OPINION OF ADVOCATE GENERAL ALBER

delivered on 8 November 2001 [1]

I — Introduction

1. In the course of a review of a restricted procedure for the award of a works contract, the Vergabekontrollsenat (Public-procurement review body), Vienna, referred four questions concerning the interpretation of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (hereinafter 'Directive 93/37'). [2] They concern the definitions of a contracting authority, in light particularly of a subsequent extension of the tasks of the body concerned, the concept of a public-works contract, the provision of limitation periods for bringing an action and whether the evaluation criteria must be stated in the invitation to tender.

1 — Original language: German.
2 — OJ 1993 L 199, p. 54.

II — Applicable law

1. *Directive 93/37/EEC*

2. Article 1 of Directive 93/37 defines 'public works contract' and 'contracting authority' as follows:

'*Article 1*

For the purpose of this Directive:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the require-

ments specified by the contracting authority;

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

A "body governed by public law" means any body:

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

— having legal personality, and

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

2. *Directive 89/665/EEC*

3. 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 (hereinafter 'Directive 89/665') [3] provides:

Article 1(1):

'The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within

3 — OJ 1989 L 395, p. 33.

the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

Article 2(7) and (8):

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

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

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

3. *Wiener Landesvergabegesetz*

4. The Wiener Landesvergabegesetz (Public-procurement law in the Land of Vienna, hereinafter 'WLVergG'), [4] in the applicable version for the purposes of the present review procedure, contains the following provisions which are of particular significance in the consideration of the issue of the admissibility of the reference for a preliminary ruling, regard being had to the question whether the referring Vergabekontrollsenat is a court or tribunal within the meaning of Article 234 EC.

4 — LGBl. No 36/1995; as amended, LGBl. No 30/1999.

5. Under Paragraph 94(2), the Vergabekontrollsenat is responsible at first and last instance for deciding applications for review. Its decisions are not liable to be set aside or varied through administrative channels. Under subparagraph 3, the Allgemeines Verwaltungsverfahrensgesetz (General Law on Administrative Procedure) and the Verwaltungsvollstreckungsgesetz (Law on Administrative Enforcement) apply to the review procedure, unless otherwise provided for in the WLVergG.

6. Paragraph 95 of the WLVergG states:

'(1) The Vergabekontrollsenat shall consist of seven members. The members shall be appointed by the *Land* Government for a term of six years. Members shall be eligible for reappointment. Three members, who may also be experienced officials of the Magistrat (municipal office) of the city of Vienna, shall be appointed after hearing the Gemeinderat (city council), one each after a hearing before the Chamber of Commerce of Vienna, the Chamber of Workers and Employees for Vienna, and the Chamber of Architects and Consulting Engineers for Vienna, Lower Austria and Burgenland. The President shall be a member of the judiciary and shall be appointed after a hearing before the President of the Oberlandesgericht (Higher Regional Court), Vienna. For each member a first, second and third substitute shall be appointed in the same manner. Substitutes, in the order of their appointment, shall represent members in the event of their temporary indisposition or, on expiry of their term of office pending the appointment of a new member. In the event of the departure of a member or a substitute, fresh appointments shall be made without delay.

(2) Members and substitutes must possess special knowledge of public procurement, and in the case of members and substitutes appointed after a hearing before the Gemeinderat that knowledge must be specifically in the economic and technical fields.

(3) A person shall cease to be a member of the Vergabekontrollsenat:

1. on his death;

2. on resignation;

3. if he ceases to be eligible for election to the Nationalrat (national council) (Nationalrats-Wahlordnung (Elections

to the National Council Order) 1992, Paragraph 41, BGBl. No 471, as amended by Federal Law BGBl. No 117/1996);

4. on expiry of his term of office;

5. in the case of the President and substitutes, on ceasing to be a member of the judiciary;

6. if he is removed by the Vergabekontrollsenat.

(3a) A member shall be removed from office by a decision of the Vergabekontrollsenat if he is permanently prevented from properly performing his duties owing to physical or mental injury or is guilty of gross dereliction of duty. The decision shall be made after hearing the member concerned. The member concerned shall not be entitled to vote.

(4) Members of the Vergabekontrollsenat shall be independent in the exercise of their office and shall not be bound by instructions.

(5) The members of the Vergabekontrollsenat shall be bound to secrecy under Article 20(3) of the B-VG (Bundesverfassungsgesetz, Federal Constitutional Law).

(6) Meetings of the Vergabekontrollsenat shall be called by the President. Where a member has an interest or is temporarily unable to carry out his duties, his substitute shall be called upon to sit. Members of the Vergabekontrollsenat shall not participate in any decision relating to any procurement procedure concerning the award of a contract in the field of activity of the institution (or, in the case of public servants in the municipal office of the city of Vienna, the department, division or office) to which they belong. If serious grounds exist for doubting a member's impartiality, he must decline to sit and arrange to be represented. Parties may reject members of the Vergabekontrollsenat on showing cause relating to impartiality. The Vergabekontrollsenat shall decide any question relating to the alleged impartiality of a member or any applications for rejection, and the member concerned shall not be entitled to vote thereon. The President shall cause the names of the members of the Vergabekontrollsenat and the institution (or in the case of public servants in the city of Vienna, the department, division or office) to which they belong to be published in the Amtsblatt der Stadt Wien (Official Journal of the City of Vienna) at the start of each calendar year.

(7) Applications shall be decided in the order determined by the President. Orders shall be made in the presence of at least five members by simple majority. Abstentions

are not permissible. Sittings shall not be public. A minute shall be made of the proceedings of the sitting. Notices shall be issued in writing. They shall include the names of the members of the Vergabekontrollsenat who took part in the decision. The notice shall be signed by the President. Orders relating to the conduct of the procedure may also be made by any member in accordance with the Rules of Procedure.

(8) The members of the Vergabekontrollsenat shall not be remunerated for their services. They shall be sworn into office by the chief executive of the *Land*.

(9) Members of the Vergabekontrollsenat shall be reimbursed for any necessary travelling expenses and compensated for their time, for which a rate shall be fixed by the *Land* Government.

(10) The Vergabekontrollsenat shall adopt its own Rules of Procedure.

(11) The Amt der Wiener Landesregierung (Office of the Government of the *Land* of Vienna) shall, on a proposal from the Vergabekontrollsenat, place at its disposal the management staff required and, after hearing the President of the Vergabekontrollsenat, the necessary premises. Officials who carry out management tasks shall, in the course of their duties for the Vergabekontrollsenat, be bound only by instructions from the President and the rapporteur for the time being. They may be removed from those duties only after the President has been heard.'

Pre-litigation procedure

'Paragraph 96.

(1) If a contractor considers that a decision taken by a contracting authority before the award of a contract infringes this Law and he has been or risks being harmed thereby, he shall formally communicate in writing to the contracting authority a statement of reasons and his intention to institute review proceedings.

(2) On receipt of the communication under subparagraph 1, the contracting authority shall either rectify the alleged infringement without delay and inform the contractor thereof or communicate in writing to the complainant why the alleged infringement does not exist.'

