists in national law, but an obligation as well to allow for a withdrawal to be set aside, that is to say, that the Member States are required to provide for the possibility of the withdrawal being annulled.

54. As appears clearly from paragraph 49 of *Hospital Ingenieure*, the Court also expressly considered Article 2(1)(b) of the Directive and held that 'Article 1(1) of that directive does not lay down any restriction with regard to the nature and content of the decisions referred to therein. Nor can such a restriction be inferred from the wording of Article 2 (1)(b) of that directive'.

52. The answer to this question depends on the provisions of the Directive to be interpreted and applied. Whereas Article 1(1) lays down its substantive scope of application as regards which of a contracting authority's decisions are covered by the Directive, Article 2(1) sets out the legal protection the Member States must provide for.

53. Both provisions assume there to be 'decisions'. Article 2 must be regarded as a specific example of the far more general provision in Article 1. Since Article 2 is linked to Article 1, both provisions must

55. Moreover, in paragraph 55 of that judgment the Court expressly considered whether a withdrawal should be amenable to review. That the Court inserted the phrase 'where appropriate' in referring to the possibility of review merely corresponds to the Directive's requirements and is not to be misunderstood as a restriction. For it is not every time a contracting authority's decision is reviewed that it requires to be set aside, but only where the requirements for doing so are satisfied. However, provision must be made generally for the possibility of annulment.

56. Furthermore, it is apparent from the Court's judgment in *GAT*¹¹ that the procedures listed in Article 2(1) come within the category of the review procedures which the Directive requires the Member States to provide for.

57. Accordingly, one must proceed on the basis of a broad interpretation of 'decisions' in Article 1(1) and of 'decisions' in Article 2 (1)(b) of the Directive.

58. Thus, a withdrawal is one of the decisions generally subject to the Directive and also one of the decisions in respect of which the Member States have to make provisions for annulment (setting aside).

59. At this point consideration should be given to the question whether the Directive permits Member States to exempt certain decisions from the possibility of being set aside (annulled). At first glance, a judgment of the Court in infringement proceedings

against the Kingdom of Spain¹² supports this proposition, the Court in that case having declared lawful a specific form of restricting liability to review to certain decisions in the contract award procedure.

60. However, from that judgment a general principle can also be drawn that the review procedures referred to in Article 1 of the Directive 'must be conducted effectively and as rapidly as possible and must be available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement'.¹³

61. The principle inherent in the Directive of protecting undertakings which have a particular interest¹⁴ also supports an interpretation favourable to legal protection. Indeed, the facts of the dispute underlying the present proceedings demonstrate this.

62. As regards the case concerning the Spanish system of legal protection, it is first

11 — Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 53, referring to the possibility of awarding damages to be granted.

12 — Case C-214/00 *Commission v Spain* [2003] ECR I-4667.

13 — *Commission v Spain* (cited above, footnote 12), paragraph 78.

14 — *Commission v Austria* (cited above, footnote 8), paragraph 24.

to be observed that the Court dismissed the Commission's complaint principally because the Commission had not adduced the evidence required in direct actions.¹⁵

possibility of annulment deprives tenderers of the possibility of bringing actions for damages has been relied on for the conclusion that it is sufficient to permit the award of damages, without also providing for the possibility of annulment.

63. It should also be emphasised that what the Court regarded as decisive in that case was that 'the Spanish legislation enables interested parties to bring actions against not only definitive acts but also procedural acts, if they decide, directly or indirectly, the substance of the case, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests.'¹⁶

66. On that point reference should be made to the principle also enunciated in *Hospital Ingenieure* that the scope of judicial review cannot be interpreted restrictively.¹⁷

64. This is precisely what the national law applicable in the main proceedings does not allow.

67. Against that background, to exclude the setting aside of withdrawals and to limit claimants to damages would have to be regarded as an exception from the general rule that all the possibilities envisaged in Article 2(1) of the Directive are to be available in respect of a contracting authority's decisions.

65. However, the Court's judgment in *Hospital Ingenieure* has sometimes been interpreted narrowly in another regard. The Court's point that the absence of the

68. Such a restriction on the powers of review bodies is, however, provided for expressly only in Article 2(6) of the Directive.

15 — *Commission v Spain* (cited above, footnote 12), paragraph 80.

16 — *Commission v Spain* (cited above, footnote 12), paragraph 79.

17 — *Hospital Ingenieure* (cited above, footnote 4), paragraph 61.

