OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 1 June 2010[1]

I — Introduction

1. The Anotato Dikastirio Kiprou (Supreme Court of Cyprus), acting as a court of first instance,[2] asks the Court of Justice whether it can be inferred from Article 2(8) of Directive 89/665/EEC[3] ('Directive 89/665' or 'the Directive') that the contracting authority for a public contract has a right to challenge before the courts the annulment of its decision by the administrative body responsible for the supervision of review procedures.

1 — Original language: Spanish.

2 — Its judgments are subject to appeal before the same court sitting in plenary session.

3 — 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).

II — Legal framework

A — *Directive 89/665*

2. Pursuant to Article 1(1), '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]

4 — Provision drafted in accordance with 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). Pursuant to 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), 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) and the second paragraph of Article 82 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 in accordance with the correlation tables in the annexes to the above directives, the references to Directive 71/305/EEC, Directive 77/62/EEC and Directive 92/50/EEC appearing in Article 1(1) of Directive 89/665 shall be construed as references to Directive 2004/18.

3. Article 1(3) states:

'The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

4. Article 2(8) 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 177 of the EEC Treaty and independent of both the contracting authority and the review body.

…[5]'

B — *Cypriot law*

5. Under Article 146.2 of the Constitution of the Republic of Cyprus, a request for judicial review of the acts or omissions of the Administration 'may be made by any person whose existing legitimate interests, as an individual or as a member of a community, are adversely and directly affected by the decision, act or omission'.

6. Law No 101(I)/2003 on the Award of Contracts (supply, works and services), as amended by Law No 181(I)/2004, was enacted in order to bring Cypriot legislation into line with European Union law, including

5 — Since Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31), which is not applicable to the present case for chronological reasons, the provision contained in Article 2(8) has now become Article 2(9), with the substance remaining unchanged, although the reference in the Spanish version of Article 2(8) to the *organismo de base* (original body) is replaced by the less ambiguous *órgano de recurso* (review body).

Directive 89/665 and, to that end, Article 55 created the Anatheoritiki Arkhi Prosforon (tenders review authority, 'the review authority') and Article 56 gave it jurisdiction to hear 'hierarchical appeals' against the decisions of contracting authorities. Article 60 of that law, as amended by Law No 181(I)/2004, provides: 'Interested parties who believe that they have been wronged by the decision of the [the review authority] shall be entitled to seek a review by the Anotato Dikastirio in accordance with Article 146 of the Constitution. The contracting authority shall also be entitled to seek a review by the Anotato Dikastirio pursuant to Article 146 initially of the Constitution where, on the basis of adequate documentary evidence, the decision of the review authority can be regarded as unfair to the aforementioned authority.'

7. As will be seen, this provision has been the subject of a declaration by the Anotato Dikastirio which is particularly relevant to this case.

III — Background to the national proceedings and the question referred

8. In June 2003, the Simvoulio Apokhetevseon Levkosias (Nicosia sewerage board, 'the Simvoulio'),[6] acting as a contracting authority, published a tender notice for the design, construction, operation and maintenance, for a period of 10 years, of a wastewater treatment plant in Anthoupolis.

9. Among the preselected tenderers were the Degremont SA & Atlas Pantou Co Ltd consortium ('Degremont') and the WTE BAMAG consortium.

10. The respective tenders having been submitted, the Simvoulio informed Degremont of its decision to award the contract to the WTE BAMAG consortium.

11. On 7 October 2005 Degremont appealed against that decision to the review authority, and sought an interim measure suspending the operation of the Simvoulio's decision, given that the latter would entail the definitive award of the contract. The date of 13 October 2005 was set for the interim hearing but, as merely applying for the interim measure did not (at the time the events took place) give rise to any suspension of operation, the Simvoulio in fact awarded the contract to the WTE BAMAG consortium before the review

6 — It transpired at the hearing that the geographical area of the Simvoulio covers the Nicosia metropolitan area and that its president is the mayor of Nicosia.

authority gave its decision on the application for suspension.