Application for review

'Paragraph 97.

(1) An application for review prior to the award of a contract shall be admissible only if the contractor has formally notified the contracting authority of the alleged infringement and of his intention to apply for review (Paragraph 96(1)) and the contracting authority has not informed him within two weeks that the infringement has been rectified.

(2) Review may be applied for by:

1. a contractor who claims a business interest in the conclusion of a supply, works, works concession or service contract or a contract in the water, energy, transport or telecommunications sectors, in respect of a ground of nullity under Paragraph 101;

2. a tenderer who claims that the contract was not awarded to him in spite of the inapplicability of the grounds of elimination within the meaning of Paragraph 47 and contrary to Paragraph 48(2).

(3) The application under subparagraph 2 shall contain:

1. the precise designation of the award procedure concerned and of the decision challenged;

2. the precise designation of the contracting authority;

3. a precise statement of the facts;

4. particulars of how the applicant risks being or already has been harmed;

5. the grounds on which the allegation of infringement is based;

6. a specific request for a declaration of nullity or amendment;

7. in cases under subparagraph 1, evidence that the contracting authority was notified in a pre-litigation pro-

cedure in accordance with Paragraph 96 of the alleged infringement and of the intention to apply for review, and reference to the contracting authority's failure to rectify the infringement within the specified time-limit.

(4) The review procedure does not have a suspensory effect on the contract award procedure to which it relates.

(5) The maximum penalty for abuse (Paragraph 35 of the AVG) which may be imposed in the review procedure shall be 1% of the estimated value of the contract, not exceeding ATS 800 000.'

Time-limits

'Paragraph 98.

Applications for review on the ground of the following alleged infringements shall be lodged with the Vergabekontrollsenat within the following time-limits:

1. as regards applications which are refused, two weeks, and where Paragraph 52 applies, three days after notification of the refusal; [5]

2. as regards provisions in the notification by which contractors are invited to apply to take part in a restricted or negotiated procedure or as regards provisions of the invitation to tender, two weeks, and where Paragraph 52 applies, one week before expiry of the date for submitting applications or tenders;

3. as regards the award of a contract, two weeks after the publication of the award in the *Official Journal of the European Communities* or, where the award is not published, six months after the award of the contract.'

III — Facts

1. *Main proceedings*

7. In the Official Gazette of the City of Vienna, Entsorgungsbetriebe Simmering GesmbH (hereinafter 'EBS') advertised its

5 — Paragraph 52 of the WLVergG applies to cases in which specified time-limits are shortened for reasons of urgency. This is not the case here.

intention to award a works contract for the extension of the principal sewage plant in Vienna under a restricted procedure. [6] The intention was to invite the five best-ranked candidates to submit tenders and to award the contract to the most economically advantageous tender in accordance with the criteria set out in the invitation to tender. In the Explanatory Notes on Applications to Take Part, [7] the following appeared under the heading, 'Criteria for ranking applications to take part':

'For the ranking of the applications to take part, the technical operating capacity over the last five years of the candidate, of each member of the consortium of contractors and of the sub-contractors indicated will be taken into account.

The five highest ranked candidates shall be invited to submit a tender.

The evaluation of the applications submitted shall be made according to a scoring procedure. [8]

The following works shall be analysed in the following order:

1. Sewage treatment plants

2. Pre-stressed components

3. Large-scale foundations supported by columns in gravel

4. Oscillating pressure compaction

5. High pressure soil consolidation

The candidate shall identify reference projects completed within the last five years comparable to the tasks to be undertaken.

Only such references as have been carried out by a candidate or a sub-contractor itself, as a leader of a consortium or as the person within a consortium who is responsible for and who carries out the technical

6 — Under Article 1(f) of Directive 93/37, restricted procedures are procedures 'whereby only those contractors invited by the contracting authority may submit tenders'.

7 — Annex 3 to the order for reference, p. 7.

8 — Scoring procedure usually means according to the number of points scored.

aspects shall be evaluated (pro formas are included in the application to take part, point 3).'

8. EBS lodged the details of the scoring procedure with a notary on 9 April 1999, that is to say before the first application to take part was submitted. The applicants in the main proceedings, Universale Bau GmbH (hereinafter 'Universale') and the Hinterreger and ÖSTU-STETTIN consortium (hereinafter 'the consortium'), were informed in the explanatory notes on applications to take part that they had been lodged with a notary. However, they were not informed of the result of the scoring procedure, or of the evaluation criteria, before the expiry of the time-limit for applications.

9. The applicants in the main proceedings gave notice of their interest in taking part in the restricted procedure. After EBS notified them that they were not among the five best-ranked undertakings and would therefore not be invited to tender, they challenged the procurement procedure before the referring Vergabekontrollsenat.

2. *Legal nature and objects of EBS*

10. EBS was established in 1976 by Wiener Allgemeine Beteiligungs- und Verwaltungsgesellschaft mbH and BIA Betriebsgesellschaft für Industrieabfall- und Altölbeseitigung GmbH. Each of the two shareholders subscribed for half the share capital. According to the findings of the referring Vergabekontrollsenat, Allgemeine Beteiligungs- und Verwaltungsgesellschaft mbH 'was accountable to' the City of Vienna. At the time of the invitation to tender, the shareholdings in EBS were as follows:

Wiener Holding AG	ATS 11 075 000
City of Vienna	ATS 160 425 000
Wiener Stadtwerke	ATS 178 500 000

11. According to the findings of the Vergabekontrollsenat, the objects of EBS were initially the design, construction and management of a special waste disposal and waste incineration facility. All its operations were carried out on a commercial basis and in competition with other waste disposal businesses, such as operators of private refuse dumps. EBS alone bore the risk of profit or loss. The deed of incor-

poration does not warrant any finding that EBS was to meet general-interest needs of a non-industrial or non-commercial nature.

12. According to clause 10(2) of the relevant EBS' deed of incorporation of 12 September 1996, the Kontrollamt (Review Office) of the City of Vienna is entitled to check both the current account for numerical accuracy, regularity, economy, profitability and expediency and the annual accounts and the situation report including performance, records and other documents, to inspect the business premises and facilities and to report on the result of that inspection to the competent bodies, the shareholders and the City of Vienna.

3. *Contracts with the City of Vienna*

13. In 1985 EBS entered into a lease with the City of Vienna under which it took over management of the City of Vienna's principal sewage plant with effect from 1 January 1986. Under this agreement, the City of Vienna paid a 'reasonable and uniform remuneration to cover the costs of management of the principal sewage plant and of existing waste disposal plants, together with a reasonable return on capital'. According to the findings of the Vergabekontrollsenat, which are confirmed by the parties to the main proceedings, EBS does not perform the task of sewage treatment with a view to profit. Rather, it is a public-service activity entrusted to EBS and carried out on a break-even basis. Thus, EBS' activity in this area is not managed on an industrial or commercial basis. The deed of incorporation was not amended when this task was transferred.

