OPINION OF ADVOCATE GENERAL LÉGER
delivered on 15 June 2000 *

1. In accordance with national legislation on water quality, a number of Austrian administrative authorities invited tenders for the award of service contracts for the taking and the analysis of water samples from Austrian lakes and rivers.

2. The fact that bodies benefiting from subsidies took part in the tender procedure alongside strictly private tenderers gave rise to a dispute which led the Austrian court in the main proceedings to refer to the Court of Justice a number of questions for a preliminary ruling.

Basically, those questions concern the legality, under Community law, of a public contract award procedure to which subsidised bodies were admitted, all of which have the nationality of the Member State of the contracting authority and are established in the territory of that Member State.

3. The questions raised by the invitation to tender at issue concern the principle of equality in two ways.

It is necessary to establish whether the fact that subsidised bodies were allowed to submit tenders is likely to infringe the principle of non-discrimination on the ground of nationality or, at the very least, to create an obstacle to the freedom to provide services, since all the bodies concerned are Austrian.

Even assuming that no restriction on trade can be identified, it is important to determine whether the advantage over the other tenderers which these bodies are able to enjoy as a result of the public funding they are accorded is compatible with the aim of securing effective competition pursued by Directive 92/50/EEC. [1]

* Original language: French.

1 — 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, hereinafter the 'Directive').

I — The Directive

4. The aim of the Directive is to coordinate the procedures for the award of public service contracts. In so doing, it contributes to the gradual establishment of the internal market, defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. [2]

5. More particularly, the Directive is designed to meet the need to avoid obstacles to the free movement of services. [3] It is justified by the need to improve the access of service providers to procedures for the award of contracts in order to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular. [4]

6. According to Article 3(1) and (2):

'1. In awarding public service contracts or in organising design contests, contracting authorities shall apply procedures adapted to the provisions of this Directive.

2. Contracting authorities shall ensure that there is no discrimination between different service providers.'

7. Article 6 sets out an exception to the application of the Directive. It states that:

'This Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.'

8. Article 37 of the Directive lays down certain obligations with which the contracting authority must comply if it intends to reject abnormally low tenders. The first paragraph of Article 37 is worded as follows:

'If, for a given contract, tenders appear to be abnormally low in relation to the service provided, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.'

2 — See the first and second recitals.
3 — See the sixth recital.
4 — See the 20th recital.

II — The facts and the main proceedings

9. Acting on the basis of the powers they hold under the Austrian system of indirect federal administration, the Offices of the Governments of the Provinces of Salzburg, Lower Austria, Upper Austria, Styria, Carinthia, Tyrol and Burgenland, as well as the Landeswasserbauamt (Water Authority) of the Province of Vorarlberg held an open procedure for the award of contracts for the taking and analysis of samples for the observation years 1998/1999 and 1999/2000, in accordance with the Wassergüte-Erhebungsverordnung [5] (Water Quality Survey Regulations).

10. ARGE Gewässerschutz, [6] an association of companies and civil engineers, and other bodies, including the Österreichische Forschungszentrum Seibersdorf GmbH [7] and the Österreichische Forschungs- und Prüfungszentrum Arsenal GmbH, [8] submitted tenders in the course of that procedure.

11. ARGE considered that the subsidies enjoyed by the latter tenderers gave them competitive advantages and created an obstacle to trade between the Member States, and successfully applied for an arbitration procedure to be carried out before the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission), in accordance with the Bundesvergabegesetz (Federal Law on Public Procurement Contracts).

12. The Bundes-Vergabekontrollkommission took the view that federal law did not preclude the participation of bodies supported by public funds or of bodies governed by public law, such as research institutes and university institutes, as tenderers in award procedures alongside other private tenderers.

13. ARGE then applied for a review by the Bundesvergabeamt.

III — The questions referred

14. Considering that an interpretation of Community law was required to settle the dispute, the Bundesvergabeamt decided to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Does the decision of a contracting authority to admit to an award procedure bodies which receive subsidies of any kind, either from the authority itself or from other contracting author-

5 — BGBl. 1991, p. 338.

6 — Hereinafter: 'ARGE'.

7 — Seibersdorf research centre, hereinafter: the 'Seibersdorf centre'.

8 — Arsenal research institute, hereinafter: the 'Arsenal institute'.

ities, which enable those bodies to tender in an award procedure at prices which are substantially below those of their commercially active competitors, infringe the principle of equal treatment of all tenderers and candidates in an award procedure?

2. Does the decision of the contracting body to admit such bodies to an award procedure constitute covert discrimination, if the bodies which receive such subsidies without exception have the nationality of, or are established in, the Member State in which the contracting authority is also established?

3. Does the decision of a contracting authority to admit such bodies to an award procedure, even on the assumption that it does not discriminate against the other tenderers and candidates, constitute a restriction of the freedom to provide services which is not compatible with the provisions of the EC Treaty, in particular Article 59 et seq. thereof?

4. May the contracting authority conclude service contracts with bodies which are exclusively or at least predominantly in public ownership and provide their services exclusively or at least predominantly to the contracting authority or other State institutions, without making the service the subject of an award procedure in competition with commercially active tenderers in accordance with Directive 92/50/EEC?'

IV — Preliminary observations

15. The first three questions for a preliminary ruling relate, as I have said, to the principle of equality, in terms of both discrimination on grounds of nationality (the second and third questions) and discrimination between tenderers in receipt of subsidies and the other tenderers (the first question).

16. The fourth question concerns the scope of the Directive *ratione personae*. It is necessary to establish whether the Directive is applicable to contracts for the provision of services concluded between a contracting authority and a service provider which is in a relationship of close dependence with a public authority because that authority is both its principal owner and the main recipient of its services.

17. It is appropriate to begin by analysing the second and third questions together, given that they both relate to Treaty provisions, namely Article 59 of the EC

Treaty (now, after amendment, Article 49 EC) and the following articles, concerning the freedom to provide services.