12. On 14 February 2006, the review authority gave its decision in the substantive case, annulling the Simvoulio's decision. [7]

13. WTE BAMAG did not bring legal proceedings challenging that decision before the Anotato Dikastirio. The Simvoulio, by contrast, did so [8] on 31 March 2006, relying on Article 146.2 of the Constitution and Article 60 of Law No 101(I) /2003 on the Award of Contracts for the purposes of *locus standi*.

14. While this case was still pending, the Anotato Dikastirio, sitting in full court, delivered its judgment of 10 December 2007 in another case [9] involving the same parties. In it, the Anotato Dikastirio rejected the argument that the Simvoulio, as a contracting authority, had a legitimate interest in calling for review of the annulment decision of the review authority because, in summary, (1) the latter decision forms part of a complex award procedure, (2) the review authority is a second-instance administrative body (of higher instance) in relation to the Simvoulio, for which reason one part of the administration cannot have a legitimate interest as against another part of the administration, (3) contracting authorities protect the public interest but have no interests of their own and, (4) Article 60 of Law No 101(I) /2003 cannot grant a right to review to the contracting authority if such a right is not recognised by Article 146.2 of the Constitution.

15. The Anotato Dikastirio (in case 629/2006), as court of first instance, mindful of the case-law laid down by the full court and in view of the fact that that case-law contained no analysis of the Cypriot legislation in the light of Directive 89/665, stayed the proceedings and referred the matter to the Court of Justice for a preliminary ruling in the following terms:

'To what extent does Article 2(8) of Directive 89/665/EC recognise contracting authorities as having a right to judicial review of annulment decisions by bodies responsible for review procedures, when those bodies are not judicial in character?'

7 — All the parties involved in these preliminary ruling proceedings have avoided specifying the precise grounds on which the review authority revoked the decision of the Simvoulio.

8 — Giving rise to the case registered under No 629/2006.

9 — No 106/2006.

IV — The proceedings before the Court of Justice

16. The order for reference was lodged with the Court Registry on 22 December 2008.

17. The Simvoulio, the Czech Government and the Commission call for a positive response from the Court of Justice to the question referred by the Anotato Dikastirio, to the effect that Article 2(8) of Directive 89/665 does recognise the right of contracting authorities to judicial review of decisions by bodies responsible for review procedures.

18. In the view of the review authority, Directive 89/665 provides protection for undertakings but not for contracting authorities, for they cannot be regarded as having separate interests for the purposes of taking judicial action against the bodies responsible for reviewing their decisions.

19. At the hearing on 25 March 2010, the representatives of the Simvoulio, the review authority and the Commission presented their oral submissions.

V — The substance of the case

20. The reference for a preliminary ruling from the Anotato Dikastirio raises the question, for the first time in the case-law of the Court of Justice, whether, on the basis of Directive 89/665, a contracting authority must have the right to contest the decisions of another public body charged with the review of that authority's decisions, when, without prejudice to the public nature of both bodies, they have separate legal personalities, belong, in addition, to different branches of administration and, in terms of function, perform different tasks.

21. The answer to this question must be prefaced by some thoughts on the structure of the actions for review contemplated by Directive 89/665, before going on to analyse the scope of Article 2(8) of the Directive, which is relied on here.

22. As early as in the third recital in the preamble to the directive, it is pointed out that 'the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; … for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law', and this statement is consistent with

the 'substantive' measures [10] coordinating public procurement procedures within the Community.

23. The Member States enjoy a wide discretion when it comes to implementing the review systems contained in the directive, which 'lays down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of Community law concerning public contracts.' [11]

24. That is why, to take but one example, the directive contains no provision specifically covering time-limits for the applications for review which it seeks to establish. [12]

25. In particular, and most significantly for our present purposes, with regard to the point made above, the directive ensures only that the review procedures provided for by the Directive are available 'at least' 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 of the Community law concerning public contracts or of the national rules transposing that law. [13]

26. In any event, the European Union directive intended the final review of legality in the field of public procurement to rest with a judicial body, [14] either directly, where the first review body is a court or judge, or indirectly, where the courts have the power to hear and determine an action brought against the decision of any administrative review body which may have been created. The latter is the model used in Cyprus, where jurisdiction to hear actions contesting the acts of the administrative body created there (the review authority) is conferred on the Anotato Dikastirio (Supreme Court).