14. By a lease dated 8 July 1996, which replaced the 1985 agreement, the management of the City of Vienna's principal sewage plant was again entrusted to EBS. In addition, EBS undertook to extend the sewage works relating to the project and otherwise to enlarge the Vienna principal sewage plant and EBS' plants in its own name and on its own account (point I.2 of the contract). The City of Vienna was to continue to supply the personnel necessary for the management of the principal sewage plant (point I.3). The City of Vienna undertook to pay a 'reasonable and uniform remuneration to ensure coverage by the business of its costs. All the expenses arising out of the extension and operation of the plants including the sewage works relating to the project, less any sums received by EBS, shall... be reimbursed...' (point IV.1).

15. No specific requirements were laid down as regards the structure of the plant. However, EBS is required in points II and III of the contract to ensure that the principal sewage plant operates in a spec-

ified way, though the City of Vienna does not have any influence over the actual organisation of the building work.

16. It is clear from the planning notice that EBS applied for planning permission. The owner of the land on which the work is to be executed is the City of Vienna. In a document of 8 September 1999, which was included as annex 8 to the order for reference, EBS stated: 'We will retain ownership of the sewage plant extension... The sewage plant will be transferred in the event of termination of the lease and management contract which have been concluded for an indefinite period between the City of Vienna and ourselves. In that case the City of Vienna shall be obliged to take over, inter alia, our sewage plant. It must pay us the current market value of the sewage plant'. According to the Vergabekontrollsenat, such a provision is compatible with Austrian law.

17. The Vergabekontrollsenat excludes any intention on the part of the City of Vienna to circumvent the rules concerning public procurement by establishing EBS and transferring the management and extension of the sewage plant to EBS. EBS was established as early as 1976, but it was not until 1986 that operation of the principal sewage plant was entrusted to it.

IV — Questions referred

18. The Vergabekontrollsenat has referred the following questions to the Court for a preliminary ruling:

1. Does a legal person constitute a 'contracting authority' within the meaning of Article 1(b) of Directive 93/37/EEC even if it was not established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, but now meets such needs?

2. If Entsorgungsbetriebe Simmering GesmbH is not a contracting authority, does the planned construction of the second biological treatment phase of the principal sewage plant, Vienna, constitute the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority, and thus a 'public works contract' within the meaning of Article 1(a), read in conjunction with Article 1(c), of Directive 93/37/EEC?

3. If Question 1 or Question 2 is answered in the affirmative, does Directive 89/665/EEC preclude a national provision which fixes a time-limit for the review of an individual

decision of the contracting authority so that on expiry of that time -limit the decision can no longer be challenged in the course of the ongoing contract award procedure? Is it necessary for the persons concerned to plead every defect, failure to do so entailing loss of their right to do so?

4. If Question 1 or Question 2 is answered in the affirmative, is it sufficient for the body inviting tenders to determine that the applications will be evaluated according to a method lodged with a notary, or is it necessary for the evaluation criteria already to have been communicated in the call for candidates [9] or the tender documents?

V — Submissions of the parties and opinion

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

19. Admittedly, none of the parties to the proceedings expressed any doubt as to the admissibility of the reference for a preliminary ruling. However, the Vergabekontrollsenat gave detailed reasons as to why it is entitled to make a reference and the Austrian Government made submissions in that regard. Referring to a judgment of the Court concerning the Tiroler Vergabesenat (Procurement Chamber for the Tyrol), both consider the reference for a preliminary ruling to be admissible. In that case, the Advocate General was of the opinion that the reference for a preliminary ruling was inadmissible, [10] whereas the Court held the question referred to be admissible. [11] The Court has not yet decided whether the referring Wiener Vergabekontrollsenat is entitled to make a reference. The question also arises in Case C-92/00. In his Opinion in that case, Advocate General Tizzano has by implication assumed that the Wiener Vergabekontrollsenat is entitled to make a reference. However, he did not expressly state his view on that question. The judgment in that case is still pending. It is therefore appropriate to express a view on this question in the present proceedings.

20. The Court has consistently held that whether a body making a reference is a court or tribunal within the meaning of Article 177 of the EC Treaty (now Article 234 EC) depends on whether it is established by law, whether it is perma-

9 — In the terminology of Directive 93/37, 'contract notice'.

10 — Opinion of Advocate General Saggio in Case C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-553, paragraphs 25 to 30.

11 — Case C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551, paragraphs 22 to 25.

nent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. [12]

21. Under Paragraph 94(2) of the WLVergG, the Vergabekontrollsenat is the body responsible at first and last instance for reviewing decisions by a contracting authority in a procurement procedure. Thus, its activity is established by law and its jurisdiction is compulsory. It is also a permanent body. Decisions of contracting authorities are reviewed in accordance with the WLVergG and, unless otherwise provided therein, under Paragraph 94(3) of the WLVergG, on the basis of the General Law on Administrative Procedure and the Law on Administrative Enforcement. Paragraph 94(2) of the WLVergG guarantees the independence of the Vergabekontrollsenat from the administration, by providing that its decisions are not liable to be varied or set aside through administrative channels. Moreover, Paragraph 95(4) of the WLVergG guarantees that members must be able to exercise their office independently and free from instructions. Subparagraph 6 makes provision in respect of partiality, a criterion on which the Court placed particular emphasis in *Köllensperger and Atzwanger*. [13] Under Paragraph 95(7), the Vergabekontrollsenat's notices are to be issued in writing. On the basis of these findings the Vergabekontrollsenat may be presumed to satisfy the criteria in the case-law governing definition of a court or tribunal for the purposes of Article 177 of the EC Treaty (now Article 234 EC). Accordingly, the reference for a preliminary ruling is admissible.

12 — See *Köllensperger and Atzwanger* (cited above, footnote 11), paragraph 17, with further references; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23.

13 — *Köllensperger and Atzwanger* (cited above, footnote 11), paragraph 22.

2. *The first question*

22. By its first question, the Vergabekontrollsenat asks whether a body which, whilst not established for the specific purpose of performing general-interest tasks, of a non-industrial and non-commercial nature, subsequently takes on and from then actually performs such a task, is to be regarded as a body governed by public law within the meaning of Article 1(b) of Directive 93/37.

(a) Submissions of the parties

23. Universale, the consortium and the Austrian Government are of the view that EBS is a contracting authority for the purposes of the Directive. That issue is determined by the tasks actually performed by the body at the time of the invitation to tender and the award of the contract, rather than by the terms of its deed of incorporation. In support of its view, the consortium relies on existing case-law,

from which it appeared that this term was to be interpreted functionally. The consortium and the Austrian Government do not relate the criterion 'established for the specific purpose' to the time of establishment, but submit that subsequent changes actually made should be taken into account. This could be satisfied either by a change to the previous determination of objects or by making provision for the inclusion of an additional object. Otherwise, Directive 93/37 might easily be circumvented by assigning needs in the general interest not to a body having legal personality newly established to that end but to an existing body which previously served other purposes. The consortium suggests that the criterion should be read as 'intended by the owners to fulfil the specific purpose'.

