# OPINION OF ADVOCATE GENERAL MISCHO

delivered on 10 June 1999 *

1. In proceedings before the Bundesvergabeamt (Federal Procurement Office) concerning the award of a public supply and works contract, certain questions have been raised, in the view of that court, as to 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 [1] (hereinafter 'the review directive').

2. In May 1996 the Austrian Federal Ministry of Science and Transport, the contracting authority, published an invitation to tender for the installation on the Austrian motorway network of an electronic system for the automatic transmission of certain data.

3. On 5 September 1996 the contract was awarded to the chosen tenderer and signed on the same day. According to the national court, the other tenderers learned of the contract through the press.

4. On 18 September 1996 the Bundesvergabeamt dismissed applications for interim measures to suspend performance of the concluded contract; then, in its decision in the main proceedings on 4 April 1997, it held that there had been various breaches of the Bundesvergabegesetz (Federal Procurement Law).

5. The decision of the Bundesvergabeamt of 18 September 1996 was set aside by the Verfassungsgerichtshof (Constitutional Court), as a result of which the Bundesvergabeamt quashed its decision of 4 April 1997 and made an interim order prohibiting further performance of the contract. That interim order was made provisionally inoperative by a decision of the Verfassungsgerichtshof of 10 October 1997.

6. By order of 3 March 1998 the Bundesvergabeamt referred certain questions concerning the review directive to the Court of Justice for a preliminary ruling.

7. Article 1 of Directive 89/665 provides:

'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 and 77/62/EEC, decisions taken by the con-

* Original language: French.

1 — OJ 1989 L 395, p. 33.

tracting 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 ...'

8. Article 2(1) of the review directive provides as follows:

'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.'

9. Article 2(6) of the review directive states:

'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.'

10. The national provisions applicable to the main proceedings are contained in the Bundesvergabegesetz (Federal Procurement Law, BGBl. No 462/1993) in the version prior to the 1997 amendments (hereinafter 'the BVergG').

11. Paragraph 9, point 14, of the BVergG defines 'award' as follows:

'The award of the contract is the declaration made to the tenderer accepting his offer.'

12. Paragraph 41(1) of the BVergG states:

'The contractual relationship between the contracting authority and the tenderer comes into being, within the period allowed for making the award, when the tenderer receives notification of the acceptance of his offer. If the period allowed for making the award has expired or the terms of the contract differ from those of the offer, the contractual relationship comes into being only when the tenderer gives written notification of its acceptance of the contract. The tenderer is to be allowed a reasonable period of time to give this notification.'

13. Paragraph 91 of the BVergG sets out the jurisdiction of the national court which has made the reference, the Bundesvergabeamt, as follows:

'1. The Bundesvergabeamt has jurisdiction to determine applications for review in accordance with the provisions of this chapter.

2. The Bundesvergabeamt has jurisdiction up until the award of the contract, upon application

1. to make orders for interim measures, and

2. to set aside unlawful decisions of the awarding department of the contracting authority

in order to eliminate infringements of the present law or regulations made thereunder.

3. Once the contract has been awarded the Bundesvergabeamt has jurisdiction to determine whether, as a result of an infringement of this law or of regulations made thereunder, the contract was not awarded to the tenderer making the best offer. In such a procedure the Bundesvergabeamt also has jurisdiction, even where there has been no infringement of this law or regulations thereunder, to determine, on application by the contracting authority, whether the contract ought not to have been awarded to a particular tenderer or candidate who has been passed over.'

14. Finally, Paragraph 94 of the BVergG provides, *inter alia*, as follows:

'1. The Bundesvergabeamt must set aside by way of a decision, taking into account the opinion of the Conciliation Committee in the case, any decision of the contracting authority in an award procedure which

1. is contrary to the provisions of this Federal Law or its implementing regulations and

2. significantly affects the outcome of the award procedure.

...

3. Once the contract has been awarded the Bundesvergabeamt may rule only on the question whether, in the circumstances set out in paragraph 1, the alleged infringement has occurred or not.'

