OPINION OF ADVOCATE GENERAL GEELHOED
delivered on 20 November 2003 [1]

I — Introduction

1. In this case the Court has been asked to give a preliminary ruling on four questions concerning the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, [2] as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (hereinafter 'Directive 89/665'). [3]

2. These questions have arisen in a dispute between Siemens AG Österreich ('Siemens') and ARGE Telekom & Partner ('ARGE Telekom'), on the one hand, and the Hauptverband der österreichischen Sozialversicherungsträger (Central Association of Austrian Social Security Institutions), the contracting authority ('the Hauptverband'), on the other.

3. The facts and proceedings relating to the dispute in which the questions submitted for a preliminary ruling have arisen are complex. They will be described below in Part III of this Opinion. It will be clear from this context that there may be reasonable doubt as to the admissibility of these questions, which, since the dispute in the main action has become devoid of any subject-matter, have become completely or partially hypothetical.

4. Although the wording of the questions is itself complex, it provides, in conjunction with the statement of reasons for the order for reference, a sufficient basis for a reply. The relevant aspects of that order will therefore be summarised in Part III of this Opinion. In essence, the Bundesvergabeamt, the body submitting the questions, asks whether, given its (limited) powers, the manner in which the Austrian legislature has implemented Directive 89/665 is appropriate.

1 — Original language: Dutch.
2 — OJ 1989 L 395, p. 33.
3 — OJ 1992 L 209, p. 1.

II — Legislative background

A — *Community law*

5. Article 1(1) and (3) of Directive 89/665 reads as follows:

'1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

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

6. Article 2(1), (6), (7) and (8) of Directive 89/665 reads as follows:

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

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law. Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

8. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty (now Article 234 EC) and independent of both the contracting authority and the review body.

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

7. Article 25 of Directive 92/50 provides:

'In the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties.

This indication shall be without prejudice to the question of the principal service provider's liability.'

8. Article 32 of Directive 92/50 stipulates:

'1. The ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

2. Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided:

...

(c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;

...

(h) an indication of the proportion of the contract which the service provider may intend to sub-contract.

3. The contracting authority shall specify, in the notice or in the invitation to tender, which references it wishes to receive.

4. The extent of the information referred to in Article 31 and in paragraphs 1, 2 and 3 of this Article must be confined to the subject of the contract; contracting authorities shall take into consideration the legitimate interests of the service providers as regards the protection of their technical or trade secrets.'

B — *National law*

9. Directives 89/665 and 92/50 were transposed into Austrian law in the Bundesgesetz über die Vergabe von Aufträgen 1997 (Federal Procurement Law 1997, BGBl. I, 1997/56, in the version published in BGBl. I, 2000/125; hereinafter 'the BVergG').

10. Paragraph 31 of the BVergG concerns the services performed by subcontractors and reads as follows:

'(1) The contract documents shall specify whether subcontracting is permitted. The subcontracting of the whole contract is not permitted except in the case

of purchase agreements and subcontracting to undertakings associated with the contractor. In the case of building contracts the subcontracting of the majority of the services ... is not permitted. ... The contracting authority shall ensure that the contractor's subcontractors themselves perform the greater parts of contracts subcontracted to them. In exceptional cases the contracting authority may specify in the contract documents, stating its reasons, that it is permissible for the majority of the contract to be subcontracted. Subcontracting parts of the contract is, moreover, permitted only if the subcontractor is qualified to perform his share of the work.

(2) The contracting authority shall ask the tenderer in the contract documents to indicate in his tender the proportion of the contract which he may intend to subcontract to third parties. This information shall be without prejudice to the question of the contractor's liability.'

11. Paragraph 40 of the BVergG — on withdrawal of the invitation to tender during the tendering period — stipulates:

'(1) During the tendering period the invitation to tender may be withdrawn for compelling reasons, especially if before the end of the tendering period circumstances become known which, had they been known earlier, would not have led to an invitation to tender or would have led to an invitation to tender essentially different in substance.

(2) The withdrawal should be made known in the same manner as the invitation to tender.

(3) Tenderers and applicants to whom the contract documents have already been forwarded should be notified without delay of the withdrawal and of the reasons therefor.'

12. Paragraphs 52, 53, 53a, 54, 55 and 56 of the BVergG — on the assessment of tenders — read as follows:

'Paragraph 52 (Elimination of tenders)

(1) Before the contracting authority proceeds to the selection of the tender

qualifying for the award of the contract, it should immediately eliminate the following tenders on the basis of the results of the assessment:

1. tenders submitted by applicants who are unqualified or do not have the necessary financial, managerial or technical capability or are not reliable;

...

8. tenders which do not satisfy the tender requirements and faulty and incomplete tenders, if these shortcomings have not been or cannot be remedied, or partial tenders, if they are not admitted;

9. tenders received from applicants who, immorally or contrary to the principle of effective competition, have come to agreements with other applicants which are disadvantageous to the contracting authority;

Paragraph 53 (Selection of the tender for the award of the contract; the best tender principle)

From among the tenders remaining after elimination, the most favourable from a technical and economic standpoint shall be awarded the contract, in accordance with the standards laid down in the invitation to tender (the best tender principle). A written statement of reasons for the decision awarding the contract shall be drawn up ...

Paragraph 53a (Announcement of the award of the contract)

(1) The contracting authority should inform the remaining tenderers without delay in writing or by fax ... of the tenderer to which the contract is to be awarded. In connection with subparagraph 4, this communication may be used to give the unsuccessful tenderers all the reasons for the rejection of their tenders.

(2) On penalty of annulment, the contract shall not be awarded within a refraining period of two weeks from the

announcement of the decision awarding the contract referred to in subparagraph 1 ... . If an accelerated procedure is adopted because of a need for urgency, the refraining period shall be shortened to one week.