That provision states that *after the conclusion of a contract*, following its award such powers may be limited to an award of damages.

provisions by the Member States, and in particular the necessary, or at least permissible, separation of a withdrawal into a decision to withdraw the invitation to tender and the actual act of withdrawal, which in that case need not be amenable to challenge.

69. The Directive does not, though, provide for their powers to be limited to awarding damages in any other cases.

72. The problem addressed corresponds — at least at a higher level of abstraction — to the Court's requirement in *Alcatel* that the decision awarding the contract be amenable to review.¹⁸

70. It follows that a limitation to damages expressly provided for only where the contract has been concluded subsequent to its award cannot be applied to a withdrawal. It is true that withdrawal terminates the contract award procedure, but the principle underlying the exclusion of annulment and the limitation to damages in the situation mentioned above is that once concluded, contracts ought not to be set aside. Since there is no contract in the present case, that reasoning cannot apply.

73. There is indeed a certain parallelism between a withdrawal and an award, in so far as both acts terminate a contract award procedure.

C — The transposition of the Directive's requirements

74. One might start by taking from the judgment in *Alcatel* the requirement to provide for a measure 'of which the persons concerned can acquire knowledge and which may be the subject of an application to have it set aside'.¹⁹

71. The second question concerns in substance the transposition of the Directive's

¹⁸ — Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671.

¹⁹ — *Alcatel Austria and Others* (cited above, footnote 18), paragraph 48.

75. Indeed, whichever decisions by a contracting authority should be liable to challenge, effective legal protection pre-supposes an external act by a contracting authority.

76. As regards the separation of a decision preceding an act, indicating the intention to act, from the act and the act itself, it is to be observed that in principle it is possible to imagine such a separation in respect of every act by a contracting authority. Thus, before a tender was eliminated, there would be a decision of the contracting authority notifying its intention to eliminate the tender.

77. In the present proceedings, however, irrespective of the sense or permissibility in law of such duplication, the only question to be decided is whether such separation in respect of withdrawal is sufficient.

78. The Commission submitted that the decision to withdraw, that is to say the withdrawal itself, must be amenable to challenge and that separation did not fulfil the Directive's requirements. The Commission based this argument on the fact that *Alcatel* concerned the contract award and the related conclusion of the contract. By contrast, a withdrawal did not precede the conclusion of a contract.

79. However, there are limits to the extent to which the judgment in *Alcatel* may be generalised. Not all of what the Court said in *Alcatel* can be applied to other sets of facts. This does not, however, mean that solutions similar to those permissible in relation to a contract award are necessarily not permissible in other cases.

80. In infringement proceedings against the Republic of Austria, the Court held that a separation was sufficient at least as regards a contract award. According to that judgment, the announcement of the award decision was enough if followed by a waiting or standstill period. The latter is intended to allow tenderers the opportunity to bring an appeal.²⁰

81. However, it is not possible to conclude from the grounds of this judgment or the other case-law of the Court on the Directive that separating acts other than awards would infringe Community law. The decisive factor is achieving the essential objectives of the Directive: the effectiveness and rapidity of legal protection. It is precisely the latter objective that could in fact be better served by holding a decision preceding the actual withdrawal to be amenable to review.

20 — *Commission v Austria* (cited above, footnote 8), paragraph 21 et seq.

82. Thus, by appropriate separation the national legislature can maintain the act of withdrawal as not being amenable to challenge. However, such a solution must satisfy the requirements of the Directive and the rest of Community law.

83. As regards decisions to withdraw an invitation to tender, the requirements include in particular the announcement of the decision to the tenderers, whose names are known where the withdrawal follows the opening of the tenders, and a reasonable waiting period.

84. For the sake of completeness, reference must be made to the amendments affecting withdrawal in the new legislative package. The new procurement directives provide that a decision not to award a contract is to be notified without the need for an application.²¹

85. Finally, it is to be observed that the effects of setting aside a withdrawal, namely the legal consequences for the withdrawn contract award procedure, or even for the

contract award procedure following the withdrawal, are not within the scope of the questions, and therefore on procedural grounds cannot be considered by the Court.

D — Interpretation in conformity with Community law and direct applicability

86. As the Court has consistently emphasised in its case-law, provisions of national law are to be interpreted in conformity with Directives. That obviously applies for the interpretation of national procurement law in the light of the Directive.²²

87. If it is not possible to interpret national law in conformity with the Directive, it must be considered whether the relevant provision of the Directive is directly applicable. That presupposes that the content of the provision is unconditional and sufficiently precise.