15. By order dated 3 March 1998, the Bundesvergabeamt (Fourth Chamber) referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) the following questions:

'(1) When implementing Directive 89/665/EEC are Member States required by Article 2(6) thereof to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which, in the light of the procedure's results, it will conclude the contract (i.e. the award decision) is, in any event, open to a procedure whereby an applicant may have that decision annulled if the relevant conditions are met, notwithstanding the possibility once the contract has been concluded of restricting the legal effects of the review procedure to an award of damages?

(2) If Question 1 is answered in the affirmative:

Is the obligation described in Question 1 sufficiently clear and precise to confer on individuals the right to a review corresponding to the requirements of Article 1 of Directive 89/665/EEC, in which the national court must in any event be able to adopt interim measures within the meaning of Article 2(1)(a) and (b) of that directive and to annul the contracting authority's award decision, and the right to rely in proceedings on that obligation as against the Member State?

(3) If Question 2 is answered in the affirmative:

Is the obligation described under Question 1 also sufficiently clear and precise to mean that in such a procedure the national court must disregard contrary provisions of national law which would prevent the court from fulfilling that obligation, and must fulfil that obligation directly as part of Community law even if national law lacks any basis on which to act?'

**Preliminary remark**

16. The Austrian Ministry of Science and Transport, which is the respondent in the main proceedings, contends, in common with the Austrian Government, that in fact the dispute in the main proceedings is now closed and the contract has already been performed in its entirety. That being the case, the answer to the questions raised will be irrelevant in the context of this dispute since the applicants can now obtain only damages, the award of which is, in any case, provided for under national law.

17. The Commission also has doubts as to the admissibility of the questions referred to the Court. These are based on the fact that, whilst citing Article 2(6) of the review directive, the questions are in reality seeking an interpretation of Article 2(1) of that directive which is concerned with the period prior to the conclusion of the award contract. In the present case that contract has already been concluded.

18. The national court states, first, that it is the court of last resort in the matter by reason of national procedural rules, application to the Verfassungsgerichtshof being an extraordinary legal remedy which is not in the nature of an appeal. In those circumstances the Bundesvergabeamt considers itself obliged, pursuant to the third paragraph of Article 177 of the EC Treaty, to refer to the Court of Justice questions of

Community law arising in these proceedings.

19. It must nevertheless be noted that the fact that the national court is a court of last resort does not exclude the possibility that the questions referred are hypothetical in nature.

20. The national court adds, however, that under national law it remains relevant to establish if it was entitled, or even required, as a matter of Community law, to set aside its decision of 4 April 1997, by which, in determining that the awards procedure did not result in the contract being awarded to the tenderer who had made the best offer, it brought an end to the first set of proceedings. The questions referred will affect the outcome of that issue in the main proceedings, which will in any event have to be resolved, regardless of the awards procedure which underlies it, even if the awards procedure in question is completely settled in the meantime.

21. The national court further emphasises that at this stage it is not yet possible to determine whether this is the case. Account must be taken of the fact that the warranty period for the performance of the contract in question has not yet expired and it therefore theoretically remains open to the awarding authority to rescind the contract which cannot yet therefore be considered definitively executed.

22. The Commission also takes the view that the questions referred to the Court may be of importance for the subsequent development of the dispute in the main proceedings.

23. The Commission notes first that criminal proceedings are pending to ascertain whether any offence was committed when the contract was awarded. If that was the case then the contracting authority would be entitled to rescind the contract and, the Commission considers, depending on the interpretation to be given in this case to the requirements of Community law, there might even be an obligation to rescind the contract.

24. The Commission further emphasises that the answers to the questions raised may affect the level of any damages payable to the applicants.

25. Lastly the Commission states that the Court's answer to the first question could result in the contract or award decision being void, which would then render it necessary to deal with the second and third questions.

26. In my opinion the considerations raised by the Commission are such as to justify the conclusion that the answers to the questions raised may affect the subsequent course of the main proceedings. The reference by the national court should not,

therefore, be regarded as inadmissible on the ground that the questions raised are hypothetical.

