OPINION OF ADVOCATE GENERAL ALBER

delivered on 10 April 2003 [1]

I — Introduction

1. The reference for a preliminary ruling from the Bundesvergabeamt (Federal Procurement Office, Austria) concerns the treatment of variants in a procedure for the award of public works contracts. One tenderer which was unsuccessful in its bid for the road construction contract concerned had submitted a tender proposing a lower-priced — but, in its view, equivalent — asphalt design instead of the concrete surface dressing stipulated in the tender document. This action concerns, on the one hand, the conditions governing the submission and subsequent assessment of variants (Questions 1 to 3) and, on the other hand, the potential repercussions of any improper treatment of variants, as the case may be, on a tendering procedure.

II — Relevant legislation

A — *Community law: Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts* [2] *(hereinafter: 'Directive 93/37/EEC')*

2. Article 19

'Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting authorities may take account of variants which are submitted by a tenderer and meet the minimum specifications required by the contracting authorities.

The contracting authorities shall state in the contract documents the minimum specifications to be respected by the variants and any specific requirements for their

1 — Original language: German.

2 — OJ 1993 L 199, p. 54.

presentation. They shall indicate in the tender notice if variants are not permitted.

...'

3. Article 30

'1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the case referred to in paragraph 1(b), the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of importance.

...'

B — *National law: the Bundesgesetz über die Vergabe von Aufträgen or Bundesvergabegesetz 1997 (Federal Procurement Law 1997; hereinafter: 'BVergG')* [3]

4. Paragraph 42

'1. In procedures other than the negotiated procedure, tenderers must ensure that their tenders meet the requirements of the tender notice. The wording prescribed by the contract documents may not be amended or supplemented.

...

3 — *Bundesgesetzblatt für die Republik Österreich* I, 1997, No 56.

4. An alternative tender [or "variant", to adopt the terminology used in Directive 93/37/EEC[4]] is admissible only if it ensures the performance of qualitatively equivalent work. It shall be for the tenderer to prove equivalence. An alternative tender may relate to the work as a whole, to parts of the work or to the legal conditions underlying the performance of the work. Alternative tenders shall be designated as such and shall be submitted separately.

...'

5. Paragraph 117

'1. The Bundesvergabeamt must declare void, by a decision adopted following the recommendation of the conciliation chamber in the case, any decision adopted by a contracting authority in the course of an award procedure which:

1. is contrary to the provisions of this federal law or its implementing regulations, and

2. has a substantial bearing on the outcome of the award procedure.

...

3. Following the award of the contract, the Bundesvergabeamt shall simply establish, in accordance with the requirements of paragraph 1 hereof, whether or not the law has been infringed as claimed.'

III — Facts

6. Acting for and on behalf of the Autobahnen- und Schnellstraßen Finanzierungs-AG (Austrian Motorway and Expressway Financing Company; hereinafter: 'Asfinag'), the *Land* Government of Lower Austria launched an open procedure throughout the Community on 27 November 1997 inviting tenders for the repair of the section 'between the 100.2 km and 108.6 km points of the carriageway from Neumarkt to Vienna'. The contract concerned bridge and road construction works.

7. With regard to resurfacing outside the motorway bridge areas, the tender document stated under the heading 'Official Design' that a dual-layer concrete overlay

4 — According to the findings of the referring court, an 'alternative tender' under Paragraph 15(14) of the BVergG is a tender based on an alternative tender proposal from the tenderer and should therefore be regarded as a 'variant' within the meaning of Directive 93/37/EEC.

of surface quality should be laid but did not describe those features as minimum requirements. Nor did the tender document contain any explicit statements regarding minimum technical specifications that would have to be met by variants that might be submitted. The tender document stated that variants were admissible. However, any variants submitted had to be accompanied by a comprehensive list of works as required by the tender document (main tender). No contract award criteria for assessing the economic and technical quality of tenders (whether tenders conforming to the tender document or variants) were laid down. Nor did the tender document stipulate that variants had to ensure the performance of work equivalent to that defined in the official design (nor was any reference made to Paragraph 42 of the BVergG which lays down that requirement), and there was no explanation of what was meant by 'performance of equivalent work' either.

8. Traunfellner, the plaintiff in the main proceedings, submitted both a tender conforming to the tender document and a variant. Its variant was the cheapest of all the tenders submitted but, of all the tenders conforming to the tender document, its own tender came second behind that submitted by the Ilbau — LSH Fischer — Heilit & Woerner consortium, to which the contract was awarded.

9. In its variant, Traunfellner proposed substituting an asphalt overlay made from bitumen material for the concrete surface dressing. Technical clarification was provided in the form of an expert opinion which stated that under the conditions assumed for the section of carriageway concerned, the asphalt design would provide adequate resistance to deformation for a period of 20 years.