(3) Unsuccessful tenderers may request in writing within a period of one week or, if because of a need for urgency an accelerated procedure is adopted pursuant to Paragraph 69, within a period of three days, after the announcement of the decision awarding the contract, to be informed of the grounds on which their tenders did not quality and of the features and advantages of the selected tender.

(4) The contracting authority should notify the unsuccessful tenderers of the name of the selected tenderer and the amount for which the contract has been awarded without delay on receipt of the request — provided that it has been made in time — and in any case three days before the end of the refraining period. The unsuccessful tenderers should also be informed of the features and advantages of the selected tender, provided that the disclosure of this information is not inconsistent with the public interest or with the legitimate commercial interests of undertakings or does not harm free and fair competition.

(5) If an unsuccessful tenderer takes the view that the decision taken by the contracting authority infringes the provisions of this Law and that he is consequently at risk of suffering a loss, he must inform the contracting authority without delay of his intention to open a review procedure, stating his reasons.

Paragraph 54 (Award and implementing agreement)

(1) During the award period the contractual relationship shall come into being at the time when the tenderer receives written confirmation of the acceptance of his tender. If the award period is exceeded or if the contract departs from the tender, the contractual relationship shall come into being only on the tenderer's written declaration that he accepts the contract. The tenderer should be given an appropriate period within which to make this declaration.

(2) ...

Paragraph 55 (Cancellation of the invitation to tender after the expiry of the tender period)

(1) After the tender period has expired, the invitation to tender shall be cancelled where there are mandatory reasons for doing so.

(2) The invitation to tender may be cancelled if, following the elimination of tenders in accordance with Paragraph 52, only one tender remains.

(3) The invitation to tender shall be deemed to have been cancelled if no tenders are received or if only one tender is received.

(4) Tenderers shall be informed without delay if the invitation to tender is cancelled and shall be informed of the reason.

(5) The cancellation of an invitation to tender ... shall be announced in the same way as the invitation to tender.

Paragraph 56 (Termination of the award procedure)

(1) The award procedure shall end with the establishment of the supply agreement or with the cancellation of the invitation to tender.

(2) Each unsuccessful tenderer should be notified in writing immediately after the termination of the procedure. ...'

13. Paragraph 113 of the BVergG defines the powers of the Bundesvergabeamt. It reads as follows:

'(1) The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the following provisions.

(2) Until the award of the contract, and for the purposes of removing infringements of this Federal Law and of the

regulations made hereunder, the Bundesvergabeamt may:

1. grant interim measures; and

2. declare void decisions of the awarding department of the contracting authority that have been taken unlawfully.

(3) Once the contract has been awarded or the contract award procedure has been ended, the Bundesvergabeamt may determine that, as a result of an infringement of this Federal Law or of any regulations made hereunder, the award was not made to the tenderer who submitted the best offer. In such proceedings, the Bundesvergabeamt may, on the application of the contracting authority, also determine whether an applicant or tenderer who has been eliminated would have had any serious chance of being awarded the contract even if this Federal Law and the regulations made hereunder had been complied with.'

14. Paragraph 117(1) and (3) of the BVergG stipulates:

'(1) A decision taken by the contracting authority during a contract award procedure shall be declared void by administrative order of the Bundesvergabeamt, with due regard for the recommendation of the mediation committee in the case concerned, if it

1. is inconsistent with the provisions of this Federal Law or of the regulations made hereunder and

2. has a significant influence on the outcome of the contract award procedure.

...

(3) If the contract has already been awarded, the Bundesvergabeamt shall, with due regard for the conditions set out in subparagraph 1, determine only whether or not it is unlawful as alleged.'

15. Paragraph 122(1) of the BVergG stipulates that 'if this Federal Law or the regulations made hereunder are culpably infringed by the departments of a contracting authority, an unsuccessful tenderer shall be entitled to claim compensation for the cost of submitting the tender and the other costs associated with participation in the

contract award procedure from the contracting authority to which the conduct of the bodies of the awarding department must be ascribed.'

16. Under Paragraph 125(2) of the BVergG a claim for damages, which must be lodged with a civil court, is admissible only if the Bundesvergabeamt has previously reached a conclusion within the meaning of Paragraph 113(3). This conclusion is binding on the court applied to and on the parties to the proceedings before the Bundesvergabeamt.

17. Paragraph 5 of the Verwaltungsvollstreckungsgesetz (Law on Enforcement of Administrative Measures) stipulates:

'(1) Where, due to its particular features, an obligation to permit something to be done, not to do something, or to do something cannot be performed by a third party, it shall be enforced by the authority responsible for enforcement requiring the person subject to the obligation to perform it on pain of fines or imprisonment.

(2) Enforcement shall be initiated by threatening to impose the penalty for the prohibited act or omission. The penalty threatened shall be imposed immediately the first time the prohibited act is committed, or once the period allowed for the act required to be done has expired without that act having been done. At the same time, a penalty, on each occasion more severe than the previous, shall be threatened for repetition or for further delay. As soon as the obligation has been performed, a penalty that has been threatened shall not be imposed.

(3) In any individual case, the penalty shall not exceed ATS 10 000 or imprisonment for longer than four weeks.

(4) Imposition of a penalty by way of fines is also permissible against legal persons, partnerships governed by commercial law and registered associations, except for bodies governed by public law.'

18. Paragraph 879 of the Allgemein Bürgerliches Gesetzbuch (General Civil Code) (ABGB) reads as follows:

'(1) A contract which is contrary to a statutory prohibition or is immoral shall be void.