## Question 1

27. The Bundesvergabeamt asks essentially whether the Member States are required by the review directive to ensure that the decision to award a public contract is in all cases subject to a review procedure whereby an unsuccessful tenderer can have that decision set aside.

28. Article 2(1) of the review directive sets out the review procedures which the Member States are obliged to put in place. They must provide for the powers to adopt 'interim measures' by way of 'interlocutory procedures' with the aim of eliminating the alleged infringement or preventing further damage to the interests concerned (point (a)), the setting aside of decisions taken unlawfully (point (b)), and the award of damages (point (c)).

29. The provision does not define exhaustively what is meant by 'decisions taken unlawfully' which may be required to be set aside, instead referring by way of example to 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 in question.

30. This category must, however, include an unlawful decision awarding the contract. The purpose of the review directive as it appears, in particular, from Article 1(1) and the third and fourth recitals in the preamble, is the establishment of the most effective review procedures possible so as to ensure compliance with the Community directives concerning public procurement, the object of which is to open the latter up to Community competition.

31. This purpose would be compromised if paradoxically the most important decision in the procedure, namely the award of the contract itself, could not be treated as one of the unlawful decisions capable of being set aside, as the applicants in the main proceedings rightly point out.

32. The Court[2] has already stated the importance of this objective of effectiveness in the context of the directive, emphasising that the directive's purpose is that of 'reinforcing existing arrangements at both national and Community levels for ensuring effective application of Community

2 — Case C-433/93 *Commission* v *Germany* [1995] ECR I-2303, paragraph 23.

directives on the award of public contracts, *in particular at the stage where infringements can still be rectified*'.

33. The Ministry of Science and Transport contends, however, that Article 2(6) of the review directive allows a Member State to provide that, once the contract following the award decision has been concluded, the powers of the national court responsible for review procedures are confined to awarding damages to any person affected by a breach of the rules.

34. In the present case the Austrian legislature merely took advantage of that possibility and therefore complied with the review directive, even if the situation could arise where, because notification of the award decision and the conclusion of the contract might take place at the same time, it would be impossible to have the decision awarding the contract set aside.

35. Such an interpretation takes no account of the chronological sequence in which the review procedures provided for by Article 2(1) and (6) are to apply.

36. The limitation on remedies provided for by Article 2(6) relates to the contract *following* the award decision. That provision therefore implies that, in the eyes of the Community legislature, the conclusion of the contract and the decision awarding the contract cannot coincide in time.

37. As the Commission submits, the review directive thus clearly envisages two distinct phases in the review procedure: before the conclusion of the contract Article 2(1) applies and requires Member States to ensure complete judicial protection; after the contract is concluded, the limitation provided for in Article 2(6) applies and the sole remedy available is an award of damages.

38. The extent of the contrast between those two phases should not be underestimated. The setting aside of a decision means that tenderers seeking review retain their chances of winning the contract. Conversely, damages alone are often unsatisfactory compensation for a company passed over, having regard to the difficulties it might face, in particular, in quantifying its loss and proving a causal link with the infringement of Community law. It would in any event be easy for the contracting authority to minimise the chances of success of the complainant. Moreover, a potential complainant is likely to be reticent about instituting proceedings for fear of compromising its future relations with the contracting authority, when in any event the contracting authority is unlikely

to put it back into a position where it could win the contract. [3]

39. The effectiveness of the review directive, and in particular its objective, set out in Article 1(1), of establishing rapid and effective review procedures, would be compromised if it were open to a Member State to widen the limitation provided for in Article 2(6) to such an extent that the most important decision of the contracting authority, namely the award of the contract, would systematically be covered by the limitation, and would thus be removed from the full protection established by Article 2(1).

40. The objective of reinforcing remedies which is laid down by the review directive requires that the possibility left open to the Member States to limit them should be regarded as an exception and so be interpreted restrictively.

41. The purpose of such a limitation is to ensure legal certainty in protecting the contract, thus recognising the contract's specific status in the award procedure in theoretically bringing it to an end.

42. By contrast there is no justification for inferring from this the possibility of restricting the review procedures applicable to those administrative decisions which *precede* the conclusion of the contract.

