

**European Court of Justice, 14 February 2008,
Varec v Belgian State**



TRADE SECRETS LAW

Respect business secrecy

- That the body responsible for the reviews must ensure that confidentiality and business secrecy are safe-guarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration.

Accordingly, the answer to the question referred must be that Article 1(1) of Directive 89/665, read in conjunction with Article 15(2) of Directive 93/36, must be interpreted as meaning that the body responsible for the reviews provided for in Article 1(1) must ensure that confidentiality and business secrecy are safe-guarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration. It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, so as to ensure that the proceedings as a whole accord with the right to a fair trial.

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European Court of Justice, 14 February 2008

(A. Rosas, J.N. Cunha Rodrigues, J. Klučka, P. Lindh and A. Arabadjiev)

JUDGMENT OF THE COURT (Third Chamber)

14 February 2008 (*)

(Public procurement – Review – Directive 89/665/EEC – Effective review – Meaning – Balance between the adversarial principle and the right to observance of business secrets – Protection, by the body responsible for the review, of the confidentiality of information provided by economic operators)

In Case C-450/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'État (Council of State) (Belgium), made by decision of 24 October 2006, received at the Court on 6 November 2006, in the proceedings

Varec SA

v

État belge,

intervener:

Diehl Remscheid GmbH & Co.,

THE COURT (Third Chamber),

composed of A. Rosas, President of Chamber, J.N.

Cunha Rodrigues (Rapporteur), J. Klučka, P. Lindh and

A. Arabadjiev, Judges,

Advocate General: E. Sharpston,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Varec SA, by J. Bourtembourg and C. Molitor, avocats,

– the Belgian Government, by A. Hubert, acting as Agent, assisted by N. Cahen, avocat,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the Commission of the European Communities, by B. Stromsky and D. Kukovec, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2007,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 1(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 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1; 'Directive 89/665').

2 The reference was made in proceedings between Varec SA ('Varec') and the Belgian State, represented by the Minister for Defence, concerning the award of a public contract for the supply of track links for 'Leopard' tanks.

Legal context

Community legislation

3 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 national rules implementing that law.'

4 Article 33 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) repeals Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), and provides that the references to that repealed directive are to be construed as references to Directive 93/36. Similarly, Article 36 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) repeals Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5), and provides that references to Directive 71/305 are to be construed as references to Directive 93/37.

5 Article 2(8) of Directive 89/665 provides: 'Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [234 EC] and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

6 According to Article 7(1) of Directive 93/36, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1; 'Directive 93/36'):

'The contracting authority shall, within 15 days of the date on which the request is received, inform any eliminated candidate or tenderer of the reasons for rejection of his application or his tender and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.

However, contracting authorities may decide that certain information on the contract award, referred to in the preceding subparagraph, shall be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers.'

7 Article 9(3) of Directive 93/36 provides: 'Contracting authorities who have awarded a contract shall make known the result by means of a notice.

However, certain information on the contract award may, in certain cases, not be published where release of such information would impede law enforcement or otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of particular enterprises, public or private, or might prejudice fair competition between suppliers.'

8 Article 15(2) of Directive 93/36 provides: 'The contracting authorities shall respect fully the confidential nature of any information furnished by the suppliers.'

9 The provisions of Articles 7(1), 9(3) and 15(2) of Directive 93/36 have been substantially reproduced in Article 6, the fifth subparagraph of Article 35(4), and Article 41(3) respectively 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).

National legislation

10 Article 87 of the Decree of the Regent of 23 August 1948 establishing the procedure before the Administrative Section of the Conseil d'État (Moniteur belge of 23 to 24 August 1948, p. 6821), provides:

'Parties, their advisers and the government commissioner may inspect the case-file at the registry.'

11 According to the third and fourth subparagraphs of Article 21 of the Coordinated Laws on the Conseil d'État of 12 January 1973 (Moniteur belge of 21 March 1973, p. 3461):

'Where the defendant fails to lodge the administrative file within the prescribed period, without prejudice to Article 21a, the facts alleged by the applicant shall be deemed to have been proven, unless they are manifestly inaccurate.

Where the administrative file is not in the possession of the defendant, he shall inform the Chamber seized of the action accordingly. The Chamber may order that the administrative file be lodged, on penalty of a fine in accordance with Article 36.'

The dispute in the main proceedings and the question referred for a preliminary ruling

12 On 14 December 2001, the Belgian State initiated a contract award procedure in respect of the supply of track links for 'Leopard' tanks. Two tenderers submitted bids, namely Varec and Diehl Remscheid GmbH & Co. ('Diehl').

13 When examining those tenders, the Belgian State considered that the tender submitted by Varec did not satisfy the technical selection criteria and that that tender was unlawful. By contrast, it took the view that the tender submitted by Diehl satisfied all the selection criteria, that it was lawful and that its prices were normal. Consequently, the Belgian State awarded the contract to Diehl by decision of the Minister for Defence of 28 May 2002 ('the award decision').

14 On 29 July 2002, Varec brought an action for annulment of the award decision before the Conseil d'État. Diehl was granted leave to intervene.

15 The file delivered to the Conseil d'État by the Belgian State did not include Diehl's tender.

16 Varec requested that that tender be added to the file. The same request was made by the Auditeur of the Conseil d'État who was responsible for drawing up a report ('the Auditeur').

17 On 17 December 2002, the Belgian State added Diehl's tender to the file, explaining that neither the plans of the whole of the proposed track link nor those of its constituent parts were included. It stated that these had been returned to Diehl in accordance with the specification and at Diehl's request. It further stated that that was why it could not place those documents on the file and that, if it was essential that they be included, it would be necessary to ask Diehl to provide them. The Belgian State also observed that Varec and Diehl are in dispute about the intellectual property rights to the plans in question.

