OPINION OF ADVOCATE GENERAL ALBER

delivered on 8 July 1999 *

A — Introduction

1. The present reference for a preliminary ruling concerns two questions in connection with public procurement. On the one hand it concerns the question as to what legal significance is to be attributed to a non-discrimination clause (prohibition against discrimination on the ground of nationality) contained in a directive on procedures for the award of public supply contracts, and on the other hand whether such a non-discrimination provision contains an obligation for bodies which are not contracting authorities to carry out a (tendering) procedure in accordance with the directive when awarding (public) supply contracts.

2. The disputed provision is to be found in Article 2(2) of Directive 93/36/EEC [1] and reads as follows:

'When a contracting authority within the meaning of Article 1(b) [2] grants to a body other than a contracting authority — regardless of its legal status — special or exclusive rights to engage in a public service activity, the instrument granting this right shall stipulate that the body in question must observe the principle of non-discrimination by nationality when awarding public supply contracts to third parties.'

B — Facts

3. The dispute in the main proceedings concerns a tendering procedure with regard to eartags for pigs. The complainants, Unitron Scandinavia A/S and 3-S A/S,

* Original language: German.

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

2 — Article 1(b) of Directive 93/36 provides:
'For the purpose of this Directive: ... "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;
"a body 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;
...'.

Danske Svineproducenters Serviceselskab (hereinafter 'the complainants') wished to supply those eartags. The respondent, Ministeriet for Fødevarer, Landbrug og Fiskeri (Ministry of Foodstuffs, Agriculture and Fisheries; hereinafter 'the respondent' or 'the Ministry') bears the 'overall responsibility' for the Danish scheme involving eartags for pigs. The award procedure, which is the subject of the complainants' grievance, was carried out by the Veterinærdirektoratet (Veterinary Department), a subordinate institution of the respondent, as well as Danske Slagterier (Danish Abattoirs), a private body.

4. In Council Directive 92/102/EEC[3] on the identification and registration of animals, rules were introduced, with a view to combating disease, concerning the marking of animals. For that purpose the Member States were to set up a central authority with the power to carry out veterinary controls. The authority was to be required to register the holdings which kept animals within the meaning of the directive. In regard to keeping pigs, the directive provides that before they leave the holding on which they are born, they are to be identified by an eartag or tattoo which will identify the holding which the animal comes from. The Danish regulation[4] provides that eartags for pigs are to be approved by the Veterinary Department, which is itself subject to the respondent. Those eartags are then sold to the individual producers via Danske Slagterier, a private body connected to the Danish agricultural organisations. The Veterinary Department fixes the price for the eartags and the supply of eartags is registered in the Ministry of Agriculture's Central Livestock Register.

5. According to the statements made in the order for reference, two kinds of eartags are in use in Denmark, those employed for slaughtered animals and those used for live animals. Eartags for the latter are ordered by pig producers from Danske Slagterier, who transmit the order to the relevant eartag supplier, who, for his part, supplies the ordered eartags directly to pig producers. Payment for the eartags is made by pig producers to Danske Slagterier. The eartags for slaughtered animals, on the other hand, are ordered directly by pig producers from the eartag supplier, who dispatches them to pig producers whilst informing Danske Slagterier. Here also, payment for the eartags is made by pig producers to Danske Slagterier. The price for both kinds of eartags is composed of the amount charged by the eartag suppliers plus DKK 0.5 per eartag. Registration of pigs in the Central Livestock Register is carried out by Danske Slagterier, for which it receives an annual fee from the Veterinary Department of DKK 400 000.

3 — Council Directive 92/102/EEC of 27 November 1992 on the identification and registration of animals (OJ 1992 L 355, p. 32).

4 — Directive 92/102 was initially implemented in Denmark by Regulation No 80 of 18 February 1993, and subsequently superseded by Regulation No 1073 of 15 December 1995 on the marking and registration of cattle, pigs, sheep and goats.