43. National legislation cannot therefore invoke Article 2(6) for the purpose of excluding a procedure for having the decision awarding the contract set aside.

44. It should, moreover, be emphasised that that solution is perfectly compatible with the view that the review directive does not undermine the private law systems in the Member States because it is the national legal system alone which determines the effects of the remedies envisaged by the directive in respect of the contract *which follows* the award decision.

45. I would add lastly that there would be a number of paradoxical consequences were it accepted that national legislation could define the time of conclusion of the contract, at which point the legal protection of the unsuccessful tenderers becomes limited, in such a way that the decision awarding the contract was also affected by that limitation.

46. As I have already stated, that would mean that the most important decision could not be set aside whilst other, lesser

3 — As to these factors, see the explanatory statement in Commission proposal (Com(87) 134 final), and the amended proposal (Com(88) 733 final).

ones could be, simply because they were reached earlier.

47. Furthermore, irregularities in the decision awarding the contract would then be highly unlikely to have any consequences for the award of the contract. The only means of challenging the award decision would be by seeking to set aside the contract, although the problem does not intrinsically arise from the contract but from the failure to observe the necessary conditions for the legality of an administrative act, which is not the same as the contract. Procedural effectiveness and economy therefore require that there should be a separate procedure for reviewing, in sufficient time, the validity of the decision awarding the contract.

48. I turn now to consider the application of those principles to the present case.

49. As the national court has explained, as a matter of Austrian law the contract is considered to be concluded when the decision awarding the contract is notified to the successful tenderer. That notification is treated in civil law as the acceptance of the tenderer's offer.

50. The sole exception to that situation is if the period allowed for making the award has expired or the terms of the contract differ from those of the offer. In that case, the contractual relationship only comes into being when the tenderer gives written notification of his acceptance of the contract.

51. According to the Bundesvergabeamt, whilst it is strictly true that the decision awarding the contract precedes the conclusion of the contract, it takes place within the internal organisation of the contracting authority and is not communicated to the interested parties before being notified to the chosen tenderer. That notification, as well as being the first external manifestation of the decision, seals the contract and thus renders the decision immune from proceedings to set it aside.

52. The national court considers that it follows from this that the award decision as such, by which the contracting authority chooses the tenderer with which it will contract, is not open to challenge. The unsuccessful tenderers are, furthermore, not generally aware of the decision, nor can they become so.

53. It must therefore be concluded that the effect of the relevant national legislation is, as a general rule, to exclude the possibility of a review procedure to set aside the decision awarding the contract.

54. It follows from the foregoing that such a situation does not comply with the requirements of the review directive.

55. The respondent in the main proceedings, meanwhile, disputes the national court's presentation of the relevant national law.

56. That is, however, a matter for the national court, whose task is to apply the principles handed down by the Court to the present case. The respondent cannot substitute its own analysis of the relevant national law for that of the national court.

57. The Ministry of Science and Transport specifically denies that the unsuccessful tenderers are unable to learn of the decision awarding the contract before the conclusion of the contract. It claims that those tenderers can avail themselves of the legislation relating to access to administrative documents and request the administration to inform them of its decision.

58. It must be pointed out, however, that such a possibility cannot be regarded as adequate compensation for the lack of any obligation on the part of the administration to inform the unsuccessful tenderers of the decision awarding the contract before the conclusion of the contract, thereby giving them a genuine opportunity to commence review proceedings.

59. This is *a fortiori* the case in respect of tendering procedures where, as noted by the review directive, award procedures are of particularly short duration whereas, as was stated at the oral hearing, the national legislation on access to administrative documents grants the administration a period of two months within which to reply to requests.

60. The Austrian Government argues that, if the review directive was to be interpreted as requiring a separation between the decision awarding the contract and the conclusion of the contract, then nowhere does the directive define the necessary delay between the two. This period could be reduced to one second of 'thinking time'.

61. It is appropriate however in this case to take into account what is required for the effectiveness of the review directive. This means, as we have seen, that a procedure for having the decision awarding the contract set aside must be possible. It necessarily follows that, having regard to the short duration of procedures for the award of public contracts, a reasonable time must elapse between the time when the decision awarding the contract is notified to the unsuccessful tenderers, so that they may challenge the decision, and the conclusion of the contract, after which time Article 2(6) applies.