10. The technical test report commissioned by the *Land* government stated that, while a study on the possibility of substituting asphalt designs had been compiled in 1989, earlier contracts had shown that, despite careful execution of an asphalt design of this kind in compliance with the contract, grooves of considerable depth had appeared after only a short time and additional repair work had been necessary. It also pointed out that ensuring that the work would be performed in accordance with the official requirements if Traunfellner's variant was accepted would necessitate additional work at a cost of some ATS 2.5 million, thus reducing the price advantage to ATS 6.9 million. The report went on to explain that if the overlay was made of concrete, the new technologies were such that the road surface could be expected to resist deformation for at least 30 years. The concrete surface specified in the official design would, therefore, have a 50% longer life and cost only 8.5% more. Moreover, the objective of using existing old concrete to obtain a high-quality aggregate for the new concrete overlay (recycling) was not taken into account in the variant since only some of the existing crushed concrete would be used on site for secondary filling-in purposes. Much of the

existing concrete surface would be put to an otherwise unspecified use off site. Preference was therefore to be given to the general repair of the carriageway in concrete, in accordance with the official tender document, at least in view of the lifetime and resistance to deformation of concrete. These two factors would, after all, reduce the subsequent need for maintenance, which in turn would result in less disruption to traffic and was therefore in keeping with the objective of minimising adverse effects on ease of movement, road safety and traffic flows. Accordingly, the variant should not be regarded as meeting the requirements of the official design and should therefore be disqualified. On the basis of that test report, the award commission decided on 17 March 1998 to propose that the contract be awarded to the Ilbau — LSH Fischer — Heilit & Woerner consortium.

11. Traunfellner requested that the referring Bundesvergabeamt annul the decision to disqualify its variant. The request was rejected on 21 April 1998 on the ground that the technical equivalence of the variant was not pertinent. It differed from the prescriptions of the tender document to such an extent that it was no longer an admissible variant. Even if it had been admissible, the referring court explained that it would not have been technically equivalent, as the contracting authority had the right to choose from among different technical systems.

12. Following that decision, the contract was awarded to the cheapest tender conforming to the tender document. The works have since been carried out.

13. Adjudicating on an appeal lodged by Traunfellner, the Verfassungsgerichtshof (Austrian Constitutional Court) overruled the decision of the Bundesvergabeamt of 21 April 1998 for failure to fulfil the obligation to state reasons. Under Austrian law, once the Verfassungsgerichtshof has annulled an administrative act (in this case, after the referring court's decision of 21 April 1998 had been overruled), the matter at issue is restored to the state it was in prior to the contested decision. The referring court is now required to give a fresh ruling on Traunfellner's request of 17 April 1998 for the annulment of the decision to disqualify the variant. However, as the award has since been granted, it merely remains for the court to determine in accordance with Paragraph 117(3) of the BVergG whether the decision to disqualify was lawful.

IV — The questions referred for a preliminary ruling

14. The Bundesvergabeamt seeks to determine the circumstances in which a 'variant' within the meaning of Article 19 of Direc-

tive 93/37/EEC arises, whether the 'equivalence' criterion, used to assess variants, must be indicated in the tender documents and how a contracting authority should conduct itself where it subsequently transpires that its invitation to tender is defective. It has therefore referred the following questions to the Court of Justice for a preliminary ruling:

'Question 1: Is an alternative tender that consists in proposing an asphalt surface instead of overlaying the carriageway with concrete as specified in the tender notice a "variant" within the meaning of the first paragraph of Article 19 of Directive 93/37/EEC?

Question 2: Can a criterion established in national legislation to determine the admissibility of the acceptance of a "variant" within the meaning of the first paragraph of Article 19 of Directive 93/37/EEC, whereby "the performance of qualitatively equivalent work is ensured" by the variant, properly be regarded as a "minimum specification" required and stated by the contracting authority in accordance with the first and second paragraphs of Article 19 of Directive 93/37/EEC, if the contract documents refer only to the national provision and do not specify the comparative parameters to be used to assess "equivalence"?

Question 3: Do Article 30(1) and (2) of Directive 93/37/EEC in conjunction with the principles of transparency and equal treatment prohibit a contracting authority from making the acceptance of an alternative tender, which differs from a tender conforming to the tender document in that it proposes a different technical quality, conditional on a positive assessment based on a criterion in national legislation requiring that "the performance of qualitatively equivalent work is ensured" if the contract documents refer only to the national provision and does not specify the comparative parameters to be used to assess "equivalence"?

Question 4a: If the answer to Question 3 is in the affirmative, may a contracting authority conclude a tendering procedure like that described in Question 3 by awarding the contract?

Question 4b: If the answers to Questions 3 and 4a are in the affirmative, must a contracting authority conducting a tendering procedure as described in Question 3 reject variants proposed by tenderers without examining their contents, at any rate if it has not defined contract award criteria for assessing the technical differences between the variant and the tender notice?

Question 5: If the answers to Questions 3 and 4a are in the affirmative and the answer to Question 4b is in the negative, must a contracting authority conducting a tendering procedure as described in Question 3 accept a variant whose technical differences from the tender document it is unable to assess on the basis of contract award criteria owing to the absence of appropriate statements in the tender document if this variant is the lowest tender and contract award criteria have not otherwise been defined?'

15. In support of its reference for a preliminary ruling the Bundesvergabeamt explains that the first question is designed to ascertain whether a tender proposing an asphalt road surface dressing instead of the concrete dressing specified in the tender document is a variant for the purposes of the first paragraph of Article 19 of Directive 93/37/EEC and whether the provisions of the directive which apply to variants can therefore be applied to the tender at issue.

16. It explains with regard to the second question that under Paragraph 42(4) of the BVergG the admissibility of accepting a variant depends on whether the performance of qualitatively equivalent work is ensured. It adds that assessing 'equivalence' plays an important role in the award of contracts. In this case too, the contracting authority examined the variant for equivalence and concluded that it had none. However, the criteria applied by the contracting authority were not defined in the tender document or in the tender notice, as is standard practice for the contracting authorities in Austria.