10 — Which currently comprise, basically, 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) and Directive 2004/18).

11 — Judgment in Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 45 and Order of 4 October 2007 in Case C-492/06 *Consorzio Elisoccorso San Raffaele* [2007] ECR I-8189, paragraph 21.

12 — According to the judgments of the Court of Justice in Case C-470/99 *Universale-Bau and others* [2002] ECR I-11617, paragraph 71 and in Case C-406/08 *Uniplex (UK) Ltd* [2010] ECR I-817, paragraph 26, '[i]t is therefore for the internal legal order of each Member State to establish such time-limits'.

13 — Order of the Court of Justice of 4 October 2007, cited, paragraph 20.

14 — A concept which, for these purposes, includes not only a judicial body recognised as such from the organisational perspective of the Member State, and whose protection is invoked by means of a 'judicial review', but also a 'body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty … independent of both the contracting authority and the review body', since Article 2(8) of Directive 89/665 also permits the decisions of the contracting authority or administrative body responsible for review to be examined by such a body.

27. However, as soon as the Directive makes it possible for an intermediate body to be responsible for ruling on the merits of actions challenging decisions of the contracting authority, it obviously gives rise to the possibility that the *raison d'être* of judicial review, necessarily subsequent, may to a certain extent be altered. In such a case, in judicial review proceedings, what is reviewed is the correctness of the decision of the administrative body, whether upholding or annulling the award in question, at the request of whoever is entitled to call for review in each particular case.

28. This consideration demonstrates that the issue raised in this reference for a preliminary ruling would, by definition, not exist in those national legal systems which have not opted for administrative review bodies but have instead chosen judicial review as the direct and only route. In that situation, contracting authorities can only be defendants. By contrast, when judicial proceedings are taken against the annulment decision of an administrative review body, there is the possibility that, apart from the undertakings detrimentally affected by the annulment decision, contracting authorities may seek to appear as applicants.

29. That is why, in the present case, the Simvoulio, possibly in an attempt to prevent a potential claim for damages against it, seeks judicial review of the review authority's annulment of the award of the contract to a particular tenderer.

30. It is therefore necessary to examine whether, on the basis of this approach, the Simvoulio is entitled to the right of review it has claimed.

31. In my view, the *locus standi* of the contracting authority to bring an action before a judicial body to contest the act of an administrative review body annulling its decision is not required by Directive 89/665 and cannot be inferred from it.

32. First of all, the seventh and eighth recitals in the preamble, taken together, do not exactly militate in favour of construing access to of judicial review for contracting authorities as a requirement of the directive. Those recitals make express provision for review only for undertakings, and include the remark that when undertakings do not seek review, 'certain infringements may not be corrected'.

33. Secondly, by stating that it is necessary for the decisions of contracting authorities to be effectively reviewed, Article 1(1) of Directive 89/665 specifically recognises that contracting authorities can be defendants, but it

is not possible to infer from any other provision of the directive that they have any *locus standi* to bring an action.

34. Finally, this rather restrictive approach is confirmed by Article 1(3) of the directive, since the relevant review may be sought by 'at least', any person 'having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement', which would seem to at least leave open the possibility that contracting authorities are excluded. Furthermore, the provision does not appear to have contracting authorities in view, given that it authorises the Member States to introduce a duty on the person seeking the review to give prior notice to 'the contracting authority of the alleged infringement and of his intention to seek review'.

35. However, it is true to say that, by the time we reach Article 2(8), the language of the directive appears more open and, unlike in other parts of the directive, there is no express reference to tenderers (that is, to the person having an interest in obtaining a contract), which seemingly is the basis for the Simvoulio's argument that, as a contracting authority, it has a right to review.

36. The representative of the Simvoulio in fact claimed at the hearing that, comparing Article 1(3) with Article 2(8) of Directive 89/665, the two provisions are not contradictory. In his view, while the latter refers only to reviews sought before a judicial body (or a body which is judicial for the purposes of Article 267 TFEU), the former also contemplates the possibility of seeking review before a non-judicial body which is responsible in this respect, relating exclusively to the decision of the contracting authority. The reason is that it would be inconceivable for a contracting authority to seek review of its own decision, in contrast to the situation covered by Article 2(8).