18 By letter of the same date, Diehl informed the Auditeur that the version of its tender that was placed on the file by the Belgian State contained confidential data and information, and that it was objecting on the ground that third parties, including Varec, would be able to peruse those confidential data and information relating to business secrets included in the tender. According to Diehl, certain passages in Annexes 4, 12 and 13 to its tender contain specific data concerning the detailed revisions of the relevant manufacturing plans and also the industrial process.

19 In his report of 23 February 2006, the Auditeur concluded that the award decision should be annulled on the ground that 'in the absence of the defendant's cooperation in the sound administration of justice and fair proceedings, the only possible sanction is the annulment of the administrative measure whose lawfulness is not established where documents are excluded from inter partes proceedings'.

20 The Belgian State challenged that conclusion and requested the Conseil d'État to rule on the issue of respecting the confidentiality of Diehl's tender documents containing information relating to business secrets which had been placed on the file in the proceedings before that court.

21 In those circumstances, the Conseil d'État decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 1(1) of [Directive 89/665], read with Article 15(2) of [Directive 93/36] and Article 6 of [Directive 2004/18], be interpreted as meaning that the authority responsible for the appeal procedures provided for in that article must ensure confidentiality and observance of the business secrets contained in the files communicated to it by the parties to the case, including the contracting authority, whilst at the same time being entitled to apprise itself of such information and take it into consideration?'

Admissibility

22 Varec submits that in order to resolve the dispute before the Conseil d'État it is not necessary for the

Court to answer the question referred for a preliminary ruling.

23 In that regard, it must be observed that, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. Similarly, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, in particular, Case C-326/00 IKA [2003] ECR I-1703, paragraph 27; Case C-145/03 Keller [2005] ECR I-2529, paragraph 33; and Case C-419/04 Conseil général de la Vienne [2006] ECR I-5645, paragraph 19).

24 Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 Foglia [1981] ECR 3045, paragraph 21). The Court 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 (see, in particular, 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 Conseil général de la Vienne, paragraph 20).

25 It must be pointed out that that is not the case here. If the Conseil d'État follows the form of order proposed by the Auditeur, it will have to annul the award decision which is before it, without examining the substance of the dispute. On the other hand, if the provisions of Community law which the Conseil d'État seeks to have interpreted justify the confidential treatment of the documents of the file at issue in the main proceedings, it will be in a position to examine the substance of the dispute. For those reasons it may be concluded that the interpretation of those provisions is necessary for the resolution of the dispute in the main proceedings.

Merits

26 In the question referred to the Court, the Conseil d'État refers both to Directive 93/36 and to Directive 2004/18. Since Directive 2004/18 has replaced Directive 93/36, it is necessary to establish which of the two directives is relevant to the examination of the question referred.

27 It must be borne in mind that, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they

enter into force, whereas substantive rules are usually interpreted as not applying, in principle, to situations existing before their entry into force (see Case C-201/04 Molenbergnatie [2006] ECR I-2049, paragraph 31 and the case-law cited).

28 The dispute in the main proceedings concerns the right to the protection of confidential information. As the Advocate General noted in point 31 of her Opinion, such a right is in essence a substantive right, even if its application can have procedural consequences.

29 The right crystallised when Diehl submitted its tender in the award procedure at issue in the main proceedings. Since that date was not specified in the order for reference, it is appropriate to conclude that it falls between 14 December 2001, the date of the call for tenders, and 14 January 2002, the date of the opening of bids.

30 Directive 2004/18 had not yet been adopted at that time. It follows that the provisions of Directive 93/36 must be taken into consideration for the purposes of the dispute in the main proceedings.

31 There is no provision in Directive 89/665 which expressly governs the protection of confidential information. It is necessary, in that respect, to refer to that directive's general provisions, and in particular to Article 1(1).

32 Article 1(1) provides that the Member States are to take the measures necessary to ensure that, as regards contract award procedures falling within the scope of, *inter alia*, Directive 93/36, decisions taken by the contracting authorities may be reviewed effectively on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

33 Since the objective of Directive 89/665 is to ensure compliance with Community law in the field of public procurement, Article 1(1) of that directive must be interpreted in the light of the provisions of Directive 93/36 as well as of other provisions of Community law in the field of public procurement.

34 The principal objective of the Community rules in that field is the opening-up of public procurement to undistorted competition in all the Member States (see, to that effect, Case C-26/03 Stadt Halle and RPL Lochau [2005] ECR I-1, paragraph 44).

35 In order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures.

36 Furthermore, both by their nature and according to the scheme of Community legislation in that field, contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators. Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them.

37 Accordingly, Article 15(2) of Directive 93/36 provides that the contracting authorities are obliged to respect fully the confidential nature of any information furnished by the suppliers.

38 In the specific context of informing an eliminated candidate or tenderer of the reasons for the rejection of his application or tender, and of publishing a notice of the award of a contract, Articles 7(1) and 9(3) of Directive 93/36 give the contracting authorities the discretion to withhold certain information where its release would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers.

39 Admittedly, those provisions relate to the conduct of the contracting authorities. It must nevertheless be acknowledged that their effectiveness would be severely undermined if, in an appeal against a decision taken by a contracting authority in relation to a contract award procedure, all of the information concerning that award procedure had to be made unreservedly available to the appellant, or even to others such as the interveners.