17. The Bundesvergabeamt considers such an approach to be inconsistent with Article 30 of Directive 93/37/EEC and with the principles of transparency and equal treatment. Such inconsistency could be avoided only if the requirement applicable to variants that the performance of the work must be equivalent was regarded as a 'minimum specification' for the purposes of the second paragraph of Article 19 of the directive. In that case, there would no longer be any need to mention the specific comparative parameters as contract award criteria. In its view, such an interpretation runs counter to the principles of the directive. The second paragraph of Article 19 of the directive clearly requires contracting authorities to state the minimum specifications in the contract documents. Merely applying a provision of national legislation which lays down the equivalence criterion could not be regarded as a specification required by the contracting authority in the contract document.

18. In addition, a mere reference to equivalence that was not further defined did not satisfy the requirements for transparency,

nor was it compatible with the meaning of the word 'state' [German: 'erläutern']. This word meant to explain and describe in greater detail, something which the contracting authority did not do.

19. The Bundesvergabeamt states with regard to the third question referred that the directive leaves contracting authorities a choice between only the lowest-price criterion and the system of awarding the contract to the most economically advantageous tender. In the former case, variants are precluded from the outset under the first paragraph of Article 19 of the directive. In the latter case, contracting authorities are required under Article 30(2) of the directive to indicate in the tender notice or contract documents the criteria established for assessing the tenders.

20. That comparison demonstrates that where different qualities may be proposed, they must be examined on the basis of the contract award criteria defined by the contracting authority. However, if the contracting authority has not defined any contract award criteria, it seems perfectly clear to the Bundesvergabeamt that variants must not be assessed or indeed accepted. The approach adopted by the contracting authorities in Austria is, in this respect, inconsistent with the scheme of the directive.

21. The Bundesvergabeamt also considers such an approach to be contrary to the principle of transparency. If, for the purpose of examining variants, a contracting authority had recourse to the 'equivalence of the performance of the work' which it had not previously defined by indicating specific comparative parameters, it would be taking into account criteria which it had not published in advance. That is, in its view, incompatible with the consistent case-law of the Court of Justice [5] and makes it impossible for tenderers to judge in advance, on the basis of published criteria, whether the anticipated contract or the preparation of variants is of interest to them. [6] It adds that, in practice, the use of the indeterminate term 'equivalence', which the contracting authority only defines subsequently when it is assessing variants, leads to considerable uncertainty and protracted legal disputes. The contracting authority finds itself in dispute either with tenderers which have submitted variants that it does not regard as equivalent to its own requirements or with tenderers which have not proposed variants and question the equivalence of variants that the contracting authority intends to accept. Tenderers can only guess beforehand what the contracting authority will regard as equivalent. This results in con-

5 — The Bundesvergabeamt refers to Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 35 et seq., and Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 57 et seq.

6 — The Bundesvergabeamt has regard to *Beentjes* (cited in footnote 5, at paragraph 21 et seq.) and to Case C-225/98 *Commission* v *France* [2000] ECR I-7445, paragraph 34 et seq.

siderable uncertainty among tenderers which prepare speculative variants, as it were, as well as among tenderers which do not propose variants but have to expect that their tenders will be beaten by a variant which the contracting authority considers to be equivalent after all the tenders have been opened.

22. In effect, the approach adopted leads to the introduction of a third, unlawful 'mixed system' operating between the award of contracts on the basis of price alone and their award on the basis of the most economically advantageous tender. This system is, according to the Bundesvergabeamt, inconsistent with the case-law of the Court. [7] Furthermore, the application of a criterion which depends on a mere reference to national legislation is unlawful. [8]

23. By Questions 4 and 5 the Bundesvergabeamt seeks ultimately to ascertain the manner in which a contracting authority must proceed where it is established in the course of a procedure for the award of a contract that the award procedure adopted in Austria is unlawful. One possible course of action would be to decide against awarding the contract and to revoke the invitation to tender. That option is supported by the fact that the tendering procedure was initiated under conditions which have proved unlawful and must consequently cease to be applied. However, a second possible course of action would be to continue with the tendering procedure. It is however essential in this regard to bear in mind that the tendering procedure would have to be completed under restrictions which had not been notified previously to the tenderers. The tenderers had submitted variants on the assumption that it was permissible to propose variants that would be examined by the contracting authority for 'equivalence', a criterion which was not defined further. If it is not possible to apply the equivalence criterion as permitted by the national legal order, then essential conditions governing the preparation of tenders are altered *ex post facto*. Such a departure from the conditions forming the basis of the tender document might be regarded as an infringement of the principle of equal treatment. [9]

24. A decision not to award the contract and to initiate a fresh tendering procedure may well be, therefore, the only proper alternative. In such circumstances, the decision actually taken by the contracting authority to reject the variant proposed by the plaintiff in the absence of equivalence and to award the contract to another tenderer would certainly be unlawful. On the other hand, to decide not to award the contract at all and to require the contracting authority to proceed with a fresh invitation to tender might be regarded as too extreme a consequence of an infringe-

7 — The Bundesvergabeamt has regard to Case 274/83 *Commission* v *Italy* [1985] ECR 1077, paragraph 24 et seq., and Case C-272/91 *Commission* v *Italy* [1994] ECR I-1409.