18. I shall then discuss the fourth question, concerning the scope of the Directive, and thereafter consider the first question which deals with the principle of equal treatment of tenderers, as set out in the Directive.

V — Is the freedom to provide services restricted (second and third questions)?

19. By these questions, the Bundesvergabeamt is asking whether Articles 59 et seq. of the Treaty have to be interpreted as meaning that they preclude a decision by a contracting authority to admit to a public contract award procedure bodies in receipt of public subsidies which enable them to submit tenders at prices substantially below the prices submitted by the other tenderers, where those bodies all have the nationality of the Member State in which the contracting authority is established and are established in the territory of that same Member State. [9]

9 — Although the second question refers to bodies which have the nationality of the Member State *or* are established in the Member State in which the contracting authority is itself established, it is clear from the grounds for the request for a preliminary ruling that, in this case, these are cumulative and not alternative factors (p. 10 of the English translation of the order for reference).

20. The first paragraph of Article 59 of the Treaty provides that: '... restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

21. According to Article 59, which establishes the freedom to provide services, all discrimination against a person by reason of his nationality [10] or the fact that he is established in a Member State other than that in which the service is provided must be abolished. [11]

22. That rule is confirmed in the third paragraph of Article 60 of the EC Treaty (now the third paragraph of Article 50 EC). Applying the principle of national treatment to the free movement of services, it provides that '... the person providing a service may, in order to do so, temporarily pursue his activity in the State where the

10 — The attribution of 'nationality' to legal persons, which makes it possible for them to be discriminated against by reason of nationality, arises out of the Treaty. In accordance with the first paragraph of Article 58 of the EC Treaty (now the first paragraph of Article 48 EC), which is applicable to services pursuant to Article 66 of the EC Treaty (now Article 55 EC): 'Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.' The location of their registered office, central administration or principal place of business serves as the factor connecting them with the legal system of a particular State in the same way as does nationality in the case of a natural person (see, in particular, Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 20).

11 — Joined Cases 110/78 and 111/78 *Van Wesemael and Others* [1979] ECR 35, paragraph 27.

service is provided, under the same conditions as are imposed by that State on its own nationals.'

23. At issue is the fact that bodies like the Seibersdorf centre and the Arsenal institute, which are said to enjoy an unwarranted competitive advantage because of the subsidies they receive, were allowed to take part in the tender procedure. Both have close links with the Member State of the contracting authority since both are established in Austrian territory and are subject to Austrian law. [12]

24. To avoid any ambiguity in the interpretation of the questions referred, I should make it clear that the discriminatory factor mentioned in the second question does not relate to the circumstance that these subsidised bodies were allowed to take part in the award procedure. That issue is covered in the first question, which I shall consider later. As I have said, the problem is that the bodies benefiting from subsidy are all Austrian, and that might give the impression that subsidised operators from other Member States were not permitted to tender.

25. In that connection, the Bundesvergabeamt suggests that there may have been covert discrimination.

26. As we know, the principle of equal treatment, to which Article 59 gives specific expression, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. [13]

27. The national court's reference to the possibility of covert discrimination indicates that it appears to harbour no doubt that the measure at issue does not involve overt discrimination, in so far as it stipulates no condition in respect of nationality or place of establishment, regardless of whether or not the bodies concerned are subsidised.

In the absence of any condition relating to nationality or place of establishment determining the right to respond to the invitation to tender, Austrian bodies or bodies located in Austrian territory would, however, still be at an advantage if the disputed measure treated tenderers differently by applying a criterion according to which *only bodies subsidised by the Austrian authorities* were allowed to take part in the award procedure.

12 — See p. 10 of the English translation of the order for reference.

13 — See, for instance, Case C-360/89 *Commission* v *Italy* [1992] ECR I-3401, paragraph 11.

28. As the Austrian Government has correctly pointed out, [14] there is a significant risk that a national rule reserving solely for bodies subsidised by the Austrian authorities the right to take part in award procedures would constitute a restriction on the freedom to provide services. Were that the case, that criterion would be disguising a difference in treatment between undertakings established, even if only in the form of branch offices, in Austrian territory, as they alone would be able to obtain subsidies from the public authorities, and the other undertakings. Foreign operators benefiting from subsidies would not be able to exploit that advantage to compete with Austrian operators in the same situation and improve their chances of winning contracts from the Austrian contracting authority.

29. In any event, whether the measure at issue is viewed in terms of direct discrimination or simply covert discrimination, the answer must be the same.

30. I do not consider it justified to conclude from the fact that all the subsidised bodies taking part in the award procedure have the same nationality as the contracting authority that the legality of the procedure at issue is necessarily flawed as a result of the application of discriminatory criteria.

14 — See p. 9 of its written observations.

31. The principle of non-discrimination does not in fact require that various operators of different nationality should, in all circumstances, be represented. It merely requires that there should be no obstacle to the exercise of free movement by economic operators, regardless of their place of origin within the Community.

32. I therefore consider that the decision to allow subsidised bodies of Austrian nationality to take part is not sufficient to establish discrimination by reason of the nationality or place of establishment of the tenderers or the source of the subsidies they receive.

33. For discrimination of that kind to be established, it would be necessary to prove that, *de jure* or *de facto*, the award procedure includes a rule whereby the right of economic operators to take part in the procedure is subject to a criterion of nationality or the location of their registered office in Austrian territory.

34. Similarly, it would have to be established that admission to the tender procedure is dependent on the subsidised bodies obtaining their subsidies from the Austrian authorities.

35. However, even though there is no reference at any point to participation by a tenderer of a different nationality, established in the territory of another Member State and benefiting from subsidies accorded by authorities other than the Austrian authorities, it does not appear that the procedure at issue lays down criteria which permit such operators to be excluded from it.

36. More particularly, I have not identified any factor to suggest that the measure at issue includes a condition whereby the subsidies received may be accorded only by the Austrian authorities. Subject to confirmation of that point by the Bundesvergabeamt, [15] the fact that only subsidised Austrian bodies took part must be attributed to factors other than the applicable law and practice.