62. The United Kingdom Government submits that since there are different types of award procedures it is not possible to fix a

single period of time. Therefore it should be for the legislature to take the initiative in the matter.

63. In my view, however, the fact that the review directive does not mention any specific period of time does not prevent the Court from construing it in a way that complies with the requirements of effectiveness. Since, as we have seen, effectiveness will be maintained only if the award decision is open to challenge, it therefore follows that there must be a reasonable time-limit for any challenge. That limit is, of course, likely to vary according to the circumstances of the case, and in particular, according to the type of award procedure in question.

64. The Austrian Government, supported by the German Government, points out that the review directive is a coordinating rather than a harmonising directive. Accordingly, it must be assumed that the Council did not intend to constrain those Member States such as the Republic of Austria, the Federal Republic of Germany and, to a certain extent, the United Kingdom, in which it is possible for notification of the decision awarding the contract to coincide in time with the conclusion of the contract, to change their public procurement procedures.

65. The fact remains, however, that that argument is not supported by the *travaux préparatoires* of the review directive.

66. On the contrary, in its presentation of the reasoning behind the draft amended directive, the Commission expressly lists, amongst the shortcomings in the national systems concerning review procedures, the fact that it is not possible in all the Member States to have the award decision set aside by administrative or judicial means. [4]

67. It is therefore clear that in the view of the Commission, at least, the review directive is intended to put in place such a possibility.

68. In any event, it is the actual wording of the review directive, as enacted by the legislature, which is determinant. Even if the wording is not of sufficient clarity for it to require no effort in interpretation, it is nevertheless the case, as we have just seen, that it is not so obscure as to require reference to external factors in order to determine the intention expressed by the legislature.

4 — Amended proposal for a Council Directive coordinating the laws, regulations and administrative provisions relating to the application of Community rules procedures for the award of public supply and public works contracts (submitted by the Commission pursuant to Article 149(3) of the EEC Treaty), Document (88) 733 final.

69. The United Kingdom Government further claims that the interpretation of the review directive put forward by the Commission and the applicants directly contradicts the system established by the Community legislature in Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts. [5] As evidenced in particular by Articles 7, 9 and 10, that directive is detailed and exhaustive. It does not provide for any time to elapse between the decision awarding the contract and its conclusion.

70. It must be noted, however, that, corresponding to the provisions cited by the United Kingdom, are equivalent provisions in earlier directives, in particular Directives 89/440/EEC [6] and 88/295/EEC. [7]

71. It appears clearly from the review directive that it is intended to supplement the system established by the abovementioned two directives. Thus the first recital in the preamble to the review directive notes that the earlier directives 'do not contain any specific provisions ensuring their effective application'.

72. The inevitable conclusion therefore is that Directive 93/96, cited above, is not so exhaustive in nature that the review directive can add nothing to its provisions.

73. Thus Article 7(1) of Directive 93/36 is cited by the United Kingdom because it provides only as follows: 'The contracting authority shall within 15 days of the date on which the request is received, inform any eliminated candidate or tenderer who so requests of the reasons of the rejection of his application or his tender, and, in the case of a tender, the name of the successful tenderer' without mentioning any review procedure in respect of the award decision.

74. That provision is, however, identical to Article 5a(1) of Directive 89/440, cited above, which, as we have just seen, in the Council's view did not contain any specific provisions on remedies.

75. I would add, moreover, that one could ask oneself why the Council would impose such a short time-limit for the administration to reply to the queries of unsuccessful tenderers, namely 15 days, if the purpose was not that the latter should be informed within sufficient time to enable them it to

5 — OJ 1993 L 199, p. 1.

6 — Council Directive of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L 210, p. 1)

7 — Council Directive of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC (OJ 1988 L 217, p. 1).

have the decision set aside before it was too late and the contract was awarded.