40 In such circumstances, the mere lodging of an appeal would give access to information which could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure concerned. Such an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors' business secrets.

41 In such an appeal, the respondent would be the contracting authority and the economic operator whose interests are at risk of being damaged would not necessarily be a party to the dispute or joined to the case to defend those interests. Accordingly, it is all the more important to provide for mechanisms which will adequately safeguard the interests of such economic operators.

42 In a review, the body responsible for the review procedure assumes the obligations laid down by Directive 93/36 with regard to the contracting authority's respect for the confidentiality of information. The 'effective review' requirement provided for in Article 1(1) of Directive 89/665, read in conjunction with Articles 7(1), 9(3) and 15(2) of Directive 93/36, therefore imposes on that body an obligation to take the measures necessary to guarantee the effectiveness of those provisions, and thereby to ensure that fair competition is maintained and that the legitimate interests of the economic operators concerned are protected.

43 It follows that, in a review procedure in relation to the award of public contracts, the body responsible for that review procedure must be able to decide that the information in the file relating to such an award should not be communicated to the parties or their lawyers, if that is necessary in order to ensure the protection of fair competition or of the legitimate interests of the economic operators that is required by Community law.

44 The question arises whether that interpretation is consistent with the concept of a fair hearing in accor-

dance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR').

45 As the order for reference shows, Varec claimed before the Conseil d'État that the right to a fair hearing means that both parties must be heard in any judicial procedure, that the adversarial principle is a general principle of law, that it has a foundation in Article 6 of the ECHR, and that that principle means that the parties are entitled to a process of inspecting and commenting on all documents or observations submitted to the court with a view to influencing its decision.

46 The Court notes that Article 6(1) of the ECHR provides *inter alia* that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal ...'. The European Court of Human Rights has consistently held that the adversarial nature of proceedings is one of the factors which enables their fairness to be assessed, but it may be balanced against other rights and interests.

47 The adversarial principle means, as a rule, that the parties have a right to a process of inspecting and commenting on the evidence and observations submitted to the court. However, in some cases it may be necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest (see *Rowe and Davis v The United Kingdom* [GC] no 28901/95, §61, ECHR 2000-II, and *V v Finland* no 40412/98, §75, ECHR 2007-...).

48 One of the fundamental rights capable of being protected in this way is the right to respect for private life, enshrined in Article 8 of the ECHR, which flows from the common constitutional traditions of the Member States and which is restated in Article 7 of the Charter of fundamental rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) (see, in particular, *Case C-62/90 Commission v Germany* [1992] ECR I-2575, paragraph 23, and *Case C-404/92 P X v Commission* [1994] ECR I-4737, paragraph 17). It follows from the case-law of the European Court of Human Rights that the notion of 'private life' cannot be taken to mean that the professional or commercial activities of either natural or legal persons are excluded (see *Niemietz v Germany*, judgment of 16 December 1992, Series A no 251-B, §29; *Société Colas Est and Others v France*, no 37971/97, §41, ECHR 2002-III; and also *Peck v The United Kingdom* no 44647/98, §57, ECHR 2003-I). Those activities can include participation in a contract award procedure.

49 The Court of Justice has, moreover, acknowledged that the protection of business secrets is a general principle (see *Case 53/85 AKZO Chemie and AKZO Chemie UK v Commission* [1986] ECR 1965, paragraph 28, and *Case C-36/92 P SEP v Commission* [1994] ECR I-1911, paragraph 37).

50 Finally, the maintenance of fair competition in the context of contract award procedures is an important public interest, the protection of which is

acknowledged in the case-law cited in paragraph 47 of this judgment.

51 It follows that, in the context of a review of a decision taken by a contracting authority in relation to a contract award procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.

52 The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute (see, by analogy, *Case C-438/04 Mobistar* [2006] ECR I-6675, paragraph 40) and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial.

53 To that end, the body responsible for the review must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets (see, by analogy, *Mobistar*, paragraph 40).

54 Having regard to the extremely serious damage which could result from improper communication of certain information to a competitor, that body must, before communicating that information to a party to the dispute, give the economic operator concerned an opportunity to plead that the information is confidential or a business secret (see, by analogy, *AKZO Chemie and AKZO Chemie UK v Commission*, paragraph 29).

55 Accordingly, the answer to the question referred must be that Article 1(1) of Directive 89/665, read in conjunction with Article 15(2) of Directive 93/36, must be interpreted as meaning that the body responsible for the reviews provided for in Article 1(1) must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration. It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, so as to ensure that the proceedings as a whole accord with the right to a fair trial.

Costs

56 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:

Article 1(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 relating to the coordination of procedures for the award of public service contracts, read in conjunction with Article 15(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, must be interpreted as meaning that the body responsible for the reviews provided for in Article 1(1) must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration. It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, so as to ensure that the proceedings as a whole accord with the right to a fair trial.

OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 25 October 2007 (1)

Case C-450/06

Varec

v

État belge

Public procurement – Award review proceedings – Evidence containing confidential information

The Belgian Conseil d'État (Council of State) asks whether a body hearing an appeal concerning the award of a public contract must protect the confidentiality of business secrets while remaining entitled to take account of evidence containing them.

2. The issue highlights the conflict between the right of one party to require production of and access to relevant evidence and that of another to maintain the confidentiality of certain evidence vis-à-vis a business competitor.

Community legislation

3. Article 1(1) of Directive 89/665 (2) requires Member States to ensure that, as regards procedures falling within the scope of the directives coordinating

award procedures for public works, supply and service contracts, (3) decisions taken by contracting authorities can be reviewed effectively and as rapidly as possible in accordance with the conditions set out in the remainder of the directive, if it is alleged that Community public procurement law or national implementing rules have been infringed.