88. The present reference for a preliminary ruling concerns principally Article 2(1)(b) of

21 — Article 41(1) of 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) and Article 49(1) of 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).

22 — See *Alcatel Austria and Others* (cited above, footnote 18), paragraph 49; Case C-76/97 *Tögel* [1998] ECR I-5357, paragraph 25; and *Santex* (cited above, footnote 10), paragraph 63.

the Directive and the requirement it lays down that it must be possible for decisions of a contracting authority to be set aside, withdrawal and the related decision being such decisions.

procedures may hear applications under the conditions laid down in that provision'.²³ If one reads this passage in conjunction with the paragraph preceding it, in which the Court refers to the possibility of claiming damages where an interpretation in conformity with Community law is impossible, one might conclude that Article 2(1) of the Directive was denied direct applicability.

89. It might be objected to the proposition that a provision of the Directive was directly applicable that it is clear from the case-law of the Court that this Directive, including in particular Article 2(1), is not directly applicable.

92. A similar view might be taken of the Court's judgment in *Tögel*, which specifically raised the question as to the jurisdiction of national bodies in respect of a whole category of awards. In that case too, the Court was required to interpret Article 2(1) of the Directive and did not recognise it as being directly applicable.²⁴

90. For that reason, before considering whether the requirements for direct applicability are satisfied, this view has to be examined in the light of the relevant judgments of the Court.

91. The first judgment that can be cited against the direct applicability of Article 2(1) is *Alcatel*. In that case, the Court stated that 'Article 2(1)(a) and (b) of Directive 89/665 cannot be interpreted to the effect that, even where there is no award decision which may be the subject of an application to have it set aside, the bodies in the Member States having power to review public procurement

93. However, common to both judgments is the fact that they have to be considered against the background of national jurisdictional problems, and in my opinion they do not in terms generally exclude the direct applicability of the provisions of the Directive in question. The scope of both these judgments is thus limited in that no general statement can be drawn from them as regards direct applicability.

23 — *Alcatel Austria and Others* (cited above, footnote 18), paragraph 50.

24 — *Tögel* (cited above, footnote 22) paragraph 21 et seq.

94. By contrast, the case-law relating to this Directive and in a judgment delivered after *Alcatel* and *Tögel* includes express recognition of the direct applicability of provisions of the Directive, namely their overriding effect.

95. Thus, in *Santex* the Court held that where application in accordance with the requirements of the Directive is not possible, 'the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessary disapplying any provision in so far as its application would, in the circumstances of the case, lead to a result contrary to Community law'.²⁵

96. Specifically, the Court ensured that tenderers should be able to raise objections to decisions of the contracting authorities by way of the national court disapplying certain national procedural rules. The fact that national law permitted such disapplication cannot be regarded as a general precondition.

97. Analysis of the case-law on the Directive accordingly permits the conclusion that Article 2(1)(b) of the Directive is directly applicable.

98. The general requirements for a provision of a Directive to be directly applicable are fulfilled. The wording of Article 2(1)(b) makes it clear that this provision is sufficiently precise. There can be no doubt that it is unconditional as regards its context.

99. The fact that the Member States have some discretion in regulating national review procedures does not preclude Article 2(1) of the Directive from being directly applicable, since the requirements it lays down are to be regarded as a minimum level of protection. According to the case-law of the Court, for the purposes of direct applicability it is enough that such minimum protection is sufficiently certain.²⁶

100. The national court can comply with the requirements of Articles 1 and 2 of the Directive by either not applying the national provisions relating to decisions which may be challenged separately, including the provision as to the admissibility of a review, or by extending the category of such decisions so as to include withdrawals.

25 — *Santex* (cited above, footnote 10), paragraph 64.

26 — See most recently Joined Cases C-397/01 to C-403/01 *Pfelffer and Others* [2004] ECR I-8835, paragraph 105.

VI — Conclusion

101. For the foregoing reasons, it is submitted that the Court should answer the questions referred as follows:

Article 1 in conjunction with Article 2(1)(b) 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 is to be interpreted as meaning that the Member States are obliged to make a contracting authority's decision, prior to withdrawal of the invitation to tender, that it will withdraw the invitation to tender amenable to review, and the applicant is entitled to have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once withdrawal has taken place, of obtaining an award of damages.

Article 2(1)(b) of the Directive is so unconditional and sufficiently precise that, in the event of withdrawal of the invitation to tender after the opening of the tenders, an individual is entitled to rely on it directly before the national courts and to seek a review on the basis of it.