(2) In particular, the following contracts shall be void:

... '

III — Facts and procedural context

A — *Facts of the case and proceedings before the national authorities*

19. On 21 September 1999, in the Supplement to the *Official Journal of the European Communities*, the Hauptverband announced a two-stage contract award procedure which it intended to conduct for the award of a contract to design, plan and construct a smart-card-based electronic data-processing (EDP) system, including the Austria-wide delivery, initialisation, personalisation, distribution and disposal of cards, delivery, installation and full-service maintenance of terminals, and support for EDP system operations, a call centre, card management and other services necessary for the operation of the system.

20. On 22 February 2000, the Hauptverband decided to invite five consortia to submit tenders and to eliminate a sixth consortium. Point 1.9 of the tender documents of 21 September 1999 and Point 1.8 of the invitation to tender documents of 15 March 2000 entitled 'Invitation to Tender' provided the following as regards subcontracting: 'A maximum of 30% of the services may be subcontracted, provided that the characteristic parts of the service, namely, project management, system design, development, construction, delivery and operation of the central components of the system that are specific to the project, development, delivery and management of the life-cycle of the cards and development and delivery of the terminals remain with the tenderer or consortium.'

21. According to the contracting authority, as is evident from the order for reference, that condition was imposed as a criterion of reliability for the purpose of ensuring that the services supplied would be free of technical errors, because if the card suppliers were personally liable, they would have a greater incentive to supply a service free of errors and the contracting authority would have greater influence.

22. Austria Card, a card supply company, which was to supply the part of the service

involving 'card delivery' in each case, was a member of three of the four consortia which actually submitted tenders (including Siemens and ARGE Telekom). The only consortium in which Austria Card was not involved was formed by the firms EDS/ ORGA.

23. By letter of 18 December 2000, the Hauptverband, as the contracting authority, notified three consortia of tenderers pursuant to Paragraph 53a of the BVergG that it intended to award the contract to EDS/ORGA.

24. The consortia that were not to be awarded the contract thereupon requested the Bundesvergabekontrollkommission (Federal Procurement Review Commission) to carry out arbitration proceedings. The latter refused to carry out arbitration proceedings in one case and attempted, unsuccessfully, to reach an amicable settlement in the other two cases. The three unsuccessful consortia then lodged review applications with the Bundesvergabeamt. The applications sought, primarily, the setting aside of the contracting authority's decision to award the contract to the EDS/ ORGA consortium. Alternatively, they requested that the Hauptverband be ordered to cancel the invitation to tender.

25. By notice of 19 March 2001, the Bundesvergabeamt (Eighth Chamber) dismissed all the applications as being inadmissible on the ground that they lacked substance. In support of its decision the Bundesvergabeamt stated that the applicants' tenders had had to be eliminated by the contracting authority in accordance with Paragraph 52(1)(9) of the BVergG because Austria Card was a member of the three consortia concerned. The exchange of information thereby made possible and the negotiations which Austria Card necessarily had to conduct with the three consortia on the form of the tenders were to be regarded as constituting agreements between tenderers inconsistent with the principle of fair competition.

26. The pleadings reveal that this decision by the Bundesvergabeamt was annulled by judgment of the Verfassungsgerichtshof (Constitutional Court) of 12 June 2001 on the ground that the constitutional right of the three consortia to proceedings in a court of law had been infringed. Before taking its decision, the Bundesvergabeamt had omitted to submit to the Court for a preliminary ruling a question on whether a tenderer whose tender had not been eliminated by the contracting authority could be refused his right to bring proceedings before the competent national authority.

27. On 28 and 29 March 2001, Debis, the third unsuccessful consortium, and ARGE Telekom again instituted, consecutively, review proceedings before the Bundesvergabeamt. They applied for annulment of the

Hauptverband's decision not to cancel the invitation to tender and for interim measures to prohibit the contracting authority from awarding the contract either for a period of at least two months from submission of the application (Debis) or until the Bundesvergabeamt had reached its decision (ARGE Telekom).

28. In response to these applications the Bundesvergabeamt adopted an interim measure by notice of 5 April 2001 prohibiting the award of the contract until 20 April 2001.

29. In their applications Debis and ARGE Telekom presented arguments based on both national and Community law in support of their position that the invitation to tender was unlawful. They maintained that the invitation to tender should be cancelled because it followed from the Bundesvergabeamt's decision of 19 March 2001 that only one undertaking still qualified for the award of the contract. After all, if the tenders submitted by Siemens, ARGE Telekom and Debis could be eliminated under Paragraph 52(1) of the BVergG on the ground that they infringed the principle of fair competition, it followed from the provisions of Paragraph 55(2) and (3) of the BVergG that the invitation to tender had to be cancelled, since only one tenderer (EDS/ORGA) remained. The invitation to tender was, moreover, inconsistent with Community law, since an inadmissible standard of quality had been established in Point 1.8 of the invitation to tender of 15 March 2000. It excluded the possibility of the subcontracting of parts of the provision of services in excess of 30% of the total contract and, in all cases, of all typical contractual services, especially the delivery and management of the life-cycle of the cards. This had forced the applicants to include Austria Card as a member of the consortia which they had formed. Had it not been for the conditions laid down by Point 1.8 of the invitation to tender, the applicants could have relied on a subcontractor. In their opinion this requirement was inconsistent with Community law. They referred to the Court's judgment of 2 December 1999 in *Holst Italia*.[4] This showed that it must be possible to have the service which was the subject of the invitation to tender performed by suitable third parties.

30. By notice of 20 April 2001, the Bundesvergabeamt (Ninth Chamber) granted the applications of Debis and ARGE Telekom and, in accordance with Paragraph 113(2), No 2, of the BVergG declared void the Hauptverband's decision not to cancel the invitation to tender. In support of its decision, the Bundesvergabeamt stated that the invitation to tender had to be cancelled because it contained a substantially unlawful provision. Specifically, the Hauptverband's prohibition of subcontracting infringed the tenderer's right under Community law to rely on subcontractors' capacity in order to prove its own capacity, as interpreted by the Court in *Holst Italia*.[5]

4 — Case C-176/98 [1999] ECR I-8607.