4. The directive then sets out conditions to be observed in such review procedures, with a view to ensuring a speedy and efficient outcome in accordance with Community law. However, it is silent in respect of the treatment of confidential information contained in documents submitted or requested as evidence. Under Article 2(8), the review body must follow a 'procedure in which both sides are heard'.

5. Questions of confidentiality at the award stage in public supply contracts were dealt with, at the time of the award of the contract in the main proceedings, in Directive 93/36, (4) in particular by Article 15(2), which provided: 'The contracting authorities shall respect fully the confidential nature of any information furnished by the suppliers.' In addition, Articles 7(1) and 9(3) provided for notice to be given of the award, subject to the contracting authority's discretion to withhold certain information where its release, inter alia, 'would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers'.

6. Directive 93/36 was repealed and replaced with effect from 31 January 2006 by Directive 2004/18, (5) Article 6 of which provides: 'Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers ..., and in accordance with the national law to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders.'

Belgian legislation

Confidentiality of tender documents

7. Article 32 of the Belgian Constitution (6) guarantees public access to administrative documents as a general rule. Among exceptions to that rule is Article 6(1) of the Law of 11 April 1994 on administrative publicity, (7) which allows an authority to refuse access if the interest in granting it is outweighed by the interest in protecting, inter alia, business or manufacturing information of a confidential nature.

8. The requirement for a public contracting authority to respect the confidentiality of business secrets contained in documents submitted to it is embodied in various provisions of the Belgian legislation covering award procedures – in particular, at the time of the award in issue in the main proceedings, Articles 25(4), 51(4) and 80(4) of the Royal Decree of 8 January 1996 on public works, supply and service contracts and on public works concessions.

9. Since then, the Law of 15 June 2006 on public procurement and certain works, supply and service contracts has been enacted to transpose Directive 2004/18. The first two paragraphs of Article 11 read:

‘Neither the contracting authority nor any person who, by reason of the duties or functions with which he is entrusted, has knowledge of confidential information relating to a contract or to the award or performance of the contract, communicated by candidates, tenderers, suppliers or service providers, shall divulge any such information. The information concerned shall include in particular technical or commercial secrets and confidential aspects of tenders.

In the event of a review procedure, the review body and the contracting authority shall take care to ensure the confidential nature of the information referred to in the preceding paragraph.’

10. However, like most of the other provisions of that law, Article 11 has not yet entered into force. (8)

Proceedings before the Conseil d’État

11. Appeals against decisions in award procedures may be brought before the Conseil d’État. In matters of judicial review, procedure before that court is governed in particular by a Decree of the Regent of 23 August 1948 and by the Coordinated Laws of 12 January 1973.

12. Article 6 of the Decree of the Regent requires the defendant authority to lodge the administrative file with the registry within 60 days from service of the application. If the file is not in the possession of that authority, there is further provision for it to be required of the authority which does hold it.

13. Article 87 of the Decree of the Regent provides that parties and their lawyers may inspect the file at the registry, a right which is also affirmed in Article 19 of the Coordinated Laws.

14. Article 21 of the Coordinated Laws allows the applicant to request an order that the defendant authority lodge the administrative file. It further provides that, if the file is not lodged within the time-limit set, the facts alleged by the applicant are to be deemed proven unless they are manifestly inaccurate. The Conseil d’État states that the latter provision applies also when only part of the file has not been lodged.

15. It appears from the order for reference that the Conseil d’État has consistently held that neither the Law of 11 April 1994 nor the Royal Decree of 8 January 1996 (9) can be relied upon to prevent a court reviewing the validity of an administrative decision from examining documents which are essential for it to be able to assess whether an alleged ground for annulment is well founded. (10)

16. It appears also that no provision governing procedure before the Conseil d’État explicitly allows anything in the documents lodged to be treated as confidential vis-à-vis a party to the proceedings.

Facts and procedure

17. The main proceedings arise out of an invitation to tender for the supply of tank track links, issued by the Belgian Defence Ministry. Two bids were received, one from Varec SA (‘Varec’), the other from Diehl Remscheid GmbH & Co (‘Diehl’). On 28 May 2002,

the contract was awarded to Diehl. The award decision listed a number of technical, administrative and legal grounds for excluding Varec’s bid but concluded that Diehl satisfied all the selection criteria. That conclusion was based on, inter alia, certain plans and samples annexed to Diehl’s bid. At Diehl’s request, those items were returned to it after evaluation of the bids.

18. Varec, in its challenge before the Conseil d’État, asserts that Diehl’s bid did not in fact comply with all the criteria for the award. In order to evaluate that claim, it considers, the plans and samples referred to in the preceding paragraph should be examined as evidence both by the reviewing court and by the party who has asked for that review to take place.

19. However, the file lodged by the defendant contracting authority does not contain the relevant items, because they were returned to Diehl. Diehl, which has intervened in the proceedings, objects to lodging them on the ground that they embody confidential information and business secrets to which it does not wish Varec to have access. The auditeur (11) considers that if the contracting authority does not lodge a complete file, thereby failing in its duty to assist in ensuring proper administration of justice and fair proceedings, there is no alternative but to annul the contested award.

20. In those circumstances, the Conseil d’État asks the Court:

‘Must Article 1(1) of [Directive 89/665/EEC], read with Article 15(2) of [Directive 93/36/EEC], and Article 6 of [Directive 2004/18/EC], be interpreted as meaning that the authority responsible for the appeal procedures provided for in that article must ensure confidentiality and observance of the business secrets contained in the files communicated to it by the parties to the case, including the contracting authority, whilst at the same time being entitled to apprise itself of such information and take it into consideration?’