37. It is clear that if the national court were to determine the existence of a condition of that kind, it would have to draw the appropriate conclusions in terms of the legality of the procedure and set aside that condition as being incompatible with Community law.

38. I should add that, if the measure at issue is not discriminatory, it is hard to see how the decision to admit the subsidised bodies restricts the freedom to provide services, as a national of another Member State which is subsidised by that State is in any case entitled to tender in the same way as the other operators.

39. It must therefore be concluded that Articles 59 et seq. of the Treaty have to be interpreted as meaning that they do not preclude a measure such as the decision at issue in the main proceedings, whereby a contracting authority has admitted to an award procedure bodies in receipt of public subsidies which enable them to tender at prices which are substantially below those of the other tenderers, even if all of those bodies have the nationality of the Member State in which the contracting authority is established and are established in the territory of that same Member State, provided no condition has been laid down in respect of the nationality of the operators, their place of establishment or the origin of the subsidies they may receive.

15 — I would point out that, according to the Bundesvergabeamt: 'It is perfectly conceivable that in other Member States too there are bodies which are provided with comparable subsidies by their Member State and could take part in the award procedure...' (see p. 13 of the English translation of the order for reference). The possibility that foreign operators similarly subsidised by the relevant authorities of their own Member State could take part is not, however, sufficient, in the view of the national court, to rule out the possibility of discrimination by reason of nationality, the place of establishment of the tenderers or the origin of the subsidies they enjoy. Accordingly, it goes on to explain, in the same sentence, that '... commercial service providers from other Member States could or should not expect to encounter Austrian tenderers in the award procedure who have a significant cost advantage over them as a result of subsidies from Austrian regional or local authorities...'. In so doing, it appears that the Bundesvergabeamt is ruling out one argument that might establish the absence of any restriction on the free movement of services — the opportunity for subsidised foreign undertakings to respond to the invitation to tender in exactly the same way as the subsidised national undertakings — by raising other considerations — violation of the principle of equal treatment of operators, regardless of national origin, as a result of the participation of subsidised undertakings. I shall examine that argument as part of my analysis of the first question.

VI — The scope of the Directive: the contracts for the provision of services concluded between a contracting authority and a service provider dependent on contracting authorities (fourth question)

40. By its fourth question, the national court is asking whether the Directive has to be interpreted as meaning that it covers a service contract concluded between a contracting authority and a service provider where the service provider is predominantly owned by a contracting authority and provides services predominantly to contracting authorities, including the authority that owns it.

41. The Bundesvergabeamt refers to the possibility of excluding from the requirements of the Directive contractual relations between a contracting authority and bodies wholly owned by it which provide their services exclusively to it. However, it considers that those conditions are too restrictive and that, in functional terms, a service provider and a contracting authority may be treated as the same, even if the contracting authority does not have exclusive ownership of the service provider and is not the exclusive recipient of its activity. In that case too, the close relationship between contracting authority and service provider would justify their contractual relationship falling outside the scope of the Directive.

A — *Admissibility*

42. As both ARGE and the Austrian Government indicated in their written observations, the admissibility of this question may be a matter of debate. It is not apparent from the reference for a preliminary ruling that the applicability of the Directive to the procedure for the award of the public contract was called in question before the Austrian court.

43. However, 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 it submits to the Court. A request from the national court may be refused by the Court of Justice only where it is obvious that the interpretation of a Community rule or assessment of its validity which is sought bears no relation to the facts or purpose of the main action or if the Court of Justice does not have before it the factual or legal material necessary to give a useful answer to the questions. [16]

44. It cannot be claimed here that the scope of the Directive has no bearing on the main proceedings. Were it to appear that, by

16 — Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 18.

their very nature, bodies such as the two subsidised tenderers fall outside the scope of the Directive, there would be nothing *a priori* to prevent the national court drawing from it, in accordance with and within the limits of the applicable national procedure, conclusions that might help resolve the dispute, for example, by replacing, of its own motion, the rule arising out of the Directive with other rules.

45. Moreover, as we shall see, the material in the file is sufficiently clear to allow us to establish the principles which the national court can apply in order to settle the dispute in the main proceedings.

46. That is why I consider it necessary to answer the question submitted, as that material stands, without taking into account the fact that, according to the case-file, there appears to be no argument likely to call into question the legal framework initially adopted for the selection by the contracting authority of a service provider.

47. It is therefore necessary to establish whether the Directive is applicable in this case.

B — *The substance*

48. According to the eighth recital of the Directive: 'the provision of services is covered by this Directive only in so far as it is based on contracts...'. According to Article 1(a), for the purposes of the Directive, and with the exception of certain contracts, public service contracts are contracts for pecuniary interest, concluded in writing between a service provider and a contracting authority.

49. The legal relationship in the form of a contract between the service provider and the service recipient requires that they should be two legal persons possessing, as such, the capacity voluntarily to enter into an undertaking. Consequently, the service provider must possess certain attributes which demonstrate that, in the exercise of its economic activity, it is acting sufficiently independently of the public authority seeking its services.

In other words, as Advocate General Cosmas clearly pointed out in his Opinion in *Teckal*,[17] the co-contractor of a contracting authority ... *must have real third-party status* with respect to that authority, that is to say, it must be a separate person from the contracting authority. The Advo-

17 — Case C-107/98 *Teckal* [1999] ECR I-8121, paragraphs 53 et seq.

cate General goes on to say that Community law, on public tenders, [18] '... does not require contracting authorities to observe the procedure ensuring effective competition between interested parties where the authorities concerned wish to assume responsibility themselves for the supply of the products they need.'

50. That is why services defined as 'in-house' services, that is to say services supplied to a public authority by its own departments or departments which are dependent on — although organisationally separate from — it, do not fall within the scope of the Directive. [19]

51. In the abovementioned *Teckal* judgment, the Court of Justice was asked to decide whether the fact that a local authority has products supplied to it by a consortium of which it is a member must result in a tender procedure provided for under Directive 93/36.