5 — Cited in footnote 4.

31. Despite this notice, the Hauptverband decided on 23 April 2001 to award the contract to EDS/ORGA without delay, as a result of which the contract was concluded. The interim measures adopted by notice of 5 April 2001 had expired on 20 April 2001 and, notwithstanding an application to this effect, had not been extended. The Bundesvergabeamt's notice of 20 April 2001 merely made a statement about 'setting aside a failure to cancel', which is difficult to understand. From this the Hauptverband deduced that it had not been decided in a judicially compelling way that its own decision to award the contract to the lowest bidder was not valid or had been set aside.

32. The Hauptverband also decided to challenge the Bundesvergabeamt's decision of 20 April 2001 before the Verfassungsgerichtshof. The documents relating to the case show that the Verfassungsgerichtshof first dismissed, by order of 22 May 2001, the application to suspend the Bundesvergabeamt's decision and then, by judgment of 2 March 2002, annulled that decision.

33. On 30 April 2001 Siemens initiated a review procedure before the Bundesvergabeamt seeking the setting aside of various decisions taken by the Hauptverband relating to the decision to award the contract to EDS/ORGA. Siemens took the view that it followed from the annulment of the Hauptverband's decision not to cancel the contract award procedure announced in 1999 that its decision to award the contract was unlawful because it concerned a second, unpublicised contract award procedure. It also applied for interim measures. That application was dismissed by the Bundesvergabeamt on 11 May 2001, a decision on the other applications being reserved.

34. On 17 May 2001 ARGE Telekom similarly applied for interim measures and for the annulment of various decisions taken by the Hauptverband in connection with its decision not to cancel the contract award procedure.

35. On 18 May 2001 Siemens again applied for interim measures and for the annulment of the Hauptverband's decisions not to cancel the contract award procedure, to award the contract to EDS/ORGA, to issue a letter of award to EDS/ORGA and to conclude the contract with this consortium without first validly announcing the award decision.

36. By decision of 9 July 2001, the Bundesvergabeamt dismissed ARGE Telekom's and Siemens' applications for interim measures and otherwise reserved its decision.

37. The Bundesvergabeamt (Ninth Chamber) held that a decision on Siemens' applications of 30 April and 18 May 2001 and ARGE Telekom's application of 17 May 2001 required a more detailed interpretation of a number of provisions of Directive 89/665. By order of 27 July 2001, it therefore submitted the following questions for a preliminary ruling.

B — *The questions submitted for a preliminary ruling and the related explanations*

'1. Is Council Directive 89/665, and in particular Article 2(1)(b) thereof, if necessary in conjunction with Article 2(7) thereof, to be interpreted as meaning that the legal effect of a decision taken by a national review body within the meaning of Article 2(8) of Directive 89/665 relating to the setting aside of a contracting authority's decision not to cancel a contract award procedure is that if national law does not provide any basis for the effective and compulsory enforcement of the review body's decision against the contracting authority, the contract award procedure is automatically terminated by the national review body's decision, without the need for any further act by the contracting authority?

2. Is Directive 89/665, in particular Article 2(7) thereof, if necessary in conjunction with Council Directive 92/50, in particular Articles 25 and 32(2)(c) thereof, or any other provisions of Community law, in particular having regard to the *effet utile* doctrine relating to the interpretation of Community law, to be construed as meaning that a provision in an invitation to tender which prohibits subcontracting material parts of the service concerned and, contrary to the case-law of the Court of Justice, in particular Case C-176/98 *Holst Italia* [1999] ECR I-8607, prevents the tenderer from using his contract with his subcontractor to prove that the services of a third party are actually available to him and which thus deprives him of his right to prove his own capability by relying on the services of a third party or to prove that he actually has available a third party's services, is so clearly contrary to Community law that a contract concluded on the basis of such an invitation to tender is to be regarded as invalid, in particular where national law in any case provides that illegal contracts are invalid?

3. Is Directive 89/665, in particular Article 2(7) thereof, or any other provision of Community law, in particular having regard to the *effet utile* doctrine relating to the interpretation of Community law, to be construed as meaning that a contract concluded contrary to a decision by a national review body within the meaning of Article 2(8) of Directive 89/665 relating to the setting aside of a contract authority's decision not to cancel a contract award procedure is invalid, in particular where national law in any case provides that immoral or illegal contracts are void but does not provide any basis for the effective and compulsory enforcement of the review body's decision against the contracting authority?

4a. Is Directive 89/665, in particular Article 2(1)(b) thereof, if necessary in conjunction with Article 2(7), to be interpreted as meaning that where national law does not otherwise provide any basis for the effective and compulsory enforcement of the review body's decision against the contracting authority, the review body has, by virtue of the direct application of Article 2(1)(b) in conjunction with Article 2(7), the power to issue a compulsory, enforceable order to the contracting authority to ensure that the unlawful decision is set aside, even though national law authorises the review body to issue only non-compulsory, non-enforceable orders to set aside contracting authorities' decisions in tenderers' applications for review within the meaning of Article 1(1) of Directive 89/665?

4b. If Question 4a is answered in the affirmative: does Article 2(7) of Directive 89/665, if necessary in conjunction with other provisions of Community law, give the review body the power in such a case to threaten contracting authorities and the members of their executive organs with, and to impose on them, such fines or fines and imprisonment by way of coercive penalties as are necessary to enforce their orders and are calculated in accordance with judicial discretion, where the contracting authorities and the members of their executive organs do not comply with the orders issued by the review body?'