24. Conversely, EBS and the Commission are of the view that EBS is not a contracting authority for the purposes of the Directive. In the first place, EBS points out that it was established in 1976 in order to perform the task of incinerating specific waste on a commercial basis. It had to bear the associated economic risk. Only 10 years after it had been established was the general-interest task of sewage disposal transferred to EBS, which it carried out on a break-even basis. However, it had not been established for that purpose. Under the terms of Article 1 of the Directive and of existing case-law, the question whether it was a body governed by public law for the purposes of Directive 93/37 depended on the date of its establishment. The fact that subsequently it began to meet needs in the general interest did not change its status, since it also continued to meet commercial needs. The wording of the Directive precluded the interpretation of the concept of a contracting authority suggested by the applicants in the main proceedings. At most, it would be consistent with that wording to interpret it in such a way as to be regard that body as a contracting authority only to the extent that it performed general-interest tasks, not tasks to meet commercial needs. Thus, EBS suggests a distinction based on the task performed by the body in a given case. The Commission further points out that the alteration of the company's objects was effected neither by an alteration of the objects of the company as stated in the deed of incorporation nor by a statutory provision.

25. Like the consortium, the Netherlands Government points to the functional interpretation it considers to have been given to the concept of a contracting authority in the case-law. On this approach, it reaches the conclusion that a body governed by private law which performs general-interest tasks, though it was not established for that specific purpose, is to be regarded as a contracting authority for the purposes of Directive 93/37. However, like the Commission, it requires this fact to be capable of objective verification. It points out that the wording of Article 1(b), subparagraph 2 of Directive 93/37 does not refer to the legal basis of the tasks performed by the

body concerned. In the present case, it cannot be objectively ascertained that EBS performs tasks in the general interest, of a non-industrial or non-commercial nature. Rather, there was an agreement with the City of Vienna (contracting authority) to carry out a public contract or there was a grant of a concession. On this analysis, it must in any event be examined whether the procurement procedure was the appropriate type of procedure.

(b) Opinion

26. The first question concerns the definition of a body governed by public law under Article 1(b) of Directive 93/37. All the parties to the proceedings agree that EBS, as a GmbH (limited liability company), has legal personality and that the City of Vienna, a regional or local authority, has majority control of it.

27. The only matter in dispute is whether EBS also satisfies the third criterion of the statutory definition, that is to say whether EBS was established for the specific purpose of performing general-interest tasks, of a non-industrial and non-commercial nature. The parties to the proceedings all agree that in managing the principal sewage plant EBS actually performs a general-interest task. In view of the judgment in *BFI Holding*, in which the collection and treatment of domestic refuse was regarded as a task performed in the general interest, [14] one is compelled to agree. Since the costs incurred by EBS in this connection are reimbursed by the City of Vienna and to that extent EBS does not bear any cost risk, the task performed is non-commercial in nature, [15] and the referring Vergabekontrollsenat is also proceeding on that basis.

28. However, what is disputed is the extent to which EBS can be regarded as 'established for the specific purpose' of performing general-interest tasks of a non-industrial and non-commercial nature. According to the findings of the referring Vergabekontrollsenat, EBS was established in 1976 to dispose of special waste on a commercial basis. In its original version, the deed of incorporation did not contain any indication that EBS was intended to be established for the purpose of performing general-interest tasks, of a non-industrial and non-commercial nature. Therefore, if reliance is placed solely on the deed of incorporation in force when EBS was established, EBS does not satisfy the conditions laid down in regard to a body governed by public law under Directive 93/37.

14 — Case C-360/96 *BFI Holding* [1998] ECR I-6821.

15 — On this criterion, see my Opinion in Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605, paragraphs 57 et seq.

29. EBS only took on the management of the sewage plant in 1986. However, this extension of its business activity was not accompanied by any alteration to the objects clause in the deed of incorporation of EBS. Even subsequently, in particular in 1996 when EBS reached agreement with the City of Vienna for an extension to the sewage plant, concerning which the main proceedings arose, the objects clause in the deed of incorporation was not altered. Thus, if reliance were to be placed solely on the deed of incorporation as being determinative of the question raised here, EBS could not be regarded as a contracting authority for the purposes of Directive 93/37.

30. However, in light of the fact that EBS has in actual fact performed general-interest tasks, of a non-industrial and non-commercial nature, since 1986, the conclusion reached on the basis of an analysis of the deed of incorporation appears to be dubious. The applicants in the main proceedings and the Austrian Government therefore rely on a 'functional' approach to the concept of a public body and suggest that the subsequent change in the scope of EBS' activities be taken into account and that, irrespective of its deed of incorporation EBS be regarded as a body governed by public law.

31. The criterion of establishment for the specific purpose of performing general-interest tasks has hitherto been considered by the Court in two cases in particular: Case C-44/96 *Mannesmann*, concerning the Austrian State printing office, and Case C-360/96 *BFI Holding*. In its judgment in Case C-44/96, the Court relied on the document founding the State printing office, the Bundesgesetz über die Österreichische Staatsdruckerei (Federal Law on the Austrian State Printing Office). However, in addition to this analysis of the legal foundations of the State printing office, the Court also took account of the actual circumstances, namely that the State printing office subsequently assumed responsibility for other tasks of an industrial or commercial nature. In this respect it held that provided that it continued to perform the tasks which it was specifically obliged to perform, a body did not lose its status as one governed by public law by carrying out other activities. [16] In Case C-360/96, the Court, developing this case-law, held that the fact that meeting needs in the general interest constituted only a relatively small proportion of the activities the entity pursued was also irrelevant, provided that it continued to attend to such needs. [17]

32. On the basis of an analysis of this case-law two points immediately arise. First, under this case-law the focus is not only on the time of establishment, but also on the subsequent evolution of the entity. Second, not only legal but also factual changes in the tasks performed must be taken into account. Consequently, it is immaterial that the original 1976 deed of incorporation did not contain any provision under which EBS was established for

16 — Paragraphs 25 and 26.

17 — *BFI Holding* (cited above, footnote 14), paragraph 55.

the specific purpose of performing general-interest tasks. The time of establishment is not decisive: subsequent developments must also be taken into account. Even the fact that EBS' deed of incorporation was not subsequently amended does not preclude EBS from being classified, none the less, as a body governed by public law. In classifying EBS, the subsequent, actual commencement of the management and extension of the sewage plant must be taken into account.

33. Nor, on the basis of the judgments cited, does the fact that EBS continues to dispose of special waste on a commercial basis in addition to managing the sewage plant preclude its being classified as a body governed by public law for the purposes of Directive 93/37. EBS can at the same time perform tasks on a commercial basis and general-interest tasks of a non-industrial and non-commercial nature. EBS need not even perform predominantly general-interest tasks. The proportion of non-commercial activities to commercial activities is irrelevant to the classification of the body. [18]

34. Furthermore, the Court has held that classification as a body governed by public law extends to all the activities carried out by it. [19] That case-law should be upheld. There must be legal certainty concerning the classification of the body concerned. It would be inconsistent with this requirement for the classification to depend on the task performed in each case. Therefore, the submission made by EBS in the alternative, namely that it should be regarded as a contracting authority only in regard to the management of the sewage plant, is to be rejected as incompatible with the case-law.