6. In 1993/94 the supply of eartags was first put out to tender. The tender specifications were drawn up by the Veterinary Department in collaboration with Danske Slagterier, whilst the latter was entrusted with the tendering procedure. The tendering procedure took place in conformity with Danish legal provisions. At the end of 1996 an additional tendering procedure was carried out at the respondent's request. An undertaking which had previously been entrusted with the supply of eartags was again awarded the supply contract. A second undertaking was also selected to supply eartags, which had not previously been awarded such a contract. Agreements were entered into with both undertakings for a duration of three years, starting on 1 April 1997. That procedure was also carried out in accordance with Danish law. A third tendering procedure, the first to be carried out in accordance with the procedure laid down in Directive 93/36, took place between October 1997 and April 1998.

7. On the grounds that they had not been considered within the 1996/97 tendering procedure, the complainants lodged an administrative complaint against the respondent with the Klagenævet for Udbud (hereinafter 'the Procurement Review Board'). They claimed that, in relation to their purchase of eartags, Danske Slagterier were to be considered a contracting authority within the meaning of Article 1 of Directive 93/36 and that consequently the directive should have been applied. They argued that Danske Slagterier had carried out the administration of the eartag scheme in the public interest and had, in reality, been acting in the respondent's stead. The contracts should thus have been awarded in a tendering procedure pursuant to Directive 93/36. In the alternative, the complainants claimed that Article 2(2) of Directive 93/36 should have been applied and Danske Slagterier should have been instructed by the respondent that differential treatment on the basis of nationality was not permitted, which consequently would have resulted in the tendering procedure being published throughout the entire European Union.

8. The Ministry contended that no public supply contract was involved and that Directive 93/36 was therefore inapplicable. In reality, suppliers sold the eartags to pig producers. Danske Slagterier had only been required to administer the scheme and the respondent had simply approved the eartags and paid a certain amount for the scheme's administration. The purchase of eartags had thus not taken place at public expense.

9. The Procurement Review Board assumes that Danske Slagterier were the purchasers of the eartags in question. That was due to the fact that Danske Slagterier had carried out the tendering procedure and that pig producers had paid Danske Slagterier for both types of eartags. The Procurement

Review Board also assumes that Danske Slagterier are not to be considered a contracting authority within the meaning of Article 1(b) of Directive 93/36, because no more than fifty per cent of their activities are financed by public funds.

10. The Procurement Review Board further states that, since the Ministry delegated the administration of the eartag scheme including the purchasing of the eartags to a private undertaking or a private organisation — Danske Slagterier — that service as such should have been awarded by means of a public tendering procedure. The awarding of that contract should have taken place pursuant to Directive 93/36 on the award of public supply contracts and not pursuant to Directive 92/50/EEC [5] on the award of public service contracts. That was due to the fact that, according to the information available to the Procurement Review Board, the value of the purchased eartags exceeded the value of the service in question.

11. In the matter presently at issue, the referring Procurement Review Board raises the question, first, whether the provision contained in Article 2(2) of Directive 93/36 has an independent meaning. The Procurement Review Board considers it possible that this provision [6] has lost its independent meaning due to the fact that a directive on the award of public service contracts has already been adopted, namely Directive 92/50 relating to the coordination of procedures for the award of public service contracts. The Procurement Review Board also considers it possible that this independent meaning remains in effect, due to the fact that, in spite of amendments made to Directive 93/36, Article 2(2) remained the same.

12. Secondly, the Procurement Review Board considers what such an independent meaning might entail, given that the interests, which in this case were to be protected under Article 2(2) of Directive 93/36 (supply contracts), were, in effect, those which fell under Directive 92/50 (public service contracts). In this context, the Procurement Review Board therefore wishes to know to what extent the principle of non-discrimination is to be taken into consideration when awarding public supply contracts, as well as whether Article 2(2) requires a body which does not constitute a contracting authority to carry out a tendering procedure for the award of public contracts if the value of the contracts exceeds the threshold value laid out in Directive 93/36. The question here is therefore not whether the respondent itself is required to carry out the procedure pursuant to the Directive, but rather whether Danske Slagterier were required to apply that procedure.