38. In its order for reference the Bundesvergabeamt gives a detailed explanation of the above questions. The main elements of this explanation can be summarised as follows:

39. To substantiate the first question, the Bundesvergabeamt points out inter alia that its decisions under Paragraph 113(2)(2) of the BVergG do not comprise any directions to the contracting authority that are enforceable at the instance of the successful applicant. In this respect the powers of the Bundesvergabeamt differ from those of similar national authorities in the areas of commercial law, construction law and the law on water resources, for example. Those authorities do have the power to issue enforceable instructions. This means that interested parties are in a far weaker legal position under public procurement law than parties in other areas of law. The Bundesvergabeamt wonders whether this outcome of national legislation is compatible with the requirements of Community law, as set out in particular in Article 2(7) of Directive 89/665.

40. In the case of Question 2 the Bundesvergabeamt points out that, in accordance with the Court's case-law, it proceeded in its decision of 20 April 2001 on the basis that every tenderer is entitled to rely on subcontractors to furnish evidence of technical capability if he can prove that their services are actually available to him. The Bundesvergabeamt therefore takes the view that it is entitled to assume that a provision relating to the tender requirements which largely excludes any such reliance on subcontractors from the outset is inconsistent with Community law and that the contract award procedure in which such a condition is imposed may not be carried through to its end, but must be cancelled.

As Community law relating to public procurement does not contain any provisions that give an explicit answer to the question as to the extent to which unlawful awards result in the invalidity of the contracts concluded on that basis, the question as to the validity of the contract can be regarded as one of national law.

Weighed against the principle of the *effet utile* of Community law, however, such a conclusion would be unsatisfactory. A contracting authority which did not abide by the provisions of Community law or comply with the review body's decisions might, after all, frustrate the achievement of the objectives of Community law without fear of any sanction where, as in the present case, national law could not guarantee compulsory enforcement of the review body's decisions.

In this context the Bundesvergabeamt considers it appropriate to determine whether a contract established on the basis of a contract award procedure in which provisions of Community law have been infringed must be considered invalid in civil law on the ground that it is unlawful or immoral.

41. In connection with the first two questions the Bundesvergabeamt also points out that, if the contracts concluded had to be considered invalid, it could still set aside decisions by the contracting authority (and, if necessary, take other measures if the Court were to answer Questions 4a and 4b in the affirmative) because, if the conclusion of the contract were invalid, the award must likewise be regarded as invalid. According to the Bundesvergabeamt, a more detailed interpretation of Community law is therefore needed to determine the powers of the national court or tribunal to decide on the validity of the award and of the contract concluded on that basis.

42. In the case of Question 3 the Bundesvergabeamt states that the Hauptverband, the contracting authority, not only disregarded the substantive provisions of Community public procurement law but also deliberately departed from the decision of the national review body within the meaning of Article 1(3) of Directive 89/665. Such an attitude should be regarded as immoral, with the associated implications for the validity of the contract.

43. In the case of Questions 4a and 4b the Bundesvergabeamt explains that national law does not ensure the effective enforcement of decisions made by review bodies because it does not provide for the compulsory enforcement of the setting aside of a contracting authority's decision. Although Article 2(1)(b) of Directive 89/665 gives the Member States considerable scope in determining the powers to be conferred on review bodies, if the result is that the provisions of Community public procurement law have insufficient *effet utile*, the Bundesvergabeamt regards the possibility of the review body directly exercising the powers provided for in the Directive as being worthy of consideration. The Bundesvergabeamt therefore wonders whether the administrative means of enforcement for which national law provides are equal to the task of ensuring effective compliance with Community law.

IV — Proceedings before the Court

44. In the order for reference the Bundesvergabeamt requests that the accelerated

procedure for which Article 104a of the Rules of Procedure of the Court of Justice provides be applied to the questions referred. It argues that an accelerated procedure might prevent the contracting authority from frustrating the enforcement of Community law, as interpreted by the Court, by establishing a *fait accompli*. If the questions referred were answered in the affirmative, a rapid decision could prevent major losses since the performance of the contract between the Hauptverband and EDS/ORGA had not yet commenced at the time when the order for reference was issued.

45. By order of 13 September 2001 the President of the Court dismissed this request, on the ground that the circumstances described by the Bundesvergabeamt did not indicate any exceptionally urgent need for answers to the questions.

46. The request for a preliminary ruling was received at the Registry of the Court on 9 August 2001. ARGE Telekom, the Hauptverband, EDS/ORGA, the Austrian Government and the Commission submitted written observations pursuant to Article 20 of the EC Statute of the Court of Justice. At the hearing on 18 September 2003 the Hauptverband, the Austrian Government and the Commission explained their positions at greater length.

V — Assessment

A — *Preliminary observations*

47. The background to the order for reference described in depth in points 19 to 37 above and the Bundesvergabeamt's comments on the questions it has submitted prompt a number of preliminary observations.

48. Once the Hauptverband, the contracting authority, had made it known to the remaining applicants in the contract award procedure pursuant to Paragraph 53 of the BVergG that it intended to award the contract to EDS/ORGA, three groups initiated proceedings before the Bundesvergabeamt:

(1) In a first set of proceedings the applicants in the main action sought the annulment of the Hauptverband's decision to award the contract to EDS/ORGA and the cancellation of the contract award procedure. They were

unsuccessful in this, their application being declared inadmissible by order of 19 March 2001.