8 — The Bundesvergabeamt has regard to *Beentjes* (cited in footnote 5, at paragraph 35 et seq.).

9 — The Bundesvergabeamt refers *mutatis mutandis* to Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353.

ment of some provisions of Community law, especially as the Community requirements in question may also be met simply by refraining from the application, contrary to Community law, of an otherwise undefined 'equivalence' criterion.

25. If, on the other hand, the tendering procedure is to be concluded, it is then necessary to determine the arrangements for the award of the contract. The referring court takes the view that there are two options to consider here; under the first, the contracting authority rejects the variant and awards the contract on the basis of lowest price or most economically advantageous tender, the only criteria that may be applied being those required by the contracting authority. That option would meet the objectives of the directive since, under the system referred to in Article 30 of the directive, the different qualities that may be offered were to be assessed precisely on the basis of contract award criteria. The fact that differences in quality cannot be assessed on the basis of those criteria make it impossible to compare the tender with those submitted by competitors. Where a comparison of this kind is impossible, however, the tender concerned would have to be disqualified in accordance with the principles of equal treatment.

26. It would also be possible, however, to require the contracting authority to accept the variant and to ignore the associated qualitative differences. However, it would not be advisable to adopt that approach as the contracting authority would then have to accept a tender which did not meet the qualitative requirements it had itself specified, the contracting authority having had no possibility of assessing the qualitative differences against some kind of yardstick. That would be contrary to the purpose of the directive, as defined by the Court, since the contracting authority would not be able in that case to compare tenders or to choose the tender which it considered the most advantageous on the basis of objective criteria. [10]

V — Arguments of the parties and assessment

A — *Admissibility*

27. In its written observations the Commission disputes the admissibility of the reference for a preliminary ruling. It refers to the arguments it put forward in Case C-314/01, in which it called into question the capacity of the Bundesvergabeamt as a court or tribunal within the meaning of Article 234 EC on the ground that its decisions are non-binding. However, it retracted that objection at the hearing in view of the judgment which has since been

10 — The Bundesvergabeamt refers to Case C-27/98 *Metalmeccanica Fracasso and Leitschutz Handels- und Montage* [1999] ECR I-5697, paragraph 31.

delivered in the *Swoboda* case. [11] The reference for a preliminary ruling is admissible.

B — *The first question referred for a preliminary ruling*

1. Arguments of the parties

28. Traunfellner, Asfinag, the Austrian and French Governments all take the view that the offering of an asphalt dressing as opposed to the concrete dressing specified in the tender document is a variant within the meaning of Article 19 of Directive 93/37.

29. Traunfellner considers that a variant comes into play where the tender proposed relates to a new execution method, a different design, different material or other alternatives which ensure that the work is performed on a more practical or cheaper basis. Asphalt, it argues, is a technical alternative to concrete. Assessment should therefore be aimed at the technical equivalence of the tender, the load-bearing capacity, the transverse flatness and the non-skid quality.

30. Asfinag keeps to a more general approach in its observations, taking the view that a variant comes into play where parts of the work specified in the tender document are substituted in a tender.

31. The Austrian Government points to the drafting history of the provision. In its proposed amendment to Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts the Commission had stated that only an amendment to the design plan or to the prescribed construction materials might be proposed. [12]

32. The French Government considers that the concept of a variant should be given a broad interpretation. In the tender document, which forms the basis of the main proceedings, concrete had not been defined as an absolutely necessary technical specification. Accordingly, asphalt was to be regarded as a variant.

33. The Commission points out that the question referred to the Court involves a point of fact that is essentially inadmissible. It may be answered only after it has been

11 — Case C-411/00 *Felix Swoboda* [2002] ECR I-10567, paragraph 27 et seq. Similarly, Opinion of Advocate General Mischo in Case C-410/01 *Fritsch, Chiari & Partner and Others* [2003] ECR I-6413, points 20 to 23. Cf. also Opinion of Advocate General Geelhoed in Case C-315/01 *Gesellschaft für Abfallentsorgungs-Technik (GAT)* [2003] ECR I-6351, point 22 et seq.

12 — COM (86) 679 final of 23 December 1986.

reworded. In its view, the question has to be construed as seeking to ascertain the conditions under which an alternative tender proposal can be regarded as a variant. It answers the question reworded in that manner by explaining that a procedure must be in place where the contract is awarded on the basis of the most economically advantageous tender, where variants may not be precluded and the proposed tender must meet the minimum specifications stated.

2. Assessment

34. By the first question the Bundesvergabeamt is seeking to ascertain whether the tender proposing the overlaying of an asphalt surface dressing constitutes a variant to overlaying with concrete as stipulated in the tender document.

35. This question involves including a specific point of fact under the Community concept of the 'variant' within the meaning of Article 19 of Directive 93/37/EEC. Under the division of functions provided for by Article 234 EC, however, it is for the national court to apply the rules of Community law to an individual case. No such application is possible without a comprehensive appraisal of the facts of the case. [13]

Consequently, the first question as it is currently worded is inadmissible.

36. The Court of Justice may, however, supply the referring court with an interpretation of Community law that will enable that court to resolve the legal problem before it. [14] Alternatively, should the Court decide to reword the first question, the following observations should therefore be made.

37. In the light of the Verfassungsgerichtshof's annulment of the first decision issued by the referring court on 21 April 1998 in this case, the first question must be understood as seeking to determine where the boundaries lie for the acceptance of a 'variant' within the meaning of Article 19 of the Directive. When can one still speak of 'variants', and from what point does the work proposed differ from the work specified in the tender document to such an extent that the proposed amendment becomes inadmissible?