5 — Council Directive 92/50/EEC of 18 June 1992 on the coordination of procedures for the award of public service contracts (OJ 1992 L 13, p. 1).

6 — This provision had already been worded almost identically in Article 2(3) of Council Directive 77/62/EEC of 21 December 1976 on the coordination of procedures for the award of public supply contracts (OJ 1977 L 13, p. 1).

13. The Procurement Review Board therefore refers the following questions to the Court of Justice for a preliminary ruling:

'1. Does Article 2(2) of Council Directive 93/36/EEC coordinating procedures for the award of public supply contracts still have an independent meaning after the adoption of Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts (as both amended by European Parliament and Council Directive 97/52/EEC)?

2. If Question 1 is answered in the affirmative, does the provision accordingly mean that, where a contracting authority entrusts the administration of an eartagging scheme to a private undertaking which is not a contracting authority, the contracting authority should stipulate, on the one hand, that the undertaking should comply with the prohibition against discrimination on the ground of nationality in public supply contracts which the undertaking awards to third parties and, on the other hand, that the procurement of goods linked to the scheme should be put out to public tender if the value of the goods to be procured exceeds the threshold value in Council Directive 93/36?'

14. The respondent — which considers the reference for a preliminary ruling inadmissible — and the Commission have taken part in the procedure before the Court. Both have submitted written statements and declined to participate in the oral hearings. I shall refer to their arguments as far as may be necessary in the course of my analysis.

C — Opinion

1. *Admissibility of the reference for a preliminary ruling*

(a) Whether the Procurement Review Board constitutes a court or tribunal within the meaning of Article 117 of the EC Treaty (now Article 234 EC)

15. Firstly the question arises as to whether the Procurement Review Board is to be considered a 'court or tribunal' within the meaning of Article 177 of the EC Treaty; that is to say, whether the reference is admissible.

16. Both the respondent and the Commission answer this question in the affirmative. With reference to the established case-law of the Court they invoke the statutory footing upon which the Procurement Review Board rests, its permanent character, the contentious nature of proceedings before it, the fact that it applies the law, and its independence. They thus conclude that the Procurement Review Board constitutes a court or tribunal within the meaning of Article 177 of the EC Treaty.

17. The Procurement Review Board was — according to information which it has itself provided — established by Law No 344 of 6 June 1991. It was set up in implementation of Council Directive 89/665/EEC[7] on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. Proceedings before the Procurement Review Board are like those in civil disputes. They are adversarial in nature and in nearly all cases an oral hearing takes place. Proceedings are concluded by the Procurement Review Board handing down a decision in the form of an order. Such orders are formulated in the same terms as judgments in civil cases. The Procurement Review Board is not bound by the instructions of any other body and operates as a completely independent institution. The Procurement Review Board is composed of a presiding judge as well as a panel of experts. The rulings of the Procurement Review Board concern the interpretation of Community law in regard to public supply contracts and can thus be said to be of a judicial nature. The Procurement Review Board is also empowered to ascertain the nullity of administrative measures. Furthermore, it also has jurisdiction at last instance in Denmark with regard to the interpretation and application of Community provisions on tendering procedures. The Procurement Review Board therefore concludes that it falls under the term 'court or tribunal' within the meaning of Article 177 of the EC Treaty.

18. That conclusion is to be endorsed. The Court has repeatedly held that in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether it applies rules of law, whether its rulings are binding, whether it is independent and whether its procedure is *inter partes*.[8] Since it fulfils the requirements set out by the Court in its case-law, the Procurement Review Board may be considered a 'court or tribunal' within the meaning of Article 177 of the Treaty. A reference for a preliminary ruling is, at least from that perspective, admissible.

7 — Council Directive 89/665/EEC of 21 December 1989 (OJ 1989 L 395, p. 33).

8 — See Case 61/65 *Vaassen-Göbbels* v *Vorstand des Beambtenfonds voor het Mijnbedrijf* [1966] ECR 261; Case C-393/92 *Almelo and Others* v *Energiebedrijf IJsselmij* [1994] ECR I-1477; Case C-54/96 *Dorsch Consult* v *Bundesbaugesellschaft Berlin* [1997] ECR I-4961, paragraph 23.