37. However, this element of ambiguity in Article 2(8) of the Directive is not enough, in my view, to alter the foregoing considerations. Article 2(8) merely creates the possibility that an administrative body might, initially, be responsible for the review and, in any event, it introduces the requirement, in the terms already mentioned, that in these circumstances there must be a review of its decisions, either of a strictly judicial nature or before a body which is equivalent for the purposes of Article 267 TFEU to a judicial body, without specifying once again which persons have *locus standi* to seek such review.

38. Finally, it is necessary to dismiss the argument raised by the Simvoulio, and supported by the Commission, to the effect that if it is not accepted that the Simvoulio has capacity to bring proceedings, the opportunity to apply European Union law directly and uniformly could be blocked because the chance to refer a question for a preliminary ruling would be lost in situations, such as the present case, where no undertaking seeks judicial review of the decision.

39. On the one hand, the possible further opportunity to clarify European Union law cannot directly determine how the specific question of *locus standi* is to be settled, for this falls within the realm of the procedural autonomy of Member States. Moreover, it is to be expected that, in normal circumstances, when annulments appear to have no basis in law, it would be the tenderers which contested them, thereby creating an opportunity for a reference for a preliminary ruling.

40. In any event, by way of safeguard, Article 3 of the Directive itself provides the Commission with a 'specific mechanism' where it considers that a clear and manifest infringement has been committed during a contract award procedure. To that end, the provision authorises appropriate steps to be taken for the rapid correction of any alleged infringement.

41. The foregoing considerations lead me to conclude that Directive 89/665 makes no statement, either directly or indirectly, regarding the legal remedies which must be made available to contracting authorities. That should be sufficient, in my view, to give a negative response to the question raised by the Anotato Dikastirio. In my opinion, however, this conclusion should be supported by some further points.

42. At point 18 of its observations, the Simvoulio argues that being restricted in this way is seriously detrimental to it, inasmuch as, on the one hand, the contract would be awarded to a legal person other than the tenderer that it considers the most suitable, and as, on the other hand, it cannot rule out the possibility that it will face a claim for liability in respect of the losses incurred as a result of the award which was subsequently annulled by the review authority. Then, of course, there is the obvious fact that the Simvoulio is a public entity with its own administrative powers, specifically, to manage wastewater, [15] in which context it has the status of a contracting authority

15 — In point of fact, the Simvoulio also represents the interest of the community in wastewater being correctly managed, a function for which it alone has full responsibility, as was confirmed at the hearing, and which covers wastewater distribution and treatment in the Nicosia metropolitan area, thus extending beyond the city limits.

and is in a position which is at any rate different from that of the review authority. [16]

43. In this regard, and although the Court of Justice cannot rule on the position of the Simvoulio as an organ of the Cypriot system or on its relationship to the review authority, [17] the hearing provided sufficient clarification to find unconvincing the review authority's argument that the acts of both bodies form part of a single award procedure, and that on that basis they are not in reality separate bodies.

44. Against this, however, would be the logic behind the review described in Article 2(8) of Directive 89/665, as the claims of tenderers seeking to have the award revoked aside would be genuinely compromised if a certain amount of independence between the review body and the contracting authority were not accepted. This view is supported by Article 2(3) of Directive 2007/66, which, in connection with the review of a contract award decision, refers to 'a body of first instance, which is independent of the contracting authority'.

45. However, irrespective of the foregoing, the following point must be made. Having established that Directive 89/665 contains no reference to the effect that legal remedies may be available to contracting authorities, even against annulment decisions taken by an administrative review body, it is clear that the detrimental effects claimed by the Simvoulio, in so far as they can be substantiated, exist, in principle, only in the sphere of the procedural autonomy of Member States, and that it is in that context of the relevant national legal systems that they must be addressed.