35. However, it must be pointed out that Case C-44/96, in contrast to the present case, concerned an undertaking which, it was not disputed, had initially been established for the specific purpose of meeting needs in the general interest of a non-industrial and non-commercial nature. Only subsequently did it start to carry out activities on a commercial basis. In the case of EBS it was exactly the opposite. It was established for industrial and commercial purposes and only subsequently assumed tasks in the general interest, of a non-industrial and non-commercial nature. For that reason, it must be examined whether an undertaking can also subsequently acquire the status of a contracting authority.

36. First, the wording of Article 1(b) of Directive 93/37 militates against that possibility. It expressly requires that the body concerned must have been established for

18 — *BFI Holding* (cited above, footnote 14), paragraph 56.

19 — Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraph 32.

the specific purpose of meeting needs in the general interest. Thus, the material date is the date of establishment, or the matter must at least be determined by the deed of incorporation. However, it is not disputed that EBS was not established for the specific purpose of managing the city sewage plant; nor was that object in any way subsequently inserted into the company's statutes, at the time when EBS actually assumed this task.

37. In this regard, one cannot but concur with the view expressed by the Netherlands Government that on the wording of Article 1(b) of Directive 93/37 the legal analysis is not confined to the body's deed of incorporation. The purpose for which a body has been established can be deduced from other sources as well. [20]

38. As the Netherlands Government and the Commission submit, all that is required is that it may be objectively ascertained that the body exists for the specific purpose of meeting needs in the general interest of a non-industrial and non-commercial nature. Therefore, it is not a requirement that the body was established for that specific purpose since subsequent developments have to be taken into account.

39. General-interest tasks were transferred to EBS by the conclusion of the contract with the City of Vienna. A contract is an objective fact which is just as clearly discernible to an objective bystander as a deed of incorporation or a statute. Therefore, there does not appear to be any reason why this contract, or, to be exact, the two contracts concluded between EBS and the City of Vienna in 1986 and 1996, should not be taken into account for the purpose of determining the objects of EBS. For, as stated, the wording of Article 1(b) of Directive 93/37 does not confine the analysis to the body's deed of incorporation. On that interpretation of the wording of Article 1(b) of Directive 93/37, EBS could be said to be a body governed by public law within the meaning of that provision.

40. That the answer should not be determined solely by the deed of incorporation is also borne out by the following consideration. The application of the provisions concerning public procurement cannot be made to depend on instruments governed by company law, such as a deed of incorporation. Whether as a matter of company law it accurately reflects the company's purpose at the time of establishment or whether, as the case may be, it has been adapted to circumstances which have in actual fact changed, is purely a problem of company law. The interpretation of the public procurement provisions cannot depend on a matter of company law such as that. Otherwise, the application of those provisions would be at the discretion of the shareholders. For that reason, it is not only the deed of incorporation or the company statutes in force on incorporation which are to be taken into account in classifying the body, but also all objectively ascertainable circumstances, which can include a contract such as that concluded between EBS and the City of Vienna.

20 — *BFI Holding* (cited above, footnote 14), paragraph 62.

41. By way of interim conclusion it may be stated that the analysis of the wording of Article 1(b) of Directive 93/37 does not provide an unambiguous answer to the question raised.

42. Nor, moreover, do the scheme of Article 1 of Directive 93/37 and of the Directive as a whole provide any further guidance as regards the answer to the question raised in the present case.

43. The history of the provision suggests that EBS is to be regarded as a body governed by public law. The statutory definition in Article 1(b) of Directive 93/37 was inserted on the initiative of the European Parliament. In its proposal, the Commission had merely referred to 'legal persons' instead of bodies governed by public law. [21] In order to ensure that the scope of the Directive concerning works contracts was as comprehensive as possible, the Parliament introduced the concept of 'organ governed by public law', [22] which was subsequently changed to 'body'. The inclusion of the statutory definition was intended to replace the registers required to be established under Article 1(b) of Directive 71/305/EEC determining the list of contracting authorities. Its purpose was to ensure that no gaps were left in the application of the Directive. [23] The scope of the Directive was intended also to extend to works contracts performed by third parties and financed, wholly or partly, directly or indirectly, by public funds. [24]

44. As EBS itself concedes, the costs of extending the sewage plant are reimbursed to EBS directly by the City of Vienna under point IV.2 of the contract of 8 July 1996. In light of the purpose pursued by the legislature in formulating the statutory definition, that is to say to make all projects financed out of public funds subject to the laws on public procurement, it is therefore appropriate to regard EBS as a body governed by public law within the meaning of Article 1 of Directive 93/37.

45. This result also accords with the purpose of Directive 93/37. According to its second recital, Directive 93/37 pursues the objective of attaining freedom of establishment at the same time as freedom to provide services in the field of public works contracts. The Directive is intended to counter the risk of preference being accorded to national tenderers or candidates in the award of contracts, thus assisting in the creation of an internal market for works contracts. The decisive factor in examining the criteria determining

21 — Proposal for a Council Directive amending Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts, COM(86) 679 final of 23 December 1986, pp. 6 and 22.

22 — Fourth Proposed Amendment, report of the Committee on Economic and Monetary Affairs and Industrial Policy, Documents of the Sittings of the European Parliament, 1988/89, document A2-37/88, p. 6 and Reasons, p. 33.

23 — See the report cited, Reasons, p. 33.

24 — See the explanation given by the rapporteur Mr Beumer in the sitting of the European Parliament of 17 May 1988, Proceedings of the European Parliament, 17 May 1988, No 2-365, p. 83.

whether a body is governed by public law is whether there is a risk that the body will allow its decisions on contract awards to be guided by considerations other than economic ones. [25] If so, attainment of freedom of establishment and freedom to provide services is jeopardised, which justifies the application of the Directives on public procurement. [26] Ultimately, the question thus arises as to whether the body bears the economic risk of its activity. [27] If it does, attainment of freedom of establishment and free movement of services is not jeopardised, if it does not, that is a reason for applying the directives on public procurement and thereby protecting the fundamental freedoms.

46. Under the 1996 agreement with the City of Vienna, EBS does not bear the financial risk of the management of the sewage plant or of the agreed extension. Admittedly, EBS is to undertake the latter in its own name and on its own account (point I.2 of the contract of 8 July 1996). However, under point IV.1 of the contract 'all of the expenses arising out of the construction and management of the plants including the sewage works related to the project, less any sums received by EBS,... shall be reimbursed...' by means of the remuneration to be paid by the City of Vienna. Because the City of Vienna finances the extension works in this way, there is a risk that EBS will allow its decision on the award of works contracts to be guided by factors other than economic ones. To that extent there is a requirement to protect freedom of establishment and freedom to provide services by means of the application of Directive 93/37.