21. Written observations have been submitted by the Belgian and Austrian Governments and by the Commission. Varec has not submitted observations because, in its view, the answer to the question posed is not necessary in order to resolve the dispute before the Conseil d’État.

22. No hearing has been requested and none has been held.

23. It should be added that, by the same judgment, the Conseil d’État also asked the Belgian Constitutional Court for a preliminary ruling on the question:

‘Do Articles 21 and 23 of the Coordinated Laws on the Council of State of 12 January 1973, interpreted as meaning that the confidential documents in the administration’s file must be placed in the administrative file and must be communicated to the parties, infringe Article 22 of the Constitution, whether or not read with Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights, where they do not enable business secrets to be safeguarded?’ (12)

24. The Constitutional Court delivered its ruling on 19 September 2007.

25. I had originally envisaged delivering this Opinion on 20 September 2007. However, when I learned of the date set for the Constitutional Court's judgment, I considered it preferable, in order best to assist this Court in reaching its decision, to allow myself the opportunity of consulting that judgment first, and consequently postponed the delivery of this Opinion.

26. In its judgment, the Constitutional Court held essentially that it would be contrary to Article 22 of the Constitution, read with Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights, to interpret the provisions in question as precluding a defendant authority from relying on the confidentiality of items in the administrative file in order to prevent their communication to the parties and as precluding the Conseil d'État from assessing the alleged confidential nature of such items. However, it would be consistent with those higher norms to interpret the provisions as allowing the defendant authority to rely on confidentiality for such purposes and the Conseil d'État to assess the confidential nature of the items.

Assessment

Admissibility

27. Varec's view that the answer to the question posed is not necessary in order to resolve the dispute before the Conseil d'État – a somewhat surprising view, if Varec originally sought production of the disputed evidence – might be interpreted as implicitly casting doubt on the admissibility of the reference for a preliminary ruling.

28. However, the Court has consistently held that 'in principle it is for the national courts alone to determine, having regard to the particular features of each case, both the need to refer a question for a preliminary ruling and the relevance of that question'. (13)

29. I see nothing in the circumstances of the present case that would justify calling into question the Conseil d'État's assessment that an answer to the question posed is necessary to enable it to give judgment. If Varec's claim is that Diehl's tender did not meet all the criteria for the award of the contract, if it has not withdrawn that claim in respect of the content of the disputed plans and samples, and if Diehl continues to object to Varec's gaining access to those items, then, given the procedural rules applicable in the Conseil d'État, an answer to the question referred seems relevant to any decision as to the pursuit of the procedure before that court.

Applicable legislation

30. In view of the Court's case-law to the effect that procedural rules generally apply to all proceedings pending at the time when they enter into force, whereas substantive rules do not usually apply, in principle, to situations existing before their entry into force, (14) it is necessary to consider whether the rules whose interpretation is sought are procedural or substantive.

31. I agree here with the Commission. A right to the protection of confidential information, although it has procedural ramifications, and even though the context in which it arises before the Conseil d'État is largely a

procedural one, is in essence a substantive right. That right first crystallised, in the main proceedings, when Diehl submitted its tender in the original award procedure. What is at issue now is the ongoing protection of that continuing substantive right.

32. Consequently, the Community law which falls to be interpreted is that in force at the time of the award procedure in 2002, namely Directives 89/665 and 93/36, to the exclusion of Directive 2004/18. (15) It may be added that in any event Article 6 of the latter directive, although more elaborately worded than Article 15(2) of Directive 93/36, contains essentially the same substantive provision, so that the situation after its entry into force is no different.

The question referred

Transparency and effective review

33. Article 1(1) of Directive 89/665 requires Member States to ensure that award decisions can be reviewed effectively. Decisions cannot be reviewed effectively unless the reviewing body has at its disposal all the evidence relevant to assessing whether they were taken in accordance with all the applicable rules and conditions. Transparency, which is an important feature of public procurement procedures, must be guaranteed in order to 'ensure that public funds are spent honestly and efficiently, on the basis of a serious assessment and without any kind of favouritism or quid pro quo whether financial or political'. (16)

34. Consequently, if it is alleged before a review body acting pursuant to Directive 89/665 that a contract was awarded irregularly, and that information taken into account by the contracting authority provides evidence of the irregularity, then the review body can carry out its duty of effective review to the full extent only if it has that information at its disposal.

The right to a fair hearing

35. As this Court has held, it would infringe a fundamental principle of law to base a judicial decision on facts or documents of which the parties, or one of them, have not been able to take cognisance and in relation to which they have not therefore been able to state their views. (17)

36. The European Court of Human Rights has also held that a fundamental aspect of the right to a fair hearing in all civil or criminal proceedings is that both parties must be heard and enjoy equality of arms, so that each party must be able to take cognisance of observations or evidence submitted by the other party – or by an independent judicial official, by an administration or by the court whose judgment is appealed against – and to comment on them. (18)

37. Consequently, where a review body takes information into account in its decision, at least the substance of that information, in so far as it affects that decision, should in principle be available also to all the principal parties to the proceedings (19) in order to respect their right to a fair hearing.

38. However, it may be thought that a party's right to a fair hearing is in no way impaired if he is denied access to evidence which is not taken into account to his detriment and which could not have been taken into

account in his favour. Such evidence could thus legitimately be withheld from him in order to protect, for example, business secrets, on the basis of a reasonable and duly substantiated application for confidential treatment.