46. Nevertheless, one final point should be made, which is that the procedural autonomy of the Member States is clearly not absolute. In fact, when that autonomy is exercised in the field of European Union law, it meets its furthest limits in the general principles of that law and, in particular here, both in the

16 — From the submissions of all those participating in these preliminary ruling proceedings it is clear that the Simvoulio is a 'contracting authority' and the review authority 'a non-judicial body responsible for the review procedure', and it is therefore only necessary to look to Directive 89/665 to conclude that the two administrative bodies, perform different roles, at least from a functional perspective.

17 — It is not for the Court of Justice to analyse national law because the mechanism for seeking preliminary rulings is based on a clear separation of functions between the national courts and the Court of Justice, which is empowered only to rule on the interpretation or, as the case may be, the validity of European Union provisions on the basis of the facts which the national court puts before it: see the judgments of the Court of Justice in Case C-30/93 *AC-ATEL Electronics Vertriebs* [1994] ECR I-2305, paragraph 16; Case C-352/95 *Phytheron International* [1997] ECR I-1729, paragraph 11; and Case C-235/95 *Dumon and Froment* [1998] ECR I-4531, paragraphs 25 to 27.

value that is the 'rule of law' [18] and in observance of fundamental rights, specifically the right to an effective remedy pursuant to Article 47 of the Charter. [19]

47. However, for the purposes of this case, suffice it to say, in this regard, that the nature of legal persons governed by public law possessed by such contracting authorities makes it very difficult for them to rely on Article 47 of the Charter [20] which, moreover, has not been expressly pleaded in these proceedings.

48. Finally, attempting to infer from the rule of law that the contracting authority has capacity to bring legal proceedings is even more problematic in the circumstances of the case. Of course, it is beyond doubt that a balanced procedural structure forms part of the image of the rule of law and, from that point of view, it might seem surprising that the contracting authority is denied access to judicial review of the annulment by the administrative body of its decision to award a contract.

49. However, in this respect, we must be mindful of the fact that, in the first place, it is primarily the tendering undertakings which were awarded the contract by the decision subsequently annulled that would naturally be inclined to seek judicial review of that annulment, in the exercise of a capacity to bring proceedings which has obviously never been in dispute.

50. Furthermore, we would do well to remember that, by virtue of Article 2(7) of Directive 89/665, the Member States 'shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced'. The provision makes no distinction between judicial and non-judicial bodies and consequently this mandate to optimise enforcement must not be interfered with more than is absolutely necessary by prolonging the dispute and the lack of legal certainty beyond what is envisaged in the directive.

18 — Article 2 TEU treats 'the rule of law' as a 'value' common to the Member States. However, the preamble to the Charter of Fundamental Rights of the European Union of 7 December 2000 (OJ 2000 C 364, p. 1), as adapted in Strasbourg on 12 December 2007 (OJ C 303, p. 1) ('the Charter') refers to it as a 'principle'. For its part, the second paragraph of Article 19(1) TEU declares that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

19 — Judgments in Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 18 and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paragraph 65 et seq.

20 — Article 34 of the Rome Convention prevents public bodies from relying on the rights set forth therein before the European Court of Human Rights; however, the Strasbourg Court has, in particular circumstances, extended the protection of Article 6(1) of the European Convention on Human Rights to certain public law bodies: see, for example, its judgment of 9 December 1994, *The Holy Monasteries* v *Greece*, Series A No 301-A, pp. 34-35, paragraph 49, which requires that such bodies should not exercise governmental powers, which is obviously not the case in relation to the Simvoulio.

51. The foregoing should be sufficient, in my opinion, to conclude that the restriction of the contracting authority's capacity to bring proceedings is, in the circumstances of the case, proportionate, viewed from a perspective as broad as the rule of law undoubtedly is. Nor, in conclusion, should it therefore be assumed from this last observation that the procedural autonomy exercised by the Member State within the context of Directive 89/665 was exercised in disregard of the general principles of European Union law or of the values or fundamental rights proclaimed therein.

VI — Conclusion

52. In the light of the foregoing considerations, I propose that the Court of Justice give the following reply to the question referred for a preliminary ruling:

'Article 2(8) 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 does not preclude an interpretation whereby a contracting authority is prevented from exercising the right to challenge before the courts the annulment of its decision by the administrative body responsible for review procedures.'