52. In addition to analysing some of the legal conditions governing the applicability of Directive 93/36, such as whether the local authority had the status of a contracting authority and whether there was a contract for pecuniary interest, the Court examined the relationship between the contracting authority and its co-contractor.

53. Like Directive 92/50, Directive 93/36 applies where the contracting authority is intending to enter into an agreement with an economic operator. In determining whether there was an agreement between these two, in fact separate, persons, the Court ruled that 'it is, in principle sufficient, if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority'. [20] However, the Court clarified this by pointing out that: 'The position can be otherwise only in the case where the local authority exercises over the person concerned *a control which is similar to that which it exercises over its own departments* and, at the same time, that person *carries out the essential part of its activities with the controlling local authority or authorities*'. [21]

54. The basic criteria thus established are founded on the notion that the entity with which the contracting authority is concluding the contract is in fact independent of it. According to the judgment in *Teckal*, for the Directive to be applicable, that entity must be formally distinct from the contracting authority and independent of it in regard to decision-making. [22]

18 — Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

19 — See also the Opinion of Advocate General Alber in Case C-108/98 *RI.SAN.* [1999] ECR I-5219, points 46 et seq.

20 — Case C-107/98, cited in footnote 17 above, paragraph 50.

21 — *Ibidem*, my emphasis.

22 — *Ibidem*, paragraph 51.

55. It is regrettable that these criteria are not more clearly defined. It is easy to imagine and identify the existence of a separate entity, since it is sufficient to establish that the economic operator is set up in a legal form different from that of the contracting authority. But it is less straightforward to gauge the degree of independence the entity enjoys. The nature of the control a local authority exercises over a legally separate body or the level at which it may reasonably be assumed that the latter carries out the essential part of its activities with the public authority on which it depends, in particular, may be a source of real uncertainty.

56. It should, however, be borne in mind that there are many tests which make it possible to establish whether an entity is in fact independent. Since the national court alone is in possession of all the matters of fact and law relevant to the solution of the dispute before it and it is for that court to apply Community law to the dispute, the national court itself is best-placed to determine most accurately the freedom of action that operator enjoys in relation to the contracting authority.

57. At any event, the close links that exist between both the Seibersdorf centre and the Arsenal institute and the Austrian public authorities must be analysed in the light of these principles. That will enable us to determine whether those links reflect the kind of dependency which justifies them being given contracts to provide services involving the taking of samples and analysis of water quality, without having to comply with the provisions of the Directive.

1. Control by the contracting authority

58. As I have said, for a contract to fall outside the scope of the Directive, it is necessary to establish that the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments. [23]

59. If, in regard to an operator, the contracting authority exercises the same control as it exercises over its own departments, the tasks it is able to assign to that operator will be treated no differently than had they been simply delegated internally. The ability of the local authority to influence the way in which the service provider operates and the latter's consequent lack of autonomy mean that the contract concluded between the local authority and the service is not really a contract at all.

60. According to the Bundesvergabeamt, the research bodies at issue are predominantly owned by the Austrian State or a Province. Their decision-making organs are appointed by the regional or local authority

23 — *Ibidem*, paragraph 50.

which owns them, or they are subject to supervision by one of those authorities. [24] ARGE, however, did not mention ownership by a Province. It stated that the Republic of Austria holds 50.5% of share capital in the Seibersdorf centre, the remaining 49.5% being held by private undertakings. According to ARGE, the Republic of Austria wholly owns the Arsenal institute. [25]

It is for the national court to consider in detail the evidence available to it. I make the general assumption that in both cases, at the very least, the State has predominant economic ownership, bearing in mind also the additional information provided by ARGE.

61. As regards the Arsenal institute, I would cite and apply to this case the analysis made by Advocate General Alber in his Opinion in *RI.SAN.*, cited above, in which he states that: 'even without a full knowledge of the internal organisation of GEPI SpA, it may be... concluded from the fact that the Italian State holds 100% of its share capital that the company is part of the Italian State in that respect'. [26]

62. The position of the Seibersdorf centre is less clear-cut. It is important to assess the degree of autonomy the centre is able to retain in relation to the State, despite being in predominantly public ownership.

63. In order to do this, the national court will assess the validity of ARGE's contention that despite being in predominantly public ownership, the action of that operator is determined by its private shareholders. [27] It is in fact for the national court to ascertain the number and nature of the posts held by representatives of the private operators on the centre's decision-making bodies and determine the extent to which that distribution of powers influences, under the applicable national law, the economic objectives of the Seibersdorf centre.

64. However, that assessment is necessary only if, in accordance with its own national law, the national court considers that the fact that — in its own words — these 'bodies... are exclusively or at least predominantly in public ownership' [28] is not sufficient to guarantee that the public entity exercises effective control over the bodies it owns.

24 — See p. 10 of the English translation of the order for reference.

25 — See p. 8 of ARGE's written observations.

26 — See the Opinion, at point 53.

27 — ARGE in fact claims that because they hold a number of important posts on the board of directors and the executive committee, it is in any event the private company shareholders that are in control (see p. 8 of the written observations).

28 — See the fourth question referred.

65. In any event, it is not enough to show that the bodies are of public origin. In order to provide the Bundesvergabeamt with a helpful answer, it is essential to make sure that the public authority which exercises control over the research bodies in the main proceedings and the contracting authority are one and the same person.

66. The reservation expressed in the judgment in *Teckal* is based on the principle that if an economic entity is not independent of the local authority that owns it, the existence of a contract between the two is impossible or illusory, even though they are legally separate. For a legal relationship to fall outside the scope of the Directive, therefore, the contracting authority which is seeking the provision of various services from the operator must in fact be the very local authority that closely controls it, and not another authority.