(2) In a second set of proceedings the unsuccessful applicants called on the Bundesvergabeamt inter alia to set aside the — notional — decision of the Hauptverband, the contracting authority, not to cancel the contract award procedure. They were forced to take this course because, as the Hauptverband and the Austrian Government have emphasised in their written and oral observations, the decision to award the contract itself could not be challenged before the Bundesvergabeamt a second time. The unsuccessful applicants succeeded with this second demand. By an interim measure of 5 April 2001 the Hauptverband was prohibited until 20 April 2001 from proceeding to award the contract. By order of 20 April 2001 the Bundesvergabeamt then set aside the notional decision not to cancel the contract award procedure. This order did not, however, prevent the conclusion of the contract between the contracting authority and EDS/ORGA a few days later.

(3) There then followed a third set of proceedings, in which the unsuccessful applicants in essence sought the annulment of the decisions taken by the Hauptverband after its decision to select EDS/ORGA as the 'best bidder', thus ignoring the Bundesvergabeamt's order of 20 April 2001 that the contract award procedure be cancelled. In the course of this third set of proceedings the Bundesvergabeamt raised the questions submitted for a preliminary ruling. From the order for reference it can be deduced that the applicants in these proceedings base their demands mainly on two arguments:

— the decision of 18 December 2000 to award the contract was invalid from the outset because the so-called Smart Card Committee had not yet given the approval required for the award of the contract;

— the decisions that led to the conclusion of the contract between the Hauptverband and EDS/ORGA were all void because they were taken in the context of an invalid contract award procedure.

49. There is no denying that a contract was concluded between the Hauptverband and EDS/ORGA, bringing to an end the second phase of the contract award procedure that had begun on 22 February 2000. Under

Austrian law, only a civil court is competent to assess the validity of this contract and any claim for damages in connection therewith.

50. From the contents of the questions referred, read in conjunction with the detailed explanation relating thereto, it can be deduced that the Bundesvergabeamt doubts that the powers conferred on it are sufficient to ensure the effective application of Directive 89/665, since a contract award procedure which it considers contrary to Community law has none the less led to the award and conclusion of a significant contract.

51. To the extent to which this background to the questions has prompted the Bundesvergabeamt, implicitly on some occasions, more explicitly on others, to question the compatibility as such of the legal system underlying Austrian public procurement law with Directive 89/665, it exceeds the limits imposed by Article 234 EC on the preliminary ruling procedure, which restricts cooperation between the national courts and the Court of Justice to the interpretation of Community law for the benefit of a decision in the main action.

52. It is therefore necessary to examine whether the Court's answers to the questions referred to it for a preliminary ruling can be beneficial to a decision in the main action.

53. In the light of this and other factors the admissibility of the questions referred should first be appraised.

B — *Admissibility*

54. The Hauptverband, the Austrian Government and the Commission have contended in their written observations and their oral statements at the hearing, albeit for widely different reasons, that the questions are not admissible.

55. The Commission doubts that the Bundesvergabeamt is a court or tribunal, since it itself recognises in the order for reference that its decision does not contain 'any recommendations to the contracting authority that are capable of implementation'. It therefore asks whether the questions submitted by the Bundesvergabeamt are admissible, having regard to the Court's case-law and specifically to the judgments in *Victoria Film* [6] and *Salzmann*, [7] according to which a national court may refer a question to the Court under Article 234 EC only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

6 — Case C-134/97 [1998] ECR I-7023, paragraph 14.
7 — Case C-178/99 [2001] ECR I-4421, paragraph 14.

56. The Austrian Government takes the view that the questions are inadmissible because they are so worded as to be incomprehensible to those who are not familiar with Austrian formal and substantive public procurement law. It contends that a referring national court or tribunal must be expected to phrase complex and fundamental questions concerning the structure of the national legal order in such a way that they are also clear and comprehensible to those who are not familiar with the national legal order in question.

57. The Hauptverband considers the questions to be inadmissible because, in its view, the order for reference gives an incomplete description of the facts in the main action. In the present case the order concerns not one, but three different basic sets of proceedings. Furthermore, the Bundesvergabeamt omitted to refer in its order for reference to the proceedings pending before the Verfassungsgerichtshof and the Handelsgericht (Commercial Court) in Vienna.

58. Nor was the Bundesvergabeamt competent to submit questions for a preliminary ruling because after its decision of 19 March 2001 an appeal against the decision awarding the contract was no longer possible. The Bundesvergabeamt was therefore no longer entitled to assess the validity of that decision or the decisions which the Hauptverband had subsequently taken. Nor did the Bundesvergabeamt have any authority to assess the validity or invalidity of a contract governed by civil law which had been concluded after the expiry of the contract award procedure.

59. At the hearing the Austrian Government and the Hauptverband also referred to the implications of the Verfassungsgerichtshof's judgment of 2 March 2002 for the admissibility of the request for a preliminary ruling. That judgment annulled the Bundesvergabeamt's decision of 20 April 2001. The Verfassungsgerichtshof held that it was logically impossible for a decision to be set aside if that decision called for something not to be done. The application to that effect from the consortia of tenderers which had not qualified for the award of the contract had therefore had to be declared inadmissible. As the Bundesvergabeamt had assessed the case in question in response to an inadmissible application, it had arrogated a power to which it was not entitled. The Hauptverband's right to a hearing before a court of law had therefore been infringed.

60. The Austrian Government and the Hauptverband contend that, as a result of this judgment by the Verfassungsgerichtshof, the relevance to the main action of the questions referred to the Court is at least partly lost, namely to the extent that they explicitly or implicitly concern the Bundesvergabeamt's decision of 20 April 2001, the questions thus becoming hypothetical. According to the Court's case-law, this would make them inadmissible. This would

certainly be true of Question 1 and perhaps of Questions 3, 4a and 4b too.