47. It may be inferred from the meaning and purpose of the Directive that the situation of establishment for industrial or commercial purposes and subsequent commencement of activities of a non-industrial or non-commercial nature cannot be treated differently from the decided cases of *Mannesmann* and *BFI Holding*, in which the body concerned met needs in the general interest which were of a non-industrial or non-commercial nature from the time it commenced business, and the performance of tasks on a commercial basis came only later. For the time at which a danger to the fundamental freedoms arises is a matter of secondary importance. All that matters is the existence of a danger to those freedoms.

48. This approach is supported principally by the consideration that it is only in this way that it is generally possible to counter the risk of circumvention of the provisions on public procurement. If the question depended on which needs are met first, it would be easy to circumvent the application of the provisions on public procurement by entrusting a body first with needs of a non-industrial or non-commercial nature and only subsequently with needs not having an industrial or commercial

25 — Case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraph 42; Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 17.

26 — Case C-237/99 *Commission* v *France* (cited above, footnote 25), paragraph 41; Case C-380/98 *University of Cambridge* (cited above, footnote 25), paragraph 16.

27 — See the Opinion in Joined Cases *Agorà and Excelsior* (cited above, footnote 15), paragraph 71.

character. It is a matter of countering any such circumvention, if it is endeavoured to give practical effect (*effet utile*) to the provisions on public procurement. Otherwise, the Directive would be devoid of purpose.

49. Admittedly, in the order for reference the referring court expressly rejected any intention on the part of the City of Vienna in the present case to circumvent the rules. However, the interpretation of Article 1 of Directive 93/37 cannot depend on whether on the facts giving rise to the order for reference a risk of circumvention actually subsists. In preliminary reference proceedings, the Court decides on the interpretation of Community law that has significance beyond the individual case.

50. On the basis of the foregoing considerations it must be stated that actually taking over the performance of general-interest tasks, on the basis of objectively ascertainable circumstances such as the conclusion of a contract, may be assimilated to its establishment for that specific purpose. Therefore, it is proposed that the reply to the first question should be as follows:

A legal person constitutes a 'contracting authority' within the meaning of Article 1(b) of Directive 93/37 even if it was not established for the specific purpose of meeting needs in the general interest, but which later actually meets such needs, provided that the assumption of such tasks is founded on objectively ascertainable circumstances.

3. *The second question*

51. By its second question, the referring court asks whether the planned extension to the sewage plant is a public works contract. It raised this question only in the event that EBS could not be categorised as a body governed by public law for the purposes of Directive 93/37. However, since this question has already been answered affirmatively, consideration is given to the second question only in the alternative, in the event that the Court does not adopt the reply proposed in this connection to the first question and does not regard EBS as a body governed by public law within the meaning of Article 1(b) of Directive 93/37.

(a) Submissions of the parties

52. The consortium and the Austrian Government take the view that it is a public works contract. This was borne out first by the fact that the contract is for the construction of a municipal sewage plant on land belonging to the municipality. More-

over, if the lease is terminated the municipality would be required to take over the plant. The construction was undertaken according to requirements specified by the contracting authority (the City of Vienna) in so far as the extension of the sewage plant served to meet a need in the general interest, the City of Vienna having an interest in ensuring that that need was met. Furthermore, a specific mode of operation is prescribed for the sewage plant, the new construction having to be integrated with the existing plant.

53. By contrast, EBS is of the view that the contract at issue is not a public works contract. The extension works were to be awarded by EBS in its own name and on its own account. Moreover, the City of Vienna did not have any influence on the actual organisation of the extension works or on the procurement procedure itself. The decision as to the technical and structural execution of the works for the sewage plant was to be taken by EBS alone. Finally, it points out that the costs of the extension were to be reimbursed only indirectly, according to the agreements applicable generally to the operation of the sewage plant.

54. Nor does the Commission consider that EBS awards a public works contract. In the present case, there could at most be a contract between the City of Vienna and EBS. However, the Commission is of the opinion that the sewage treatment taken over by EBS, in the context of which the extension to the sewage plant must be viewed, is a contract for services and not a works contract, and for that reason suggests that the second question should be answered in the negative.

55. The Netherlands Government merely formulates general views. The decisive criterion for deciding the question whether the contract is a public works contract is whether the contracting authority has specified particular requirements and that the works must become the property of the contracting authority. Furthermore, in order to be a public works contract, a contract must be carried out on the basis of a specific award by a contracting authority.

(b) Opinion

56. According to the statutory definition in Article 1(a) of Directive 93/37, 'public works contracts' are 'contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority'. For the purposes of the question referred, EBS should be presumed to be a contractor within the meaning of

this provision and — contrary to the submissions on the first question — not a contracting authority. The relevant written contract is the contract with the City of Vienna, a regional or local authority and thus a contracting authority under Article 1(b) of Directive 93/37. Under that contract EBS assumed the obligation in 1996 to extend the sewage plant leased and managed by it. Under point IV of the agreement, the City of Vienna is obliged to pay EBS reasonable and uniform remuneration for the operation of the plant and to refund the costs arising out of the extension, and therefore the contract is for valuable consideration.

57. The question referred seeks to ascertain to what extent the contract at issue has as its object '... the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority...'. The parties to the main proceedings dispute both whether the object of the contract is the execution of a work and whether the execution of the work corresponds to requirements specified by the City of Vienna.

58. The Commission has doubts as to whether the contract is for the execution of a work and considers rather that it is a contract for services. In that connection it should be stated that under point I.2 of the contract, EBS is obliged to extend the City of Vienna's principal sewage plant. Under point II.1, it is also obliged to treat all waste water, to dispose of the resulting sludge and to dispose of all the special waste delivered by the City of Vienna. Under Annex I A, category 16, of Directive 92/50,[28] sewage and refuse disposal services are services for the purposes of Article 8 of Directive 92/50, for which there is a special procurement procedure. In regard to the obligations on EBS under point II.1, the 1996 agreement is not a contract for works.

59. It is therefore questionable whether, conversely, the obligation in point I.2 to extend the existing plant can be regarded as a works contract for the purposes of Directive 93/37. Admittedly, this obligation involves the execution of works. However, its execution would have to be in accordance with the requirements laid down by the City of Vienna. That is borne out by the fact that the extension is specified at least by reference to its function. The plant is required to be capable of treating all incoming waste water at the rate of up to 18 cubic metres per second (point II.1). In favour of the proposition that the agreement is for the execution of works corresponding to requirements specified by the City of Vienna, it may also be observed that it concerns the extension of a main municipal sewage plant, that is to say a facility for whose operation the City of Vienna is ultimately responsible as a matter of public-health provision. This responsibility is reflected in the assumption of

28 — Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

responsibility for costs (point IV), the provision of the necessary personnel (point I.3) and in the obligation on the district to purchase the property on termination of the lease (see EBS' declaration of 8 September 1996, cited in the order for reference).