38. Although, reworded in this way, Question 1 becomes a point of law which the Court of Justice can in principle answer, it must be borne in mind that the proceedings before the Bundesvergabeamt relate to the award stage, not to the stage at which variants are assessed for their admissibility.

13 — Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraph 11, and Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 31.

14 — Case C-17/92 *Federación de Distribuidores Cinematográficos* [1993] ECR I-2239, paragraph 8; *Teckal* (cited in footnote 13, at paragraph 33).

According to the account in the order for reference, the contracting authority disqualified the variant at issue on the ground that it was not equivalent, not on the ground of its inadmissibility. Strictly speaking, the answer to Question 1 is consequently irrelevant to the dispute in the main proceedings and could therefore be regarded as a hypothetical question, which is inadmissible under consistent case-law. [15] The same argument applies to Question 2.

39. The first two questions make sense only if there is support for the Bundesvergabeamt's argument that appeals against decisions adopted by a contracting authority are inadmissible where the tendering procedure already involves an error in law at an earlier stage (in this case, the indication of minimum specifications in the tender document and the assessment of the admissibility of variants) but against which error there has been no objection (in this case, legal proceedings were not instituted until the contract had been awarded). The extent to which this view of the law is compatible with Community law, in particular with 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, [16] is the subject-matter of the proceedings in Case C-315/01 *Gesellschaft für Abfallentsorgungs-Technik (GAT)*. In his Opinion of 10 October 2002, Advocate General Geelhoed considered that approach to be incompatible with the review directive. [17] A judgment has not so far been delivered in that case. The question must remain unanswered in this case as it has not been discussed in the proceedings.

40. It is therefore necessary to point out in the alternative that variants under the first paragraph of Article 19 of Directive 93/37/EEC are inadmissible where they fail to satisfy the minimum specifications defined by the contracting authority. The point at which a variant comes into play therefore depends on the minimum specifications which are defined in the individual case by the contracting authority and which must be indicated in the tender document.

41. The parties' observations on the first question support the argument that everything turns on the circumstances of the individual case. The Commission points above all to procedural considerations, such as the award of contracts on the basis of the most economically advantageous tender and the absence of a measure excluding variants. However, it additionally focuses on compliance with the stated minimum specifications. The other

15 — Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39, and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19.

16 — OJ 1989 L 395, p. 33.

17 — Opinion in Case C-315/01 *GAT*, cited in footnote 11, point 45 et seq.

parties mention specific aspects of the work specified in the tender document, such as new (construction) execution methods or new materials.

42. Article 19 of the directive stems from a Commission initiative. Its proposal for a directive amending Directive 71/305/EEC provided that variants may involve a fundamental alteration to the design plan or to the required building materials, or an alteration to working methods or to the anticipated working techniques. [18] Operators had to be afforded the possibility of proposing more advanced technical solutions. [19] The Commission subsequently broadened the scope of that proposal during the legislative procedure so that a 'variant' had only to meet the minimum specifications required by the contracting authority. [20] That amendment then became Article 20a of Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts. [21] It has the same wording as Article 19 of Directive 93/37/EEC. It is apparent from the legislative history that a variant can, in principle, relate to any part of the tender document. The aim of the provision in question, even as it currently stands, is to stimulate technical progress in the construction industry. It is drafted in a deliberately open manner and leaves it to the discretion of the contracting authorities to decide whether they wish to authorise or prohibit variants and to establish what type of variants they are prepared to consider. [22] The sole requirement imposed by Article 19 is that of the admissibility barrier governing the equivalence of the work proposed in the variant with the work specified in the tender document. Equivalence must be examined by reference to the minimum specifications that the contracting authority is required to impose.

43. It is clear from the foregoing considerations that assessing whether a variant does indeed come into play or whether the tender proposed must be disqualified on grounds of its inadmissibility is ultimately a matter for the contracting authority alone. Judicial review must be confined to examining whether the procedural requirements laid down in Directive 93/37/EEC and the minimum specifications defined by the contracting authority have been met and whether or not the contracting authority has blatantly exceeded the margin of discretion it enjoys in assessing the tenders, for example by entertaining unrelated considerations in examining equivalence. The factual assessment of whether the work proposed is consistent with the work specified in the tender document falls to the contracting authority, the only entity capable — on account of its competence in the matter — of assessing the equivalence of the work proposed with the work specified in the tender document.

18 — COM (86) 679 final (cited in footnote 12), p. 43, new Article 20a(2).

19 — COM (86) 679 final (cited in footnote 12), p. 12.

20 — COM (88) 354 final of 21 June 1988, pp. 13 and 22, in Article 20a.

21 — OJ 1989 L 210, p. 1.

22 — Cf. Commission's 'Guide to the Community Rules on Public Works Contracts', p. 60, point 6.4.1, which can be consulted via the homepage of European Commission DG Internal Market at www.europa/comm/internal_market/en/.

44. I accordingly propose in the alternative that the answer to the first question referred should be that, in the context of an award decision on the basis of the most economically advantageous tender in an open procedure, a variant within the meaning of Article 19 of Directive 93/37/EEC comes into play where the submission of variants is permitted and where the relevant proposal replaces part of the work specified in the tender document yet at the same time meets the required minimum specifications.