61. The answer with respect to the Commission's first objection to the admissibility of the questions can be brief. Very recently, in the judgment in *GAT*,[8] the Court explicitly ruled that the decisions of the Bundesvergabeamt are indeed of a judicial nature and that the Court is therefore competent to answer questions submitted by that body. The Court pointed out in this context that it is evident from Paragraph 125(2) of the BVergG that an assessment by the Bundesvergabeamt under Paragraph 113(3) of the BVergG is not only a requirement for the admissibility of any claim for damages made to a civil court for the culpable infringement of the aforementioned provisions, but is also binding both on the parties to the proceedings before the Bundesvergabeamt and on the civil court concerned. Consequently, the Court is competent to answer questions referred to it by the Bundesvergabeamt.

62. Nor, it seems to me, does the Austrian Government's second objection to admissibility serve any purpose. It can indeed be deduced from the detailed order for reference and the explanation it contains what the Bundesvergabeamt is seeking to achieve with the questions referred, although the wording of those questions is not *prima facie* always clear. In raising this objection, which refers primarily to national law, the Austrian Government appears, moreover, to be ignoring the fact that the procedure for which Article 234 EC provides concerns the interpretation and validity not of national law but of Community law and especially, in the present case, the interpretation of a number of provisions of Directives 89/665 and 92/50.[9]

63. The third objection, raised by the Hauptverband, to the admissibility of the questions is more persuasive, partly in the light of my preliminary comments in points 48 to 53 above. Although, according to settled case-law of the Court, it is for the national courts to determine whether the order for reference accords with national formal and substantive law[10] and it is left to them to identify[11] and assess[12] assess the relevant facts, this authority is not unrestricted. If it can be deduced from the

8 — Case C-315/01 [2003] ECR I-6351, paragraphs 25 to 29.

9 — See, inter alia, Case 63/76 *Inzirillo* [1976] ECR 2057, paragraph 6.

10 — See, inter alia, Case 104/77 *Oehlschläger* [1978] ECR 791, paragraph 4, and Case C-181/96 *Wilkens* [1999] ECR I-399, paragraph 33.

11 — See, inter alia, Joined Cases C-175/98 and C-177/98 *Lirussi and Bizzaro* [1999] ECR I-6881, paragraphs 37 and 38, and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18, and Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 43.

12 — See, inter alia, Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 14, and *Canal Satélite Digital*, cited in footnote 11, paragraph 43.

order for reference, from the court documents forwarded and from written and oral observations that the answers to the questions referred can clearly have no influence on the outcome of the main action and that they are therefore of a hypothetical nature, they should, again according to settled case-law of the Court, [13] be dismissed without a ruling.

64. In the light of the foregoing, it must therefore be examined whether the questions which the Bundesvergabeamt has submitted are relevant to the settlement of the main action.

65. As I have already observed in points 48 to 51 above, the Hauptverband has concluded a contract with EDS/ORGA without abiding by the decision of the Bundesvergabeamt in which the Hauptverband's — notional — decision not to cancel the contract award procedure was set aside. In the main action the applicants now state inter alia that the decisions by the Hauptverband which ultimately resulted in the conclusions of the contract are all void because they were taken in the context of an invalid contract award procedure.

66. Now that it has been determined that under Austrian law it is not the Bundesvergabeamt but a civil court which is competent to assess the legal validity of the contract concluded on 23 April 2002 between the Hauptverband and EDS/ORGA, the answers to the questions referred cannot in principle make any contribution to the settlement of the main action.

67. Under Austrian law the civil courts are competent to assess contracts concluded after their award. In accordance with the last sentence of Article 2(6) of Directive 89/665, Austrian law limits the powers of those courts to awarding damages to any person harmed by an infringement of the contract award requirements.

68. Now that it appears to have been established that in the situation underlying the main action the decision awarding the contract taken by the contracting authority was not annulled by the Bundesvergabeamt and, to implement that decision, one or more contracts were concluded as a result of their award, it must be assumed that only a civil court is competent to assess the contracts which have emerged from the contract award procedure here at issue.

69. In the light of the foregoing I take the view that it must be assumed that the questions submitted by the Bundesvergabeamt, which essentially ask whether the

13 — See, inter alia, Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 21, Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 26, and *Inspire Art*, cited in footnote 11, paragraph 47.

powers conferred on it in the BVergG satisfy the minimum requirements set out in Article 2(7) of Directive 89/665, are purely hypothetical.

70. The hypothetical nature of the questions is, moreover, reflected in their content. Taken together, they contain, as I have already observed in point 51, an invitation to the Court to weigh, in a context far removed from the actual legal dispute in the main action, the general system of legal protection for which the national contract award procedure provides against the applicable Community law. The Bundesvergabeamt thereby overlooks the fact that the procedure set out in Article 234 EC charges the Court to contribute to the administration of justice in the Member States and not to give learned opinions on general or hypothetical questions. [14]

71. As the final element in the assessment of the admissibility of the questions referred, the consequences of the Verfassungsgerichtshof's ruling of 2 March 2002 should be considered.

72. As is evident from the order for reference, the Bundesvergabeamt has submitted its questions primarily because its decision of 20 April 2001 setting aside the contracting authority's — notional — decision not to cancel the contract award procedure was not enforceable under Austrian law. This is quite obvious from the wording of Questions 1, 3, 4a and 4b. Now that the Verfassungsgerichtshof has annulled the decision of 20 April 2001 on the ground that the Bundesvergabeamt was not competent to take such a decision, the questions directly concerning this decision have no basis. They have thus become of a purely hypothetical nature, even without the arguments advanced above in support of this view being considered.

73. Although Question 2 does not refer directly to the decision of 20 April 2001, it seems to me that this question too is affected by the ruling of the Verfassungsgerichtshof referred to above. In substance, the statement of reasons for the — annulled — decision of 20 April 2001 was, after all, based on the assumption that the contract award procedure was invalid because it contained a contract award requirement which was contrary to Community law, as construed by the Court in *Holst Italia*. [15] However, that assumption is pivotal in

14 — Most recently, *Inspire Art* (cited in footnote 11), paragraph 45.