39. Under the European Convention on Human Rights and under the Charter of Fundamental Rights, (20) the right to a fair hearing is an unqualified right. However, it does not follow that the entitlement to disclosure of relevant evidence is likewise an absolute right. The European Court of Human Rights has indeed consistently held, even in the context of criminal proceedings, that evidence may be withheld where that is necessary to preserve the fundamental rights of another individual or to safeguard an important public interest.

40. However, such measures restricting the rights of the defence are permissible only when they are strictly necessary, and any difficulties caused to the defence by a limitation on its rights must be sufficiently counter-balanced by the procedures followed by the judicial authorities. (21)

The right to protection of business secrets

41. Directive 93/36, governing award procedures, explicitly requires contracting authorities to protect tenderers' business secrets, in particular vis-à-vis other tenderers. Directive 89/665, governing review procedures, does not explicitly extend that requirement to review bodies.

42. All the observations submitted (22) express the view that there is none the less an implicit requirement for such bodies to protect business secrets, and I agree. A right to such protection is recognised in principle in Community law.

43. Under Article 41 of the Charter of Fundamental Rights, the right to good administration includes 'the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy'. A general obligation to respect business secrecy is imposed on the Community institutions by Article 287 EC, and confirmed in a number of legislative provisions, particularly in the field of competition. That obligation, admittedly, is thus binding only on the Community institutions but, in SEP, (23) the Court made specific reference to the existence of a 'general principle of the right of undertakings to the protection of their business secrets', of which the Treaty article and subordinate provisions were an expression.

44. Moreover, where confidentiality is protected at the award stage of a procurement procedure, that protection would be liable to lose all value if it were not ensured equally at any subsequent review stage.

45. To adapt the words of the Court in AKZO Chemie, (24) a failure to protect information submitted as confidential at the award stage of such a procedure would lead to the unacceptable consequence that an unsuccessful tenderer might be inspired to challenge an award – or even to submit a tender manifestly doomed to rejection, with a view to being entitled to challenge the award – solely in order to gain access to a competitor's business secrets.

46. However, as with the entitlement to disclosure of relevant evidence, the right to confidential treatment of information is not absolute. For example, the rights conferred by Article 8(1) of the European Convention on Human Rights, which include the confidentiality of private, and in some circumstances business, correspondence, (25) may pursuant to Article 8(2) be restricted, where necessary and in accordance with the law, in order, inter alia, to protect the rights of others.

Reconciling the conflicting interests

47. It is evident that conflicts are likely to arise between the right to confidential treatment of business secrets, the need for transparency in the field of public procurement, the duty of review bodies to ensure effective review and the right of all parties to a fair hearing.

48. To the extent possible, those interests should obviously be reconciled, although it will not always be feasible to reconcile them fully. In particular, it will in some cases be necessary to restrict one party's right – to require confidential treatment of business secrets or to have access to all the evidence in the file – in order to ensure that the very substance or essence of the other party's right, or the court's power and duty of effective review, is not impaired. However, any restriction must not go beyond what is necessary for that purpose, and a fair balance must be struck between the conflicting rights. (26)

49. Where rights are not absolute, (27) they must be considered in relation to their function. Restrictions may be imposed, provided that they meet objectives of general interest and do not constitute a disproportionate and intolerable interference impairing the very substance of the rights. (28)

50. In award review proceedings of the kind in issue in the present case, the review body could first examine any disputed evidence itself and then place on the file accessible to all the principal parties only such evidence as it judges relevant to deciding the case before it. Evidence which is not placed on the file should not be taken into account. Some evidence might however be placed on the file in a masked, truncated or otherwise edited form in order to protect business secrets, if the court or tribunal concerned considered that full disclosure of the evidence in question would genuinely be detrimental to the legitimate interests of a party which had made an application requesting confidentiality of that information.

51. A reasonable and pragmatic solution could be for the review body to request the party holding the evidence to provide an edited version which could be made available to the other party or parties – subject to the review body's own supervision in order to ensure that only genuinely confidential elements which do not appear decisive to the resolution of the dispute are edited out. In that case, even if the review body has seen evidence concealed from certain parties, it should endeavour not to use that evidence in any way which could infringe those parties' rights to a fair hearing and to equality of arms.

An illustration

52. An example of that type of approach may be seen in the ‘Steel Beams’ cases before the Court of First Instance. (29) In March and April 1994, 11 undertakings brought actions for the annulment of a Commission decision under the ECSC Treaty concerning concerted practices by producers of steel beams. The actions were dealt with together and, for part of the procedure, joined.

53. Article 23 of the ECSC Statute of the Court of Justice provided: ‘Where proceedings are instituted against a decision of one of the institutions of the Community, that institution shall transmit to the Court all the documents relating to the case before the Court.’

54. The Commission did not however lodge all the documents until requested to do so by the Court of First Instance. In its covering letter, it stated that some of the documents might contain business secrets or that they fell under the obligation of confidentiality in Article 47 of the ECSC Treaty, (30) so that not all of them should be accessible in their entirety to all the parties. Some of the applicants, however, sought to have access to the whole file.

55. At that time, the Rules of Procedure of the Court of First Instance dealt with confidentiality only in Article 116(2), which allowed confidential documents to be omitted from the case-file communicated to an intervenor. Under Article 5(3) of the Instructions to the Registrar, however, parties’ lawyers or agents, or persons authorised by them, were entitled to inspect the original case-file, including administrative files produced before the Court, and to request copies or extracts of documents.