76. For the above reasons, I would propose the following reply to the first question.

77. The combined provisions of Article 2(6) and (1)(a) and (b) of the review directive are to be interpreted as meaning that the Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder with which, in the light of the procedure's results, it will conclude the contract (i.e. the award decision), is in all cases open to a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of limiting the legal effects of the review procedure to an award of damages.

## Question 2

78. By the second question the Bundesvergabeamt in effect asks whether the provisions of Article 2(1)(a) and (b) of the review directive as interpreted above are capable of having direct effect.

79. The respondent in the main proceedings and the Austrian Government consider that the review directive leaves a margin of discretion to the Member States to determine the bodies competent to perform the review procedures required by the review directive.

80. That obligation is not therefore sufficiently precise and unconditional so as to give rise to direct effect.

81. The applicants in the main proceedings state that, to the contrary, the content of the obligation on the Member States is clear and precise and that the Member States therefore have no discretion in the matter. Their margin for manœuvre is confined to the choice of competent body.

82. The Commission refers, first of all, to the settled case-law of the Court on the subject of direct effect. This establishes that: [8]

'... wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is

8 — Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraphs 11 and 17.

incompatible with the directive or in so far as the provisions of the directive define rights which individuals are able to assert against the State.'

83. In particular, '... the right of a State to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals of enforcing before the national courts rights whose content can be determined sufficiently precisely on the basis of the provisions of the directive alone'.

84. It is undeniable in the present case that the content of the Member States' obligation is clearly determined. They are required to ensure that unsuccessful tenderers are able to initiate proceedings to have the decision awarding the contract set aside.

85. It is also clear that this obligation necessarily gives rise to rights for individuals since it is they who must be able to initiate the review procedures required by the review directive. [9]

86. Consequently the only question which remains to be decided is whether the fact that the Member States have a margin of discretion when establishing suitable bodies means that the provision in question cannot have direct effect.

87. The Commission rightly points out in this context that this question has already been raised in *Dorsch Consult* [10] and *HI* [11] as well as in a number of other cases. [12] It follows from that case-law that the Member States' margin for manœuvre when organising the review system prevents the review directive from having direct effect.

88. The Commission submits however that the present case differs fundamentally from the cases cited above. This is because the Austrian authorities have already used their margin for manœuvre and definitively established the bodies and procedures intended to implement the provisions of the review directive, whilst in all of the abovementioned cases the national legislation in question did not include the necessary attributions of competence and therefore further action on the part of the national authorities was required.

89. In this case, the situation is quite different, because Paragraph 91 of the

9 — See Article 1(1) and (3), first sentence, of the review directive.

10 — Case C-54/96 [1997] ECR I-4961.

11 — Case C-258/97 [1999] ECR I-1405.

12 — Case C-76/97 *Tögel* [1998] ECR I-5357; Case C-111/97 *EvoBus Austria* [1998] ECR I-5411.

BVergG expressly provides that the Bundesvergabeamt is competent to examine the legality of award procedures and decisions within the ambit of the BVergG. For an award of damages the matter would be referred to the ordinary courts.

90. The system of competence would therefore appear to be definitively established, all the more so since the national law sets out all of the review procedures laid down in Article 2(1) of the review directive. The national legislature has therefore already implemented the obligation to set up a system of review and it is open to individuals to select the competent forum to adjudicate on their complaint.

91. I accept that analysis.

92. The argument derived from the existence of a margin of discretion can, by its very nature, only be raised while that discretion has not been exercised. As soon as it has been exercised that discretion necessarily disappears and can no longer prevent recognition of direct effect.

93. The fact that this discretionary power may not have been exercised in compliance with the review directive is irrelevant in this respect.

94. I consider that a distinction should be drawn between the situation in which a Member State has set up the necessary body, and has only to vest that body with the necessary powers, and that in which no provision has been made to implement the obligation to establish a system of review.

95. The second situation is effectively an insurmountable obstacle to recognition of direct effect. Conversely, in the first case such effect cannot be excluded because the body which will implement the obligation imposed by the review directive already exists.

96. I would add that I also share the Commission's view when it suggests that in the present case it is by no means certain that the applicants need to avail themselves of direct effect. As we have already seen, all of the problems stem from the fact that in

practice the decision awarding the contract is announced at the same time as the contract is concluded.