15 — Cited in footnote 4.

Question 2. However correct it may be, the Court does not need to consider it now that it forms part of a ruling by the Bundesvergabeamt which cannot play any further part in the main action.

74. In view of the foregoing I conclude that the questions referred to the Court by the Bundesvergabeamt in this case are not relevant to the resolution of the legal dispute in the main action and so, being purely hypothetical, must be declared inadmissible.

C — *Substance*

75. Merely in the alternative, if and in so far as the Court does not agree with my opinion that all the questions submitted are inadmissible and concludes that only those directly affected by the Verfassungsgerichtshof's ruling of 2 March 2002, that is to say, Questions 1, 3, 4a and 4b, are inadmissible, I will now consider Question 2.

76. In this regard the Commission has observed, for good reason to my mind, that the question is based on the false premiss that it follows from the Court's ruling in *Holst Italia* [16] that the condition imposed by Point 1.8 of the contract award requirements of 15 March 2000 for permitting subcontractors' services is contrary to Community law.

77. Indeed, Directive 92/50, the directive applicable to the contract award procedure here at issue, does not contain any provision prohibiting subcontracting as such. It is clear from Article 25 of that directive that the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties. Article 32(2)(h) stipulates that evidence of the service provider's technical capability may be furnished through an indication of the proportion of the contract which he may intend to subcontract, according to the nature, quantity and purpose of the services to be provided.

78. In the assessment of the admissibility of a prohibition of subcontracting a distinction must be made, as the Commission, the Austrian Government and the Hauptverband have rightly observed, between such a prohibition where the suitability of tenders is being assessed and a prohibition in the

16 — Cited in footnote 4.

case of the performance of the contract once it has been awarded.

79. The ruling of the Court in *Holst Italia*,[17] to which the Bundesvergabeamt refers, concerned the assessment and selection phase of a contract award procedure.

In paragraph 26 of that judgment the Court ruled in this respect: 'From the object and wording of those provisions, it follows that a party cannot be eliminated from a procedure for the award of a public service contract solely on the ground that that party proposes, in order to carry out the contract, to use resources which are not its own but belong to one or more other entities.'

In paragraph 31 the Court rounds off its reasoning by stating '... that Directive 92/50 is to be interpreted as permitting a service provider to establish that it fulfils the economic, financial and technical criteria for participation in a tendering procedure for the award of a public service contract by relying on the standing of other entities, regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities which are necessary for performance of the contract ...'.

80. I interpret this ruling as follows: potential applicants for a public works contract may not be eliminated on the ground that they do not themselves have all the skills needed for the performance of the contract. Such a prohibition might result in the number of applicants being severely limited from the outset, especially in the case of large and technically complex contracts. This would mar the effect of Directive 92/50. However, to ensure that the contract, once awarded, is performed appropriately, the contracting authority may require that, where a tenderer relies on the skills of other entities, he vouch for the availability of their resources.

81. It is, however, evident from the wording of Point 1.8 of the contract award requirements, as referred to in point 20 of this Opinion, that this condition relates not to the tendering and selection phase of the contract award procedure but to the phase in which the contract for the performance of the works is concluded.

82. During that phase a prohibition or restriction of subcontracting, by which the contracting authority seeks to prevent the performance of essential parts of the con-

17 — Cited in footnote 4.

tract from being left to entities whose capacities and qualities it has been unable to assess during the contract award procedure, is not inconsistent with Directive 92/50. It is evident from the wording of Article 25 of that directive that it applies explicitly to the tendering and assessment phase of the contract award procedure. Article 25 provides for the contracting authority to have an insight into the capacities of the entities concerned, which is necessary for a correct assessment of the tenders submitted. From this it is impossible to deduce an argument for prohibiting subcontracting in the phase in which the contract on the performance of the work is concluded with the selected tenderer after the contract has been awarded.

83. It follows from this that the premiss on which the Bundesvergabeamt's decision of 20 April 2001 is based, namely that Point 1.8 of the contract award requirements is contrary to Community law and that, therefore, the contract award procedure should be cancelled in its entirety, is in itself incorrect.

84. Although the Bundesvergabeamt has not asked in its questions for an assessment of its interpretation of the Court's ruling in *Holst Italia*, [18] it is my view that the Court can hardly let an obviously incorrect interpretation of its case-law pass unchallenged. This is all the truer if it formed the basis of the decision of the Bundesvergabeamt to which its questions refer and which may, for that and other reasons, make those questions hypothetical.

85. Furthermore, leaving aside the substantive premiss of the decision of 20 April and assuming that the invitation to tender included a condition inconsistent with Community law or continued despite a notice issued in view of this inconsistency by a review body within the meaning of Article 2(8) of Directive 89/665, an assessment should be made in accordance with applicable national law of the validity and possibly the cancellation of the contracts already concluded.

86. This view is endorsed inter alia in the Court's judgment in *Alcatel* [19] and in the Opinion of Advocate General Alber in *Commission* v *Austria*. [20]

18 — Cited in footnote 4.

19 — Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraph 49.

20 — Case C-328/96 [1999] ECR I-7479, point 48.

VI — Conclusion

87. In view of the foregoing I propose that the Court should:

— declare the questions referred to the Court in the Bundesvergabeamt's order for reference of 11 July 2001 inadmissible;

— in the alternative, declare Questions 1, 3, 4a and 4b inadmissible and answer Question 2 as follows:

If there has been a contract award procedure which included a tender requirement inconsistent with Community law, or if the contract has been awarded despite a decision issued in view of this inconsistency by a review body within the meaning of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, the validity and possible cancellation of the contracts already concluded should be assessed in accordance with applicable national law.