60. However, the 1996 agreement provides for only one aspect of the way in which the extended plant must function, namely by prescribing a capacity of 18 cubic metres per second. However, the agreement does not contain any provisions as to the actual construction, in particular as regards technical and structural execution. Whether this is sufficient for there to be the execution of works corresponding to the requirements specified by the contracting authority is not free from doubt. Moreover, the contracts for the requisite works are awarded by EBS in its own name and on its own account (point I.2 of the agreement). It is not apparent that the City of Vienna is in any way involved in the formulation of the detailed specifications or in the award of the individual contracts. That means that it is not able to make the general capacity requirement any more specific at a subsequent stage of the award procedure. In Case C-331/92, both the Advocate General in his Opinion and the Court in its judgment emphasised that for there to be a works contract, the works to be executed must be specified in detail. [29] However, the 1996 agreement does not contain any description of works to be executed, but states only the result to be achieved. It follows that the agreement cannot be held to be a public-works contract.

61. For the sake of completeness, it must also be noted that even if one were to regard the specification of the purposes of the works to be sufficient, there would be yet another point to examine. As established above, the 1996 agreement also contains elements of a contract for services. According to the 16th recital of Directive 92/50, it follows from Directive 71/305/EEC, '... that for a contract to be a public works contract, its object must be the achievement of a work; whereas, in so far as these works are incidental rather than the object of the contract, they do not justify treating the contract as a public works contract.' Under the terms of Case C-331/92 the referring court would therefore have to consider whether any obligation to execute a work is predominant in relation to the agreed obligation to supply services. [30]

62. Without anticipating the judgment of the national court, one can hardly imagine, on the basis of the circumstances of the present case as described, that the execution of work would be held to predominate. Instead, the agreement is the continuation of 10 years' cooperation, and the agreed works, if at all, are the adaptation of existing capacity to changed circumstances.

29 — Case C-331/92 *Gestión Hotelera Internacional* [1994] ECR I-1329, paragraph 24, and Opinion, paragraph 41.

30 — *Gestión Hotelera Internacional* (cited above, footnote 29), paragraph 28.

Primarily, it must therefore involve the continuance of responsibility for sewage and waste water disposal which, as already explained above, constitutes a service.

63. In light of the foregoing, it is submitted in the alternative that the second question should be answered as follows:

A contractual provision which describes the work only by reference to the function to be fulfilled and at the same time is the continuation of an existing contract for services is not a public works contract within the meaning of Article 1(a) of Directive 93/37.

4. *The third question*

64. By its third question the Vergabekontrollsenat seeks to ascertain whether the limitation periods of two weeks provided for in Paragraph 98 of the WLVergG are compatible with Council Directive 89/665 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. [31]

31 — Cited above, footnote 3.

(a) Submissions of the parties

65. Universale and the consortium regard the time-limits for bringing proceedings provided for in the WLVergG as too short. According to Universale, foreign tenderers are usually unable to adhere to these time-limits. On the one hand, that defeats the objective of ensuring that public contracts are awarded without discrimination and, on the other, frustrates the objective of giving undertakings access to a large common market while strengthening the competitiveness of European undertakings. As evidence of the correctness of its view of the law it points to the fact that the time-limit has in the meantime been extended to four weeks. As a matter of fact, it again emphasises that it was in a position to notice the mistake in the conditions in the invitation to tender only when studying the evaluation of the application documents after EBS had already rejected it and after the two-week time-limit had expired. The consortium adds that in the short period for bringing proceedings candidates are not in a position to analyse the contracting authority's reasons for elimination and expose those which are without substance. Furthermore, the obligation in Paragraphs 96 and 97 of the WLVergG to give the contracting authority prior notice of a challenge means that the two-week time-limit for bringing proceedings, which runs from the date of notification of the rejection, has already expired by the time the contracting authority to whom notice has been given replies to the candidate.

66. In contrast, EBS points to the discretion granted to the Member States by Directive 89/665. The Community legislature

required only that decisions taken by awarding departments could be reviewed as rapidly as possible (Article 1(1)), that the review procedures had to be available to any person who had an interest in a contract and who risked being harmed by the alleged infringement (Article 1(3)), that Member States could require prior notice to be given to the contracting authority (Article 1(3)) and finally that interim measures had to be available, unlawful decisions set aside and damages awarded to tenderers who were harmed (Article 2(1)). In EBS' view, short time-limits correspond to the objective in the fifth recital to the Directive of not causing disproportionate delay to the performance of public contracts. However, national procedural rules cannot render the enforcement of Community law impossible in practice. Finally, EBS points out that a time-limit of two weeks for bringing proceedings against State acts is in general usual and, as evidence thereof, refers to Paragraph 63(5) of the General Law on Administrative Procedure, under which every challenge to a decision by an authority must be made within two weeks, as well as to Paragraph 403(3) of the EO,[32] under which interim measures granted by civil courts are to be challenged within two weeks.

67. The Austrian and Netherlands Governments, as well as the Commission, point out first that Directive 89/665 itself does not fix any time-limits, but merely lays down minimum requirements. The Member States have a discretion as regards fixing time-limits for bringing proceedings. However, all three emphasise that the Directive requires that effective legal protection be provided. Moreover, the Austrian Government observes that time-limits for bringing proceedings have the effect of speeding up the procedure and of reducing the risk of any abusive resort to legal action. Both correspond to the objectives of Directive 89/665. The Commission also submits that the legal protection must not be less favourable than for similar actions concerning national law only.

(b) Opinion

68. As regards the time-limit fixed by the WLVergG for challenging provisions contained in a public contract notice, it should first of all be observed that Directive 89/665 merely lays down minimum requirements as to the legal protection to be secured. It contains no provisions either as to the period within which specific acts may be challenged or as to whether or not national implementing measures may contain limitation provisions.

69. In the context of actions for repayment of charges paid unduly, the Court has held that, in the absence of Community rules, it is for the Member States to lay down the procedural rules under which citizens of the

32 — EO stands for Exekutionsordnung (Execution Regulations). However, the provision cited does not contain a time-limit.

Union can exercise the rights conferred on them by Community law. However, such procedural rules must not be less favourable than those in respect of similar rights conferred by national law (principle of equivalence) and must not render virtually impossible the exercise of rights conferred by Community law (principle of effectiveness). [33] In this context, the Court has also held that it is essentially compatible, in the interests of legal certainty, with the principle of effectiveness to lay down reasonable limitation periods for bringing proceedings. Such time-limits are not liable to render virtually impossible or excessively difficult the exercise of rights conferred by Community law. [34] In the absence of Community rules on limitation periods, no objection can be raised under the case-law cited to the enactment in the WLVergG of time-limits for bringing proceedings. In that connection, the national legislature has a margin of discretion.

70. However, the Directive specifies inter alia the following objectives to be achieved by implementation and whose realisation must not be defeated by the enactment of limitation provisions. Decisions of contracting authorities must be able to be reviewed effectively and as rapidly as possible (Article 1(1)); the Member States may provide that the contracting authority must be notified in advance of the intention to seek review (Article 1(3)); the national legislature must ensure the availability of interim measures and enable unlawful decisions to be set aside and damages to be awarded (Article 2(1)).