97. That fact does not seem to me to be a necessary consequence of the national provisions because they do not prevent the contracting authority from publishing the award decision a certain time before concluding the contract, nor do they prevent the Bundesvergabeamt from acceding to an application to set that decision aside and ordering, where appropriate, interim measures.

98. That was furthermore confirmed at the oral hearing at which the applicants emphasised, without being contradicted on the point, that certain Austrian public bodies in practice allow a period of time to elapse between the date on which the award decision is notified to the unsuccessful tenderers and the conclusion of the contract.

99. The national provisions in question are capable of being applied so as to comply with the requirements of the review directive. Recourse to the concept of direct effect is therefore unnecessary.

100. It should be noted in passing that that finding clearly does not imply that those provisions constitute a proper implementation of the review directive, that question not being directly in issue in the present case.

101. In the light of the foregoing I would propose that the second question referred to the Court by the Bundesvergabeamt be answered to the effect that the combined provisions of Article 2(6) and (1)(a) and (b) of the review directive are to be interpreted as meaning that the obligations set out therein are sufficiently clear and precise, so that individuals can rely upon them in procedures against the Member State where the Member State in question has adopted definitive rules as to the jurisdiction of review bodies charged with implementing the various phases of the review procedures and has already adopted the necessary procedural rules for each step in the procedure.

**Question 3**

102. By this question the Bundesvergabeamt asks whether it is required to apply the provisions of Article 2(1)(a) and (b) of the review directive, even if the BVergG contains no provisions to that effect, or conflicting provisions.

103. It should first be noted that this question is closely linked to the preceding question. This is because, like Question 2, it only arises where the issue is one of direct effect and not of the interpretation or application of a national law so as to comply with the review directive.

104. Having said that, I am of the opinion that the Court's case-law provides a ready answer: if a Community law text recognises a right of individuals against the Member State, the national court seised of the matter must give full application to the Community law right and must disapply, so far as may be necessary, any inconsistent provisions of national law.

105. This principal has already been established by judgment in the *Simmenthal* case, [13] in which the Court held that

'a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means ...' (paragraph 24)

'... national courts must protect rights conferred by provisions of the Community legal order and ... it is not necessary for such courts to request or await the actual setting aside by the national authorities empowered so to act of any national measures which might impede the direct and immediate application of Community rules' (paragraph 26).

106. I would therefore suggest that the reply to the Bundesvergabeamt's third question should be that the national court which, within the limits of its jurisdiction, must apply the provisions of Community law, is required to guarantee the protection of the rights provided by the Community legal order and to ensure the full effectiveness of those rules by disapplying, of its own initiative where necessary, any conflicting national provision without having to request or await the setting aside by the competent national bodies of any national measures impeding the direct and immediate effect of the Community rules.

13 — Case 106/77 [1978] ECR 629.

## Conclusion

107. For the reasons set out above, I propose that the Court should reply as follows to the questions referred to it by the Bundesvergabeamt:

(1) The combined provisions of Article 2(6) and (1)(a) and (b) 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 must be interpreted as meaning that the Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which, in the light of the procedure's results, it will conclude the contract (i.e. the award decision), is in all cases open to a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of limiting the legal effects of the review procedure to an award of damages.

(2) The combined provisions of Article 2(6) and (1)(a) and (b) of Directive 89/665 are to be interpreted as meaning that the obligations set out therein are sufficiently clear and precise so that individuals can rely upon them in procedures against the Member State where the Member State in question has adopted definitive rules as to the jurisdiction of review bodies charged with implementing the various phases of the review procedures and has already adopted the necessary procedural rules for each step in the procedure.

(3) The national court which, within the limits of its jurisdiction, must apply the provisions of Community law, is required to guarantee the protection of the

rights provided by the Community legal order and to ensure the full effectiveness of those rules by disapplying, of its own initiative where necessary, any conflicting national provision without having to request or await the setting aside by the competent national bodies of any national measures impeding the direct and immediate effect of the Community rules.