C — *The second and third questions*

45. Asfinag, the Austrian and French Governments all deal with Questions 2 and 3 jointly. The two questions essentially concern the obligation to publish the assessment criteria applied by the contracting authority. I will adopt the same approach in this respect.

1. Arguments of the parties

46. Traunfellner's view is that — in so far as the tender document does not indicate any minimum specifications — the equivalence condition laid down in Paragraph 42(4) of the BVergG must be regarded as a minimum specification for the purposes of Article 19 of the directive. The purpose of the work to be performed, which is specified in the tender document and thus known by all tenderers, constitutes the central connecting factor for examining equivalence.

47. Even where the tender document does not mention any criteria, it argues, variants have to be assessed. In such circumstances, the contracting authority simply seeks to ensure the performance of qualitatively equivalent work.

48. Asfinag and the Austrian Government highlight the difficulty in practice of imposing minimum specifications. Asfinag maintains that works contracts in particular are composed of a large number of elements. The contracting authority could not identify in advance the elements for which variants would be submitted. It was not necessary, however, to indicate specific criteria for all elements since the general criterion of equivalence of the work to be performed was sufficient. The principle of transparency was not infringed so long as it was guaranteed that all tenders would be assessed on the basis of the same award criteria. Article 30 of the directive, Asfinag maintains, did not prohibit an arrangement whereby acceptance of a variant was subject to the requirement that the performance of qualitatively equivalent work be ensured.

49. The Austrian Government points out first of all that, as far as it can see, the referring court is mixing the two aspects of minimum specifications within the meaning of Article 19 of the directive on the one hand and contract award criteria for the purposes of Article 30 of the directive on the other. It argues that the former aspect concerns the admissibility of a variant and the latter concerns the assessment of admissible tenders. The Commission concurs with that viewpoint.

50. The obligation to lay down minimum specifications existed, according to the Austrian Government, irrespective of whether or not variants were allowed. The minimum specifications had to be stated, meaning that the contracting authority was required to point out those specifications which it considered indispensable and which it would use as assessment criteria for examining the equivalence of a tender.

51. The Austrian Government also considers that where minimum specifications are defined, reference in the tender document to rules which are of general application and accessible to the public is permitted. Paragraph 31(2) of the BVergG expressly requires that it be stated in the tender documents that they are governed by the BVergG. Interested tenderers can find out about those rules for themselves. It adds that a reference to applicable provisions reduces the number of texts relating to the tender procedure that have to be published. Moreover, under Article 23 of the directive reference may be made to an authority from which information concerning the obligations to be fulfilled in terms of labour law can be obtained. It argues that the reference to a general, published provision can be compared to the above arrangement.

52. The French Government and the Commission take the contrasting view that a reference to applicable provisions does not — as the Court has consistently held — meet the requirements of transparency. [23]

53. The French Government considers that, in the main proceedings, the approach taken has resulted in discrimination against tenderers resident outside Austria. Furthermore, tenderers intending to submit variants were placed at a disadvantage as they did not know the criteria that would be used to assess their tenders.

54. The Commission adds that the reference to the equivalence of the work is insufficient where the use of specific materials is required. What is more, criteria such as durability and resistance to deformation must be mentioned.

23 — The parties refer to the judgments in *Beentjes* (cited in footnote 5) and *Commission* v *France* (cited in footnote 6).

55. In its view, variants may not be accepted where minimum specifications have not been mentioned. In such circumstances the tender document is contrary to Community law because there has been neither a prohibition on the submission of variants nor a reference to the minimum specifications that have to be met. Therefore, the tendering procedure may not be continued in those circumstances.

2. Assessment

56. The second question is focused on determining whether Paragraph 42 of the BVergG can be regarded, by virtue of a reference to that provision in the tender documents, as the establishment of minimum specifications within the meaning of Article 19 of the directive where there is a failure to specify the comparative parameters to be used to assess the equivalence of the work to be performed. This question can be broken down into two parts: first, the question whether the reference to a provision of national legislation meets the transparency requirement, and secondly, the question whether the rules under Paragraph 42(4) of the BVergG can be regarded as minimum specifications within the meaning of Article 19 of Directive 93/37.

57. The third question aims to determine whether Article 30 of the directive precludes a provision of national legislation which makes the acceptance of a variant conditional on the criterion requiring that a tender for equivalent work be submitted where, rather than being mentioned in the tender document, that criterion is apparent only from a provision to which the tender document refers. The issue of the compatibility of such an approach with the transparency requirement arises at this point too. In that respect this question overlaps with the second question. It is therefore necessary, first of all, to consider the aspects relating to the transparency requirement.

58. In *Beentjes* and *Commission* v *France* the Court of Justice held that where the authorities awarding the contract have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents. A general reference to a provision of national legislation cannot satisfy the publicity requirement. [24]

59. Those decisions concerning Article 30 of Directive 93/37/EEC are based on the principles of transparency and equal treatment, both of which are dominant principles within the context of public procurement which also form the basis of Directive 93/37/EEC, as is clear from the 10th and 11th recitals in the preamble thereto. The two principles must therefore be observed in the interpretation of Article 19 of the directive. Consequently, a general reference to a provision of national legislation is not sufficient to meet the requirement to state the minimum specifications either.

24 — *Beentjes* (cited in footnote 5, at paragraph 35) and *Commission* v *France* (cited in footnote 6, at paragraph 73).