67. On the other hand, a contractual relationship between a public authority and a service provider that is not in any way subordinate to it does fall within the scope of the Directive, even if that service provider is owned by another public authority.

68. It would appear from the case-file that the Republic of Austria is the majority shareholder in both research bodies, whereas the contracting authority is made up of the Federal Provinces and a specialist authority (the *Landeswasserbauamt* of Vorarlberg).

In those circumstances, it is for the Bundesvergabeamt to decide whether, although these public authorities are separate, the Seibersdorf centre and Arsenal institute may none the less be subject, under national law, to the same kind of control by the local authorities that make up the contracting authority as those authorities exercise over their own departments.

69. The Directive is applicable if, on the basis of its findings, the national court decides that the relationship between the research bodies and the contracting authority does not indicate the exercise of any control by the latter, within the meaning of the judgment in *Teckal*.

70. If it emerges that the contracting authority does in fact exercise control, other criteria will have to be considered. This is not the sole criterion according to which the activity of the bodies concerned may be defined as 'in-house' services. Simply establishing the existence of structural dependence in relation to the local authority that is to award a public contract is not of itself sufficient to make the services provided by the bodies in question comparable to the services that would be available to the local authority were it to use its own internal resources.

71. For that reason, it is also necessary to take into account the recipient of the economic activity those bodies engage in, applying the judgment in *Teckal*.

2. The recipient of the activity of the service provider

72. It is clear from the judgment in *Teckal* that an agreement cannot be considered to have been concluded between persons who are legally distinct if the operator carries out the essential part of its activity with the controlling local authority or authorities. [29]

73. As I have said, the principle set out in that judgment is based on the criterion that the operator is independent. An entity is not necessarily deprived of freedom of action simply because the decisions affecting it are taken by the local authority that controls it, if it is able to carry out a substantial part of its economic activity for other operators.

74. However, the entity must be considered to be wholly linked to the controlling authority if, in addition, the organisational relationship between the authority and the entity in question is coupled with the fact that the latter provides its services more or less exclusively to the authority. Such circumstances show that the local authority intends to use the services not just for public purposes but also, and principally, for its own benefit.

75. Only in that situation can it be argued that, administratively, the entity in question is an extension of the local authority, which is not therefore required to comply with the rules on competition laid down by the Directive, since it is opting to carry out itself the economic activities it requires.

76. Where a body acts essentially for the controlling public authority, the proprietorial relationship between the two entities justifies the provision of services by one to the other, in the same way as where an in-house department acts on behalf of the institution to which it belongs. On that basis, it seems justified that it should be exempt from the constraints of the Directive, since they are dictated by the need to maintain the kind of competition that is no longer appropriate in those circumstances.

77. It is less understandable, however, that, being in receipt of State aid, that body should offer services to other operators or local authorities without being subject to the legislation on public contracts, even though it is acting in circumstances comparable to those of a traditional economic operator. Its public origin and nature are not sufficient to mark it out from other service providers if it is offering the same type of service for a similar commercial purpose.

29 — Paragraph 50.

78. Diversification of activities, in an economic operator of this kind, shows that it has a special position as compared with the in-house departments of its controlling local authority, and that this position amounts to more than just a special feature of the organisational structure.

79. Consequently, the considerations of safeguarding competition that justify the Community rules on the award of public contracts apply to that economic operator just as much as they apply to other service providers.

80. Similarly, a service provider which intends entering into a contract with a local authority other than its own is no different from any other operator, from the point of view of both its competitors and the public authority awarding the contract. Since that body is not, by definition, a part of the contracting authority, as far as that authority is concerned, the services it is offering are those of a third party.

81. Clearly, whilst control of the service provider by the public authority awarding the contract is a necessary condition for the former to be considered to be providing 'in house' services, it is far from being a sufficient condition. The service provider must carry out the essential part of its activity for the controlling local authority. Consequently, if it engages in commercial activities, the Directive is once again applicable, unless those activities represent a marginal part of its overall activity.

82. In this case, according to ARGE, both the Seibersdorf centre and the Arsenal institute are engaged in a large number of commercial activities on the market. [30]

83. In order to decide whether the Directive is applicable, the national court will have to verify this, even if, in its view, it seems to be settled that the bodies in question carry on their activities exclusively, or at least predominantly, for public authorities, as the wording of the fourth question suggests. It will have, above all, to ascertain whether the bodies in question carry out the essential part of their activities with the contracting authority, to whose control I have assumed they are subject in this case. [31]

84. If the Directive were to be declared applicable to the main proceedings, it would still be necessary to establish whether, in accordance with Article 6 of the Directive, the contract at issue is among the contracts that can be exempt from it.

30 — See p. 8 of its written observations.
31 — See point 70 above.

3. The application of Article 6 of the Directive

85. It should be recalled that Article 6 excludes from the scope of the Directive contracts awarded to an entity which is itself a contracting authority on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

86. That provision echoes the 18th recital of the Directive, according to which '... contracts with a designated single source of supply may, under certain conditions, be fully or partly exempted from this Directive.'

87. By making a reservation in regard to that type of contract, the Directive is taking account of services which may be supplied to the public authorities in certain Member States only by specific public bodies, to the exclusion of all other service providers. The other entities are excluded regardless of nationality. [32]

88. Application of the Directive therefore depends, first and foremost, on the nature of the service provider concerned. In this case, it is already clear that the subsidised bodies meet the three criteria laid down by the Directive in its definition of 'bodies governed by public law', an expression used to describe contracting authorities other than the State, regional or local authorities and associations formed by one or more of such authorities. [33]

89. It is common ground that these bodies were established to meet needs in the general interest, not having an industrial or commercial character, that they have legal personality and are managed, controlled or financed for the most part by another contracting authority. [34]

32 — See Flamme P., Flamme M.-A., 'Les marchés publics de services et la coordination de leurs procédures de passation', *Revue du marché commun et de l'Union européenne*, No 365, February 1993, p. 150 et seq., paragraph 9, No 10.