56. The Court of First Instance was thus faced with problems very similar to those now facing the Conseil d’État.

57. In the first of its three orders addressing those problems, that Court rejected the argument that Article 23 of the ECSC Statute, together with the principle *audi alteram partem*, meant that all parties should have unconditional, unlimited access to the file forwarded by the Commission. It noted that Article 47 of the ECSC Treaty guaranteed the confidentiality of professional, in particular business, secrets in order to protect the legitimate interests of undertakings, and decided that the only way to balance the requirements of Article 23 of the Statute and the adversarial nature of judicial proceedings against the protection of the business secrets of individual undertakings was to examine the specific situation of the undertakings concerned. On that basis, it removed one document from the file, restricted full access to certain documents to one applicant only (the others being entitled to consult a non-confidential version), and reserved a decision on documents classified by the Commission as internal until it had received further information. (31)

58. In a second order made after receiving that information and hearing further argument, the Court of First Instance made it clear that the purpose of Article 23 of the Statute was to ‘enable the Court to exercise its power of review of the legality of the contested decision, having regard to the rights of the defence’, and

not to ‘guarantee all the parties unconditional and unrestricted access to the administrative file’ or to ‘enable the applicants to peruse the files of the institution concerned as they see fit’. (32) It also distinguished the documents transmitted pursuant to Article 23 of the Statute from the case-file constituted in accordance with the Instructions to the Registrar. The parties had access only to the latter, which contained the documents to be taken into consideration in deciding the case. Documents transmitted to the Court but not placed in the case-file remained ‘wholly extraneous to the proceedings’ and would not be taken into consideration by the Court in deciding the case. (33) On that basis, it examined the documents in question in the light of the submissions and decided that some were relevant and should be placed on the case-file and communicated to the parties. In a third and final order, it examined two further documents and decided that one of them should be placed on the file. (34)

59. Thus, in a situation of possible conflict between a need to consider all the relevant evidence, a need to allow all parties access to that evidence and a need to protect the confidentiality of some of it, the approach taken by the Court of First Instance was (a) to screen the evidence itself at a preliminary stage, (b) to include only the relevant evidence in the case-file, (c) to make all that evidence available to all the parties, subject to the ‘masking’ of certain details of certain documents vis-à-vis certain parties, and (d) to take into consideration only the evidence in the case-file to which the parties had access.

60. That solution was adopted, pragmatically and with due regard to each of the interests at stake, in a regulatory context similar to that facing the Conseil d’État in the main proceedings. It was subsequently enshrined in the Rules of Procedure of the Court of First Instance. (35)

Conclusions to be drawn

61. Although neither that pragmatic solution nor, a fortiori, the rule laid down in those Rules of Procedure can constitute any binding precedent for a national court, I consider that they provide helpful, practical guidance as to the approach to be taken, which must conform with the rules applicable to that court, in so far as they do not conflict with any higher norm.

62. As regards review bodies functioning in conformity with Directive 89/665, such higher norms include those which flow from that directive and from Directive 93/36 (or now Directive 2004/18), both as interpreted in the light of the right to the protection of business secrets and the right to a fair hearing. The principles to be applied are the following: (a) a party may not refuse to communicate evidence to the review body on the ground of business secrecy; (b) a party communicating evidence to the review body may ask for it to be treated as confidential, in whole or in part, vis-à-vis another party; (c) all principal parties should have access to all evidence relevant to the outcome of the review, in a form adequate to enable them to comment on it; (d) the review body should take care not to use any evidence withheld from one or more principal

parties in any way which could infringe those parties' rights to a fair hearing and to equality of arms.

63. The assessment can only be on a case-by-case basis, and must seek to assure the greatest protection of each interest – confidentiality of business secrecy and the right to a fair hearing – which is achievable without impairing the substance of the other, and to strike as fair a balance as is possible between the two.

Final remarks

64. As regards the specific situation confronting the Conseil d'État, I would make three final remarks.

65. First, it seems clear that when Article 11 of the Law of 15 June 2006 (36) enters into force, the obligation to protect the confidentiality of business secrets in review proceedings will be explicit in Belgium.

66. Second, I note that, in a case referred to by the Belgian Government in its observations, (37) the Conseil d'État appears to have already taken an approach consistent with that which I have outlined above. The case concerned an undertaking's challenge to a decision granting registration of a competitor's medicinal product. The administrative authority lodged two versions of its file with the Conseil d'État – a version containing confidential documents relating to the medicinal product and a non-confidential version. The auditeur in his report examined the issue and concluded that the confidential documents should not be available to the applicant. The court decided that it was not necessary to rule on that question, since the application could be conclusively dismissed on a ground which did not involve examination of those documents.

67. Furthermore, the approach taken by the Constitutional Court in its judgment of 19 September 2007 is also largely consistent with the approach set out above. After considering the general principles of the right to a fair hearing in adversarial proceedings, and the right to protection of confidentiality of business secrets, that court concluded that the Conseil d'État should be able to assess the confidential nature of the information, in order to strike a balance between those two rights.

68. Finally, it appears from the order for reference that Varec may in fact already have had access to at least some of the disputed elements of the file, apparently outside the strict context of the award or review proceedings. If that is so, it might, depending on the actual circumstances, be a factor to be taken into account when deciding whether and to what extent to accord confidential treatment.

Conclusion

69. In the light of all the above considerations, I am of the opinion that the Court should give the following reply to the question raised by the Conseil d'État:

Article 1(1) of Council Directive 89/665, read in conjunction with the provisions of Council Directive 93/36 relating to the protection of confidential information, requires a review body

(a) to take cognisance of the whole of the administrative file and other evidence on which the contracting authority based its award and

(b) to accord confidential information the same protection as is accorded to it at the award stage.