(b) The importance of the questions referred

19. The respondent nevertheless still considers the reference inadmissible on the ground that a ruling on the questions submitted is not indispensable in order for the Procurement Review Board to hand down its decision. An answer would not contribute to resolving the dispute in the main proceedings. The respondent holds that, although it may be within the purview of the national court to decide whether or not a reference pursuant to Article 177 of the Treaty is necessary and indispensable for its ruling, the reference is inadmissible because any answer in the present case would only be of hypothetical value. The respondent further argues that an interpretation of Article 2(2) of Directive 93/36 as requested by the Procurement Review Board would not have any impact on the complainants' legal situation. The respondent holds that there is no legal interest worth protecting and that, in reality, questions are concerned that might arise in some later legal dispute. It would, in any event, be of no help to undertakings if the Court were to answer the questions, because in the meantime, a possible procedural error had been cured by the award of the disputed contract. The last tendering procedure which was carried out in 1997/98 had, the respondent argues, taken place in conformity with Directive 93/36 (supply contracts). Thus the complainants could only claim damages, a matter for which the Procurement Review Board does not have jurisdiction and which was not the subject-matter of the initial proceedings.

20. Article 177 of the Treaty provides that it is up to the national court to decide whether a preliminary ruling from the Court of Justice is necessary. Article 177 does not provide that the Court may reject such a reference. The Court has thus consistently held that it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine, in the light of the special features of each case, both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. [9] One factor particularly in favour of this solution is the fact that it is solely the national court which has direct and exact knowledge of the facts and is in the best position to decide the issue. Where the questions referred by a national court concern the interpretation of Community law, the Court of Justice is, as a rule, required to hand down a ruling.

21. The Court has, however, occasionally allowed exceptions to that rule and refused to rule upon some or all of the questions referred to it. Such cases are, on the one hand, where the national court has not provided the Court of Justice with enough information for the latter to be able to hand down a ruling that might be of some use to the former in the main dispute. On the other hand, the Court has, on a number of occasions, refused to answer the questions referred to it where it was obvious that they

9 — See, for example, Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* v *Ente Nazionale Risi* [1994] ECR I-711, paragraph 17.

bore no relation to the main dispute. Also worth mentioning are those cases where the Court of Justice has rejected a reference for a preliminary ruling because it was of the opinion that the national court had made improper use of the procedure set out in Article 177 of the Treaty. In cases such as these the Court held the view that the questions referred to it were of a general or hypothetical nature.

22. The Ministry's line of argument refers to those last two categories.

23. The order for reference nevertheless shows that the Procurement Review Board considered itself obliged to submit a reference for a preliminary ruling due to the assertions made by the complainants. The Procurement Review Board considers it a possibility that the tendering procedure could have been subject to procedural errors which would invalidate it. If the provisions mentioned by the Procurement Review Board were found to provide that a tendering procedure pursuant to Directive 93/36 should have been carried out, then the Procurement Review Board would most certainly be required to declare the procedure which had already taken place null and void. However, because it is unsure as to the interpretation of Article 2(2) of Directive 93/36 in particular, the Procurement Review Board has referred two questions to the Court of Justice for a preliminary ruling.

24. Thus it may be ascertained that the Procurement Review Board considered the referral of these two questions as necessary in order for it to be able to rule on the matter in dispute. Contrary to the view held by the respondent, the order for reference does not allow one to conclude that hypothetical questions are involved here that could only be of relevance in an eventual, future dispute. Because the referring Procurement Review Board has affirmed and justified the relevance of the questions referred to the Court, the reference for a preliminary ruling is admissible.