33 — According to Article 1(b) of the Directive, '*contracting authorities* shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

Bodies governed by public law means any body:

— established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

— having legal personality and

— financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.'

In Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraph 21, the Court interpreted those conditions, as also provided for in the second subparagraph of Article 1(b) 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) as being cumulative. That same solution can be applied to Article 1(b) of the Directive, which is identical to the latter text.

34 — See p. 10 of the English translation of the order for reference.

90. Since they are thus themselves contracting authorities, it remains to be shown that they both enjoy an exclusive right, within the meaning of Article 6 of the Directive, pursuant to a published law, regulation or administrative provision.

91. None of the evidence cited by the national court or the interveners indicates that, at the time of the invitation to tender, either of the research bodies enjoyed an exclusive right to provide services of the kind involved in the award procedure. Neither Article 6 nor the concept of exclusivity on which it is based are even mentioned in the order for reference, confirming the impression that neither of the two tenderers challenged by ARGE enjoyed an exclusive right.

92. Moreover, had they enjoyed such a right, it is not clear why an award procedure should have been organised in accordance with the Directive, given that Article 6 specifically provides that a contract of that kind can be exempt from the Directive.

93. I therefore conclude that the Directive is applicable where a contracting authority intends to enter into a contract with an entity that is formally distinct from it and belongs for the most part to local authorities other than those that make up the contracting authority.

If, although formally distinct from the contracting authority, the entity belongs for the most part to that authority, the Directive is applicable if that entity carries out the essential part of its activity with operators or local authorities other than those of which the contracting authority is made up.

In both cases, the Directive is not applicable if the contract falls within the scope of Article 6 of the Directive.

VII — The existence of discrimination during the procedure for the award of public service contracts (first question)

94. By its first question, the Bundesvergabeamt is asking whether Article 3(2) of the Directive must be interpreted as meaning that it precludes a decision whereby a contracting authority admits to a procedure for the award of public service contracts bodies which receive subsidies from contracting authorities that enable

them to tender at prices which are substantially below those of the other tenderers.

95. The principle of equal treatment of tenderers laid down in Article 3(2) is not intended merely to prohibit discrimination that might be applied to economic operators who are nationals of other Member States. Like other provisions in the same Directive or in directives concerning other kinds of public contracts, [35] it contains no condition on nationality.

35 — For instance, Article 3(1) of the Directive provides that, in awarding public service contracts or in organising design contests, contracting authorities are to apply procedures adapted to the provisions of the Directive. The Court clearly stated, in relation to a comparable piece of legislation — Article 4(1) of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy and transport and telecommunications sectors (OJ 1990 L 297, p. 1), which provides that Directive 90/351/EEC is to apply when the contracting bodies are awarding their supply contracts, is identically worded — that there was no condition relating to the nationality or place of establishment of the tenderers (Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, paragraph 32). Furthermore, it is clear from the 20th recital of the Directive that the elimination of practices that restrict competition is not confined to practices which impede the participation in award procedures of nationals of other Member States. Similarly, the Court held in Case C-243/89 *Commission v Denmark* [1993] ECR I-3353, paragraph 33, in relation 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) that although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive whose purpose is, according to one of its recitals, to ensure the development of effective competition in the field of public contracts and the criteria for selection and the award of contracts, by means of which such competition is to be ensured. The Court was called upon to rule on a complaint based on an infringement of Directive 71/305/EEC which was linked to the nationality of the tenderer to whom the contract had been awarded. The objective of safeguarding competition pursued by the public contract directives must be achieved by applying the principle of equal treatment, which is not automatically confined to discrimination by reason of nationality. In my view, the principle of free competition is independent of the principle of the freedom to provide services, on which the Directive is founded, even though the two principles are closely related, with the former underpinning the effectiveness of the latter.

96. The infringement of the Directive is not therefore necessarily linked to a failure to accord equal treatment to tenderers from other Member States.

97. Moreover, that same philosophy underpins the relevant national legislation. Article 16(1) of the Bundesvergabegesetz accordingly provides that: 'Contracts for services under a procedure provided for in this law are to be awarded, in accordance with the principles of free and fair competition and of equal treatment of all candidates and tenderers, to undertakings which — at the latest at the time of opening of tenders — are authorised, efficient and reliable, at reasonable prices.'

98. The fact that, in this case, the operators benefiting from subsidies are all Austrian entities is not therefore relevant for the purposes of answering the first question.

99. It must first be established whether the very principle of according subsidies to economic operators bars them from taking part in procedures for the award of public contracts, and, if it does not, we should then go on to consider whether that is so even if the subsidies in question are illegal.

100. According to the Bundesvergabeamt, the subsidies paid to the tenderers constitute aid within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) or 'special cost advantages.' [36] It explains that: 'The competitive advantage in the form of lower costs...' that they enjoy '... derives from payments in the nature of aid, which may take the form either of the direct payment of money or of the provision of staff or premises or technical equipment or both.' The national court adds that the payment is made by the relevant regional or local authority, the State or a Province. [37]

101. It should be borne in mind that 'the concept of aid... encompasses not only positive benefits, such as subsidies, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict sense of the word, are of the same character and have the same effect.' [38] In so far as staff or goods are supplied by the Austrian public authorities for no consideration or on preferential terms, [39] there is reason to consider that the advantages thus conferred constitute State aid within the meaning of Article 92 of the Treaty.

102. However, as we know, the fundamental prohibition of State aid is neither absolute nor unconditional since not only is some State aid *ipso jure* compatible with the common market in accordance with the second paragraph of Article 92, but the third paragraph of Article 92 confers on the Commission a wide discretion to allow aid by way of derogation from the prohibition laid down in the first paragraph. [40]

103. If Community law accepts that some State aid is lawful, then, in my view, operators in receipt of that aid must have the right to carry on their activity in the same way as other operators. What point would there be in according undertakings aid lawfully if, at the same time, they were barred from engaging in normal economic activity or even merely from certain contracts on the pretext that the latter were regulated. Moreover, that interpretation would hardly be compatible with the concept of compensation which justifies some kinds of aid, because aid in the form of subsidy or logistical assistance would soon be eliminated as a result of the restrictions on an undertaking's activity.