Those obligations must be carried out subject to the right to a fair hearing and to equality of arms, which implies in particular that the review body should take care not to use any evidence withheld from one or more principal parties in any way which could infringe those rights.

1 – Original language: English.

2 – Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

3 – The provision refers to Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), and Directive 92/50, cited in footnote 2. Directive 71/305 was however repealed and replaced by Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), and Directive 77/62 was repealed and replaced by Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1). Since the time of the award in the main proceedings, all the directives concerned have been repealed and replaced by 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).

4 – Cited in footnote 3, as amended in particular by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1).

5 – Cited in footnote 3.

6 – See http://www.senate.be/doc/const_fr.html.

7 – The search page on http://www.juridat.be/cgi_loi/legislation.pl may be used to consult this and all subsequent Belgian legislation referred to. Since 2003 the Moniteur Belge is no longer published in paper form.

8 – See Article 80, read in conjunction with the amending Law of 12 January 2007.

9 – Cited above in points 7 and 8 respectively.

10 – Judgments of 14 December 1999 in Case 84.102, 23 December 1999 in Case 83.593, 21 March 2000 in Case 86.150 and 6 May 2003 in Case 119.018.

11 – An independent member of the Conseil d'État, some but not all of whose functions and duties correspond to those of an Advocate General in this Court.

12 – The last three provisions cited all guarantee a right to respect for private and family life, widely inter-

preted as including the protection of confidentiality and as not necessarily excluding activities of a professional or business nature (see, for example, *Niemietz v Germany*, European Court of Human Rights judgment of 16 December 1992, Series A No 251-B, p. 33, § 29).

13 – See for example Case C-213/04 *Burtscher* [2005] ECR I-10309, paragraph 34 and the case-law cited there; in respect of courts of last resort, such as the *Conseil d'État*, see for example Case 283/81 *CILFIT* [1982] ECR 3415, paragraphs 10 and 11.

14 – See, for example, Case C-201/04 *Molenbergnatie* [2006] ECR I-2049, paragraph 31 and the case-law cited there.

15 – See footnote 3 above.

16 – Opinion of Advocate General Jacobs in Case C-19/00 *SIAC Construction* [2001] ECR I-7725, point 33.

17 – Joined Cases 42/59 and 49/59 *SNUPAT v High Authority* [1961] ECR 53, at p. 84; Case C-480/99 *P Plant and Others v Commission* [2002] ECR I-265, paragraph 24.

18 – See *Aksoy (Eroğlu) v Turkey*, No 59741/00, § 21, 31 October 2006, and the case-law cited there. With respect specifically to failure to allow an applicant for judicial review the opportunity to consult evidence in the case-file, see *Feldbrugge v the Netherlands*, judgment of 29 May 1986, Series A No 99, p. 16, § 44.

19 – The position as regards interveners, and the public at large, may legitimately differ. Since the request for a preliminary ruling does not concern those aspects, I shall not address them.

20 – Solemnly proclaimed at Nice in December 2000 by the Parliament, the Council and the Commission (OJ 2000 C 364, p. 1).

21 – See, for example, *V. v Finland*, No 40412/98, § 75, 24 April 2007, and the case-law cited there.

22 – And it will be recalled that *Varec* has submitted no observations to this Court.

23 – Case C-36/92P *SEP v Commission* [1994] ECR I-1911, paragraph 36; my emphasis.

24 – Case 53/85 *AKZO Chemie v Commission* [1986] ECR 1965, paragraph 28.

25 – See footnote 12 above.

26 – See, for example, in the context of a clash between different rights, Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraphs 77 to 81.

27 – See points 39 and 46 above.

28 – See, for example, again in the context of different rights, Joined Cases C-20/00 and C 64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paragraph 68, Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 126, and the case-law cited in both.

29 – Case T-134/94 *NMH Stahlwerke v Commission* [1999] ECR II-239; Case T-136/94 *Eurofer v Commission* [1999] ECR II-263; Case T-137/94 *ARBED v Commission* [1999] ECR II-303; Case T-138/94 *Cockerill-Sambre v Commission* [1999] ECR II-333; Case T-141/94 *Thyssen Stahl v Commission* [1999] ECR II-347; Case T-145/94 *Unimétal v Commission* [1999] ECR II-585; Case T-147/94 *Krupp Hoesch v Commission* [1999] ECR II-603; Case T-148/94 *Preussag Stahl*

v Commission [1999] ECR II-613; Case T-151/94 *British Steel v Commission* [1999] ECR II-629; Case T-156/94 *Aristrain v Commission* [1999] ECR II-645; and Case T-157/94 *Ensidesa v Commission* [1999] ECR II-707.

30 – The second paragraph of which prohibited the Commission from disclosing ‘information of the kind covered by the obligation of professional secrecy, in particular about undertakings, their business relations or their cost components’.

31 – Order in Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others v Commission* [1996] ECR II-537, especially at paragraphs 12 to 15 and the operative part.

32 – Order in Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others v Commission* [1997] ECR II-2293, paragraphs 32 and 37.

33 – *Ibid.*, paragraph 33.

34 – Order of 16 February 1998 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others v Commission*, not published in the ECR.

35 – Article 67(3), added on 19 December 2000 (OJ 2000 L 322, p. 4).

36 – See point 9 above.

37 – Case 137.993; report of Auditeur Stevens of 22 October 2004, point 3; judgment of the *Conseil d'État* (or *Raad van State*, since it was a Dutch-language case) of 3 December 2004, point 1.2.