2. *The first question*

25. In its first question the Procurement Review Board asks whether Article 2(2) of Directive 93/36 (supply contracts) has an independent meaning. In its opinion this question could be answered in the negative. In this vein it argues that this provision was taken over from Article 2(3) of Directive 77/62 and could, under certain circumstances, be understood in connection with the fact that, at the time of its adoption, no Community-wide rules existed as to awarding public service contracts. The contested provision could thus have lost its meaning when Directive 92/50 (service contracts) was adopted. However, the Procurement Review Board holds the view that the fact that the contested provision was maintained when adopting Directive 93/36 could, on the other hand, speak in favour of its having an independent meaning.

26. The respondent, which expresses its opinion on the questions referred to the Court only in the alternative, also affirms the independent character of Article 2(2) of Directive 93/36. It holds that comparisons with the original Directive 77/62 on the coordination of procedures for the award of public supply contracts demonstrate that this provision has constantly been retained despite several amendments. The respondent further holds that an analysis of the preparatory documents and drafts of Directive 93/36 does not reveal that Article 2(2) was to have lost any of its independent character upon the adoption of Directive 92/50. The respondent argues that this provision is not only to be understood in terms of 'reminiscing about old times'.

27. In its submission the Commission begins by stating that, on the basis of the facts as presented by the Procurement Review Board, both Directive 93/36 (supply contracts) and Directive 92/50 (service contracts) could be applicable. According to the Commission the preparatory documents and drafts of Directive 93/36 show that this Directive was not meant fundamentally to change the previous Directive. Its adoption was necessary particularly in order to carry out amendments to Directive 92/50, which were also introduced in Directive 93/37/EEC. [10] That did not however affect Article 2(2). Despite those modifications, it is still to be found in Directive 93/36 and guarantees the principle of non-discrimination, even where Directive 92/50 is not applicable. This would particularly be so in cases involving concession contracts. One must thus, in the Commission's opinion, assume that Article 2(2) has its own independent meaning.

28. I essentially concur with the comments made by the respondent and the Commission. The provision contained in Article 2(2) of Directive 93/36 is to be found in a similar wording as early as in Directive 77/62, which was the first Directive on the coordination of procedures for the award of public supply contracts to be adopted. The contested provision is still to be found in Article 2(3) of Directive 77/62. The only amendment this provision has been subject to over the years merely concerns the definition of what constitutes a contracting authority. In its essence, the provision has none the less remained unchanged. Thus, pursuant to both provisions, the legal instrument by which a contracting authority grants special rights to a body other than a contracting authority must stipulate that the body in question is to observe the principle of non-discrimination on grounds of nationality when awarding public supply contracts. It may be true that Article 3(2) of Directive 92/50 (service contracts) contains a non-discrimination clause; however this clause only provides that contracting authorities must ensure 'that there is no discrimination between different service providers'. As can be deduced from its title, this Directive is, however, applicable particularly to public service contracts, whereas Directive 93/36 governs the pro-

10 — Council Directive 93/37/EEC of 14 June 1993 on the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

cedures applicable for the award of public supply contracts.

29. It is nevertheless quite conceivable that cases might exist where, in addition to Directive 93/36 (supply contracts), Directive 92/50 (service contracts) could be applicable. That could apply in particular where a contract that is to be awarded contains service as well as supply components. Should, however, the contract's emphasis be on the supply of goods, then Directive 92/50 would no longer be applicable in such a case. The ban on discrimination contained in Article 3(2) of Directive 92/50 would not apply. It is, however, in such a case that the independent meaning of Article 2(2) of Directive 93/36 becomes apparent. Another type of case is, however, conceivable, in which, although the award of public service contracts is involved, these could be awarded within the framework of a concession contract. Here also Directive 92/50 and the ban on discrimination contained therein would not be applicable; however such a case would still fall under the scope of Directive 93/36. Under circumstances such as these, the ban on discrimination contained in Article 2(2) would again apply.

30. Due to the fact, however, that neither the preparatory documents nor the various drafts of Directive 93/36 indicate that the provision contained in Article 2(2) was to be deprived of an independent meaning, one must assume that this provision is meant to remain in force alongside Directive 92/50.