104. The fact that State aid may be legal therefore implies that economic entities in receipt of lawful aid cannot be precluded from participating fully in the market. As the market is not restricted to unregulated

36 — See p. 6 of the English translation of the order for reference.

37 — *Ibidem*, p. 14.

38 — Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 58.

39 — *Ibidem*, paragraph 59.

40 — *Ibidem*, paragraph 36.

contractual relations but also includes public contracts, there is no reason why such operators should be excluded from public contract award procedures.

105. According to the Commission, whose point of view must be endorsed here, aid that has been notified and declared compatible with the common market cannot affect the decision of the contracting authority to admit a tenderer or the assessment of its tender.

106. I should add that, as the Austrian and French Governments point out,[41] the exclusion from the scope of the Directive of certain contracts concluded between two contracting authorities in accordance with Article 6 thereof, where a public service contract is awarded on the basis of an exclusive right, confirms the view that the Directive may apply to bodies which benefit from State aid where they do not enjoy such a right. As we have seen, the definition of contracting authority in the Directive covers bodies governed by public law, defined as bodies able to be financed, for the most part, by regional or local authorities.[42] For the Directive to be applicable, it is therefore sufficient that a service provider should fulfil the definition of contracting authority, which usually indicates the existence of public financing, without being linked on the basis of an exclusive right to the contracting authority to which it is providing the services. The Directive does not therefore rule out participation by a subsidised body in a public contract award procedure.

107. In those circumstances, the Directive does not preclude entities such as the bodies concerned in the main proceedings from participating in the public service contract award procedure at issue.

108. However, the answer to the question of the approach a contracting authority should take to a tenderer in receipt of illegal State aids is not quite so clear.[43]

109. It is perfectly natural that operators which have been rejected, or whose chances of winning a contract have diminished because of competition from entities which enjoy competitive advantages of this nature, should challenge the right of the contracting authority to allow those entities to tender without having to carry out a minimum of checks on the legality of the aid.

41 — See p. 7 of the written observations of the Austrian Government and paragraphs 16 to 18 of the written observations of the French Government.

42 — See footnote 33 above.

43 — Although this issue was frequently raised, both in the written observations and at the hearing, the question of the regime applicable to illegal State aids is purely hypothetical in this case, as no one is claiming that the aid enjoyed by the research bodies can be termed illegal.

110. If an aid is illegal the effect should be to bar the subsidised operator from taking part in any public tender procedure. Even if not specifically earmarked for certain elements — such as the price offered in the tender procedure — which significantly influence the final decision of the contracting authority, aid illegally accorded to an economic operator is bound to mitigate the charges that reduce its level of economic competitiveness.

111. None the less, however well-founded it may be, that view does not resolve the — essentially legal and procedural — problem facing the national court in the main proceedings. That court has in fact to establish whether the principle of equal treatment of tenderers, as set out in Article 3(2) of the Directive, encompasses the right of the contracting authority to bar tenderers benefiting from illegal subsidies from taking part, or indeed to investigate whether the subsidies they receive may be declared to be illegal.

112. Title VI of the Directive sets out the attributes required of the tenderers, the content of their tenders, and the relevant documentary evidence, those factors determining the admission of the operators to the procedure and the final award of the contract.

113. Also set out there are the criteria that give the contracting authority the right to bar a particular service provider from taking part in an award procedure. A number of provisions concern the legal obligations that are binding on the service provider. They permit the contracting authority to preclude a tenderer in an illegal position from the point of view of tax or social requirements, for example. [44]

However, the Directive is silent as to the action the contracting authority could take were it to establish the existence of aid that had not been notified, was suspected of being illegal or was manifestly illegal.

114. The Commission has described the background to the Directive from that angle. It pointed out that its initial proposal for a directive [45] included a provision identical to the last paragraph of Article 34(5) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. [46] According to that provision: 'Authorities may reject tenders which are abnormally low owing to the receipt of State aid only if they have consulted the tenderer and if the tenderer has not been able to show that the aid in question has been notified to the Commission pursuant to Article 93(3) of the Treaty and has received the Commission's approval.

44 — According to Article 29(f), for example, a service provider which has not fulfilled its obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority may be excluded from participating in a contract.

45 — OJ 1991 C 23, p. 1.

46 — OJ 1993 L 199, p. 84.

Authorities which reject a tender under these circumstances shall inform the Commission thereof.'

115. According to the Commission, the Council deleted that provision from its proposal for a directive in the course of the legislative procedure. [47] In response, the Commission made a declaration in its communication to the European Parliament to the effect that by amending the proposal for a directive in that way, the Council was expressing its concern to avoid any discrimination between private and public tenderers. In that same declaration, it observed that the Treaty gave it the power to prevent the improper use of State aid that could distort competition, and it could therefore accept the amendments.

116. The history of the Directive is instructive in two ways.

117. It is first apparent that, at the time the Directive was adopted, the legislature was aware of the problem linked to the existence of economic operators enjoying an advantage in procedures for the award of public contracts because they were in receipt of State aid. Moreover, the Commission's decision to restrict the regulation of situations of this kind solely to aid that had not been notified or had not been approved confirms acceptance of the principle that entities in receipt of legally accorded State aids could participate in procedures for the award of service contracts. My earlier analysis of this point is therefore confirmed here, on the basis of the intention of the Community legislature. [48]

118. A further indication is provided by the fact that the Community legislature also adopted an unambiguous stance as regards the extent of the power to act accorded to the contracting authority in relation to public service contracts. In its final version, the first paragraph of Article 37 of the Directive deals in particular with the right of the contracting authority to reject tenders which are obviously low in relation to the service to be provided. It lays down that the contracting authority must request details of the constituent elements of the tender and verify them, taking account of the explanations received, before it may reject the tender.