60. I therefore propose that the second and third questions referred be answered as follows: A reference to a provision of national legislation meets neither the requirement to lay down minimum specifications as provided for in Article 19 of Directive 93/37/EEC nor the requirement to lay down criteria on which to base the award of the contract as provided for in Article 30 of the directive.

61. Strictly speaking, that response obviates the need to answer the second part of the second question concerning the extent to which the rules laid down in Paragraph 42(4) of the BVergG can be regarded as minimum specifications. I will comment on that matter merely in the alternative, in the event that the Court adopts a different view as regards the publicity requirement.

62. The concept of minimum specifications within the meaning of Article 19 is not defined in the directive. As I have already pointed out with regard to the first question, the contracting authority enjoys a margin of discretion in laying down minimum specifications. Those specifications relate to features or results which distinguish the work specified in the tender document and which must be satisfied by the work proposed in the tender.

63. As also discussed earlier with regard to the first question, the contracting authority is, in principle, at liberty to decide whether it wishes to authorise or prohibit variants. If it decides to prohibit them, its decision must be expressly stated in the tender notice in accordance with the second sentence of the second paragraph of Article 19 of Directive 93/37/EEC. Where variants are allowed, the contracting authority is not obliged to say so in the tender document. [25]

64. However, as can be seen from the first sentence of the second paragraph of Article 19 of the directive, where variants are allowed, the contracting authority must state in the tender notice the minimum requirements to be met by those variants. [26] That obligation arises from the use of the mandatory expression 'shall state... the minimum specifications'. If the contracting authority had been at liberty to decide in this case whether or not to lay down minimum specifications, the expression 'may state... the minimum specifications' would certainly have been used.

65. This reading based on the wording of the provision concerned is also consistent with its spirit. Where variants are permitted, tenderers have to know the criteria on which basis their proposed tenders are to be assessed by the contracting authority. The assessment is carried out by reference to the minimum specifications which define the contracting authority's expectations

25 — See the explanations given in the Public Works Contracts Guide (cited in footnote 22, at p. 60, point 6.4.1).

26 — See the explanations given in the Public Works Contracts Guide (cited in footnote 22, at p. 60, point 6.4.1).

vis-à-vis the work for which it has invited tenders. Tenders submitted in the form of variants are allowed only if the variants meet those specifications, which have been laid down previously (principle of equal treatment) and notified in the tender document (principle of transparency). [27] A tender document which permits variants — since it does not expressly prohibit them — but does not impose any minimum specifications does not, therefore, meet the requirements of Directive 93/37.

66. The objection that it is impossible in practice to state all the criteria in advance because the aspects on which variants will be submitted are as yet unknown must therefore be dismissed. The contracting authority should be able to set out its expectations vis-à-vis the work for which it invites tenders and the specifications under the individual subheadings, such as the load-bearing capacity of a bridge or the load-carrying capacity and durability of a road surface. The document inviting tenders for a works contract should above all set out the result expected by the contracting authority. The assessment whether a tender guarantees that result must be carried out — for proposals consistent with the tender document and variants alike — on the basis of objective criteria which must be notified to the tenderers in the tender document. It is of no consequence here whether the criteria govern admissibility, as in the context of Article 19 of Directive 93/37/EEC, or the award of the contract, as provided for in Article 30 of the directive. The principle of equality of tenderers and the principle of transparency apply to both provisions.

67. The rules in Paragraph 42(4) of the BVergG require that the work proposed by the variant be equivalent to the work specified in the tender document. That criterion does not relate to the features or result which distinguish the work put out to tender. On the contrary, it concerns the assessment of the work proposed as compared with the work for which tenders have been invited.

68. The equivalence criterion is also contained in the first paragraph *in fine* of Article 19 which states that account may be taken of variants which '... meet the minimum specifications required by the contracting authorities'. The Commission's proposal of 1986 stated that account must be taken of variants where they at least met the prescribed specifications in terms of quality. [28] The wording of that proposal, which was amended as early as in the procedure for adopting Directive 89/440/EEC in favour of the version currently in force, largely corresponds to the wording of Paragraph 42(4) of the BVergG. That provision states that a variant is allowed only if it '... ensures the performance of qualitatively equivalent work'.

27 — *Commission* v *Denmark* (cited in footnote 9, at paragraphs 37 to 40), Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 40 et seq.

28 — COM (86) 679 final (cited in footnote 12), p. 43, Article 20a(3).

69. It is apparent from those different expressions that the equivalence criterion cannot be a 'minimum specification' for the purposes of Article 19 of Directive 93/37/EEC. On the contrary, it is the result that a variant must achieve. The issue of whether that result is achieved must be determined by reference to the minimum specifications used by the contracting authority to define its expectations vis-à-vis the work for which it has invited tenders. Equivalence does not in itself constitute an assessment criterion but merely defines the level to be attained by the variant.

70. Should the Court still consider it necessary, I therefore propose that this part of the second question be answered as follows: The equivalence criterion established for the purpose of assessing the admissibility of a variant is not a minimum specification required by the contracting authority as provided for in Article 19 of Directive 93/37.

D — *The fourth and fifth questions*

1. Arguments of the parties

71. Asfinag and the Austrian Government take the view that the fourth and fifth questions are inadmissible in that they are hypothetical. They point out that the contract forming the basis of the main proceedings has since been awarded and the works completed. It merely remains for the referring court to decide whether the disqualification of the variant was lawful.