3. *The second question*

31. In its second question, the Procurement Review Board requests an interpretation of Article 2(2) of Directive 93/36 in the event that it should have an independent meaning. It enquires in particular as to the content of that provision and whether, first, a contracting authority must, when granting special rights to a private undertaking which is not a contracting authority, require that private undertaking to observe the principle of non-discrimination, and, second, whether Article 2(2) provides that the said private undertaking must apply the procedure for the award of public contracts.

32. The respondent is of the opinion that a contract granting special rights must contain the non-discrimination provision contained in Article 2(2). This would ensure the application of the principle of non-discrimination even where a tendering procedure pursuant to the directive was not required. That would make it clear that individuals are also required to comply with the principle of non-discrimination within the framework of tendering procedures. The respondent further argues that Article 2(2) nevertheless does not require an undertaking which has been granted

special rights to carry out a public tendering procedure without fail.

33. According to the Commission, Article 2(2) requires a contracting authority which grants special rights to a body to inform that body of the existence of the prohibition against discrimination and ensure that it is complied with. An additional requirement for that body to carry out a tendering procedure is, in the Commission's view, not contained in Article 2(2).

34. The first point I would make is that the provision in Directive 93/36 concerning tendering procedures is not applicable in the matter at issue here, in so far as Danske Slagterier are concerned. Nevertheless it is true that the threshold value contained in Article 5 of Directive 93/36 has been exceeded, so that, from the point of view of contract volumes, it would normally be applicable. However Danske Slagterier do not constitute a contracting authority. Nor are the eartags in question sold on behalf of, or for the benefit of, the Danish authorities. No financial ties exist in this context between the eartag suppliers and the authorities. Consequently, in so far as the tendering procedure for the award of public supply contracts is concerned, the directive is not applicable in a case such as this.

35. However in order to guarantee the application, beyond the Directive's actual scope, of the prohibition against discrimination so central to Community law, Article 2(2) requires that a contracting authority enforce this prohibition when granting special rights to other bodies. Article 2(2) does not, however, contain a broader obligation to observe the procedural provisions in respect of the award of public contracts. Nor does a comparison with the other two directives on the award of public contracts allow one to read more into the contested provision. Both Directive 93/37 and Directive 92/50 (merely) require the Member States to introduce the necessary measures in order to ensure that *contracting authorities* respect the provisions contained in these directives. This also includes any prohibition against discrimination contained in the directives.

36. In the present case, the wording alone of Article 2(2) demonstrates that the contracting authority is only required, when granting special rights to a body, to ensure that the prohibition against discrimination is not breached. This is intended to avoid unequal treatment on the basis of nationality in cases involving numerous tenderers. The directive's purpose is to achieve the free movement of goods in the area of public supply contracts which are awarded in the Member States at the expense of the State, local or regional authorities, and other public bodies. It is to that end that the directive makes the award of public supply contracts by contracting authorities subject to a special procedure. The individual procedural conditions are set out in the individual provisions of the Directives. On its own, however, Article 2(2) does not

provide that bodies which have been granted special rights, but which do not constitute contracting authorities, must carry out a procedure for the award of public supply contracts as laid out in Directive 93/36, but rather that they must merely observe the principle of non-discrimination on the ground of nationality.

37. Thus it may be concluded that Article 2(2) of Directive 93/36 only places an obligation on the contracting authority, when granting special rights to a body, to ensure compliance with the prohibition against discrimination.

D — Conclusion

38. In light of the foregoing considerations, I suggest the following answers to the questions referred to the Court for a preliminary ruling:

(1) Article 2(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts has retained its independent meaning, regardless of the entry into force of Council Directive 92/50/EEC of 18 June 1992 on the coordination of procedures for the award of public service contracts.

(2) Where a contracting authority within the meaning of Directive 93/36/EEC grants special or exclusive rights to carry out public service activities to a body which is not a contracting authority, regardless of its legal status, then the legal instrument granting those rights shall provide that that body, when awarding public service contracts to third parties, must comply with the principle of non-discrimination on the basis of nationality. Article 2(2) does not place any further obligation on the contracting authority to ensure that that body, which is not a contracting authority, applies the procedure for awarding public supply contracts.