However, since it lacks a specific provision akin to Article 34 of Directive 93/38/EEC, the Directive does not give the contracting authority the right to reject a tender submitted by a tenderer in receipt of illegal aid or benefiting from aid which has not been notified to the Commission. That is to be regretted, particularly since it is not clear why the legal system of Directive 93/38/EEC should be different from that of Directive 92/50.

47 — See paragraph 22 of the Commission's written observations.

48 — See points 99 to 106 above.

119. The fact remains that the Directive is silent on this point for a reason which must be taken into account in interpreting the text.

120. The Council's amendment to the Commission's proposal for a directive, and indeed the Commission's declaration of approval, reveal the Community legislature's approach to the mechanism for monitoring illegal State aids, for which the Commission has prime responsibility.

121. According to the French Government and the Commission, the fact that the Directive is silent about the right of the contracting authority to reject the tender of an illegally subsidised tenderer does not necessarily mean that the contracting authority cannot draw the appropriate conclusions from the existence of that kind of aid.

122. The French Government considers that the Directive neither compels nor expressly permits the contracting authority to exclude a tender from a subsidised body. But it emphasises the risk it would run if it awarded a contract to a tenderer in receipt of illegal aid. The French Government asserts that if a contracting authority were to establish that an abnormally low tender was financed through illegal aid, it would be entitled to reject it. The risk of having to repay aid improperly granted would in fact adversely affect both the tenderer and the full performance of the contract.

123. The Commission considers that illegal aid may be taken into account at the stage at which undertakings are selected, that is to say at the point when the contracting authority assesses the financial and economic standing of the service provider. Like the French Government, the Commission bases its argument on the fact that, in accordance with the Court's case-law, State aid which is incompatible with the common market, or has simply not been notified, may be recovered. It points out that a contracting authority cannot be criticised for protecting itself against the risk of entering into a contract with an economic operator in receipt of aid of doubtful legality, by excluding the latter on the basis of checks on its financial and economic standing. The Commission therefore proposes that the Court should rule that Community law does not preclude a contracting authority from taking into consideration at the selection stage, in accordance with its national law, when determining a tenderer's financial standing, the fact that it has been in receipt of aid that is illegal and may therefore be subject to recovery.

124. Whatever the respective merits of these arguments, in my view, they should be considered only to the extent that they help resolve the dispute in the main proceedings. However, as I have said, as it is

formulated and as it must be interpreted in the light of the request for a preliminary ruling, the first question concerns the legality of a decision whereby a contracting authority *has admitted* subsidised entities to a procedure for the award of contracts.

125. The issue here, therefore, is not to provide the national court with guidance as to whether the contracting authority has the power to exclude a tenderer or reject its tender for reasons linked to the legality of the aid. The national court has, instead, to be informed whether the contracting authority has an obligation to proceed in that way where the State aid is illegal.

As Community law now stands, I have to take the view that a contracting authority is entitled to draw no conclusions, as regards the admission of a subsidised body, from the existence of aid which has not been notified or is illegal. I should add that the position would have been no different had the original text of Article 37 not been amended. Article 37 actually accorded the contracting authority a mere power to reject a tender which was abnormally low because the tenderer was in receipt of aid that had been improperly paid or had not been notified.

126. The Austrian Government, finally, points to the binding provisions of the Treaty relating to competition and the application of Article 37 of the Directive, where a tender appears to be abnormally low in relation to the service provided. In accordance with that provision, it advocates a detailed consideration of the various cost elements that make up the tender at issue. If the cost breakdown shows that the tender is incompatible with the principles of competition, because of unauthorised subsidies, it suggests that it should be mandatorily rejected.

127. The argument by the Austrian Government is based on both the procedure currently provided for under the Directive if a tender is abnormally low and on Community competition law. Here again, it is not necessary to analyse the validity of the argument, and it is sufficient to point out that the Republic of Austria is assuming that, subsequent to the decision at issue to allow an entity to participate, the contracting authority establishes that the tender is abnormally low and makes clear its intention of rejecting it. In substance, it therefore goes beyond the subject-matter of the first question, which is confined to the admission procedure.

128. On the basis of the above considerations, I conclude that the principle of equal treatment of tenderers, provided for in Article 3(2) of the Directive, does not preclude a decision whereby a contracting authority admits to a procedure for the award of public contracts entities in receipt of aid from contracting authorities which enables them to submit tenders at prices substantially below those submitted by the other tenderers.

Conclusion

129. In view of the foregoing, I propose that the Court answer the questions submitted by the Bundesvergabeamt as follows:

(1) Article 59 of the EC Treaty (now, after amendment, Article 49 EC) et seq. must be interpreted as meaning that they do not preclude a measure such as the decision at issue in the main proceedings, whereby a contracting authority admits to a procedure for the award of public contracts entities in receipt of public subsidies which enable them to submit tenders at prices substantially below the prices submitted by the other tenderers, even if those entities all have the nationality of the Member State in which the contracting authority is established and are themselves established in the territory of that Member State, provided the decision is not subject to any condition relating to the nationality of the operators, their place of establishment or the origin of the subsidies they may receive.

(2) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts is applicable where a contracting authority intends to enter into a contract with an entity that is formally distinct from it and belongs for the most part to local authorities other than those which make up the contracting authority.

If, although formally distinct from the contracting authority, the entity belongs for the most part to that authority, Directive 92/50 is applicable if that entity carries out the essential part of its activity with operators or local authorities other than those of which the contracting authority is made up.

In both cases, Directive 92/50 is not applicable where the contract falls within the scope of Article 6 thereof.

(3) The principle of equal treatment of tenderers provided for in Article 3(2) of Directive 92/50 does not preclude a decision whereby a contracting authority admits to a procedure for the award of public contracts entities in receipt of aid from contracting authorities which enable them to submit tenders at prices substantially below those submitted by the other tenderers.