72. In the alternative, they consider with regard to Question 4a that the procedure can be concluded. Asfinag relies on Article 2 of Directive 89/665/EEC [29] in support of that argument. The Austrian Government refers to the fact that there is no obligation to award the contract [30] yet infers from that *a contrario* that the contracting authority may none the less conclude the procedure.

73. With regard to Question 4a, Traunfellner and the Commission on the other hand consider that, where the tender document has not met the requirements of Community law, the contracting authority may not conclude the procedure and must initiate a new procedure. Variants may be prohibited, in their view, only subject to very strict conditions.

29 — Cited in footnote 16.

30 — It invokes the *Metalmeccanica* judgment (cited in footnote 10).

74. As to Question 4b, Traunfellner maintains that if the contracting authority has allowed the submission of variants, it must also allow an assessment of equivalence. In view of the broad possibility of submitting variants, it would be unreasonable for the contracting authority to reject them without examination. In the alternative, Asfinag also supports that conclusion.

75. As regards Questions 4b and 5, the Commission on the other hand considers that variants should be rejected if contract award criteria have not been defined for assessing technical differences.

76. As far as Question 5 is concerned, Traunfellner takes the view that an obligation to accept the cheapest tender is incompatible with the spirit of the directive. It was indeed possible in the main proceedings to assess the technical differences on account of the equivalence of the variant submitted. Furthermore, road construction was an area in which there was vast experience; thus, it was unnecessary to indicate award criteria for assessing function-related, technical equivalence.

2. Assessment

77. According to consistent case-law, it is, in principle, solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case whether a preliminary ruling is necessary to enable it to deliver judgment and whether the questions which it submits to the Court are relevant. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. [31]

78. Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The Court may consequently refuse to rule on a question referred for a preliminary ruling by a national court where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual and legal material necessary to give a useful answer to the questions submitted to it. [32]

79. As Asfinag and the Austrian Government rightly point out, Questions 4a, 4b and 5 are no longer relevant in the main

31 — Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; *PreussenElektra*, cited in footnote 15, at paragraph 38; *Canal Satélite Digital*, cited in footnote 15, at paragraph 18.

32 — Cf. the case-law cited in footnote 15.

action. The referring court has itself observed that the contract for the bridge and road construction works has been awarded and the works completed. Thus, it only remains for the Bundesvergabeamt to rule on whether the disqualification of Traunfellner's variant from the tendering procedure was lawful. There is no longer any need in the main proceedings to resolve the issue of whether and, if so, how the tendering procedure is to be continued. Hence it is quite obvious that Questions 4 and 5 bear no relation to the purpose of the main proceedings and are hypothetical. According to settled case-law, such questions do not require an answer. [33]

80. In the alternative, should the Court consider the questions to be admissible, I propose that it answer them as follows:

81. Question 4a: A tendering procedure in the context of which the tender document does not specify the comparative parameters to be used to assess equivalence may not be concluded by awarding the contract. Under Article 30(2) of Directive 93/37/EEC all the criteria that the contracting authority intends to apply to the award are to be stated in the contract notice. As observed with regard to Questions 2 and 3, the principles of equal treatment and transparency form the basis of that provision. Using award criteria that have not been published in the tender document while continuing the tendering procedure would be contrary to those principles. Advocate General Mischo also reaches that conclusion in his Opinion of 27 February 2003 in the case of *EVN and Wienstrom*. [34]

82. Question 4b: This question is relevant only if the tendering procedure may be concluded. There is no need to give an answer in the light of the previous considerations. It should be stated, simply for the sake of completeness, that variants cannot be assessed if assessment criteria have not been published in the tender document. If they were assessed, however, that measure would offend against the principles of equal treatment and transparency.

83. Question 5: Where a contracting authority has decided to award the contract to the most economically advantageous tender, it cannot, in the course of the procedure, revert to awarding the contract on the basis of the lowest-price criterion. Changing the award criteria within a tendering procedure which is already under way is contrary to the transparency requirement. [35] Consequently, a variant whose technical differences from the tender docu-

33 — Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraphs 18 to 21; Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 25; Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, paragraph 43.

34 — Opinion in Case C-448/01 [2003] ECR I-14527, point 122 et seq.

35 — *SIAC Construction* (cited in footnote 27) paragraph 43; *Commission* v *Belgium* (cited in footnote 5), paragraph 88 et seq.

ment cannot be assessed on the basis of contract award criteria owing to the absence of appropriate statements in the tender document may not be accepted where it is the cheapest tender and contract award criteria have not otherwise been defined. Should the contract be awarded on the basis of the most economically advantageous tender, the criteria intended to be applied to the award of the contract must be stated, as prescribed by Article 30(2) of Directive 93/37/EEC. A tender document which does not meet that requirement is unlawful.

VI — Conclusion

84. On the basis of the foregoing considerations I propose that the Court should:

(1) declare Questions 1, 4 and 5 inadmissible, and

(2) answer Questions 2 and 3 as follows:

The reference to a provision of national legislation does not meet the requirement to lay down minimum specifications within the meaning of Article 19 of Directive 93/37/EEC or the requirement to lay down contract award criteria for the purposes of Article 30 of the directive.

The equivalence criterion required to assess the admissibility of a variant is not a minimum specification required by the contracting authority for the purposes of Article 19 of Directive 93/37/EEC.