71. However, effective legal protection for the purposes of Directive 89/665 is guaranteed only if the time-limits do not render impossible enforcement of the legal protection granted. For that reason, the time-limits must not be so short as to prevent tenderers and candidates from exercising their rights. In view of the fact that Article 1(1) of Directive 89/665 requires a contracting authority's decisions to be reviewed as rapidly as possible, a time-limit of two weeks as provided for in the WLVergG appears not to be unreasonable. In particular, it should in principle be possible for foreign candidates to comply with it and to allow the candidates concerned time to clarify whether their rights have been infringed. The enactment of limitation periods in the procedural rules also promotes legal certainty. Candidates in whose favour a decision has been taken should be entitled to rely on the unchanged continuance of their legal position.

72. The extent to which this legal protection is equivalent to the legal protection granted for the enforcement of legal rights conferred by national provisions and the extent to which it follows that the principle of equivalence is complied with remains a

33 — Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 34.
34 — *Edis* (cited above, footnote 33), paragraph 35.

question for the national court within the framework of its analysis of national law. The order for reference is silent in that regard. A priori, however, the submissions of the parties to the proceedings, in particular the time-limits under the General Law on Administrative Procedure referred to by EBS for bringing proceedings, indicate that there are no doubts. In undertaking its examination, the referring court must also consider whether the challenge may be lodged only by recorded delivery or, for example, by fax or by e-mail as well. The required form has consequences as regards the period of the time-limit allowed.

73. As regards the consortium's complaint, that the obligation in Paragraphs 96 and 97 of the WLVergG to notify the contracting authority in advance results in expiry of the period for bringing an action under Paragraph 98 of the WLVergG by the time the contracting authority replies to the candidate, it must be pointed out that the time-limits can hardly ever overlap. Paragraphs 96 and 97 of the WLVergG concern a time-limit prior to the award of the contract, whereas the time-limits in Paragraph 98(1) and (3) of the WLVergG refer to time-limits after the award of the contract. Nor, in relation to the time-limit in subparagraph 2 of that provision, is there ever likely to be a conflict. Admittedly, this provision is concerned with a period prior to expiry of the application period and thus also prior to the award of the contract. The time-limit provided for in Paragraph 98 relates to challenges to conditions in the public notice. On the other hand, the time-limit provided for in Paragraph 96 of the WLVergG concerns 'a decision taken by a contracting authority before the award of a contract'. Whether conditions in the public notice can also constitute such a 'decision' is a question to be decided by the referring Vergabekontrollsenat by reference to national law. Only if this question is answered affirmatively could there be overlaps resulting in a problem as regards the effectiveness of the legal protection ensured. However, that is not a necessary inference from the wording of the provisions of the WLVergG.

74. Therefore, it is proposed that the third question should be answered as follows: Directive 89/665 does not preclude a national provision which fixes a time-limit for the review of an individual decision of the contracting authority in such a way that, on expiry of that time-limit, the decision can no longer be challenged in the course of the ongoing contract award procedure, provided that it is ensured that the legal protection afforded is not less favourable than for comparable rights conferred by national law and the exercise of the rights conferred by Directive 89/665 is not rendered impossible in practice. In that connection, every defect in the procedure must be pleaded by the persons concerned, subject to loss of the right to object in the event of failure to do so.

5. The fourth question

75. The Vergabekontrollsenat's fourth question concerns the content of the contract notice to be published by the contracting authority. It concerns whether and to what extent the evaluation criteria by reference to which the candidates to be invited to tender are selected must be stated in the contract notice or in the tender documents.

(a) Submissions of the parties

76. As regards the scoring procedure, Universale and the consortium complain of an infringement of the principle of transparency and intelligibility. Universale believes that the weight attached to the individual selection criteria listed must be clearly stated in the invitation to tender so as to preclude arbitary decisions. For that reason, not only the order of importance of the criteria but also their relative weight, and thus an objectively intelligible evaluation scheme, must be indicated in the prior information or in the tender documents. This is not guaranteed where the evaluation scheme is lodged with a notary.

77. In the final analysis, the Netherlands Government shares that view. Applications must be evaluated transparently and objectively. Therefore, candidates must be able to find out in advance how and against what criteria the candidates will be evaluated.

78. In contrast, EBS points to Article 30(2) of Directive 93/37. This provides only that the award criteria are to be indicated and, where possible, though not necessarily, in order of the importance attributed to them. Nor is it possible to infer a requirement for complete transparency from primary Community law. Therefore, lodgement of the evaluation yardsticks with a notary is unobjectionable.

79. The Austrian Government and the Commission also point out that Directive 93/37 does not contain any detailed provisions concerning the evaluation of applications to take part within the framework of the public prospecting of candidates in a restricted procedure. The Austrian Government relies on Article 22 of Directive 93/37, which makes no provision as to the procedure for selecting candidates. On general principles, the procedure chosen must be objective and non-discriminatory. However, there is no obligation to advertise in advance in the tender documents the evaluation scheme for selecting the candidates to be invited to tender. The Commission points out that under Article 11(6) of the Directive, only specified documents may be requested. The selection must be based on these documents.

(b) Opinion

80. As regards the fourth question, it may first be observed that Directive 93/37 does not make any express provision concerning the extent to which the evaluation procedure adopted by the contracting authority is to be explained in detail in the notice of a restricted procedure or in the tender documents.

81. However, in a number of places the Directive contains statements concerning the publication of selection criteria. Under Article 7(2), a negotiated procedure may be carried out only if the candidates have been selected in accordance with published qualitative criteria. From this it follows that the qualitative criteria are to be advertised, but not that the mechanism to be applied in evaluating the individual criteria must also be advertised.

82. Article 11(6) states what information contracting authorities may request from candidates. As the Commission rightly inferred, the criteria which may be applied in selecting candidates may be discerned from this. However, this does not say whether the candidates must be told of the system applied in evaluating the individual details.

83. Article 13(2) specifies the minimum information to be included in the invitation to tender in a restricted procedure. Under subparagraph 2(e), this also includes the criteria for the award of the contract. However, nor does this provision require publication of the evaluation system on which the contracting authority bases its selection.

84. Articles 18 and 22 provide that the candidates invited to tender in a restricted procedure are to be selected on the basis of the information given by the candidates relating to the contractor's position and on the basis of the information and formalities necessary for the evaluation of the minimum economic and technical requirements to be fulfilled by him. However, nor do these provisions say anything concerning the evaluation of the individual criteria.

85. Finally, Article 30(2) of the Directive requires that where the award is to be made to the most economically advantageous tender all the award criteria to be used are to be stated in the contract documents or in the contract notice. 'Where possible', they are to be stated in order of importance. Admittedly, it can be inferred from this that all the criteria on which the selection is to be based must be advertised. However, even Article 30 merely requires that the criteria on the basis of which the award is made should be indicated. Furthermore, the wording of the provision

itself contains the qualification that 'where possible', this must be done in order of importance. It may be supposed that this means that the contracting authority is in principle under a duty to state the criteria in the order of the importance attached to them. The wording of the provision does not necessarily require such an interpretation. However, it accords with the purpose of Directive 93/37 to make the award of public works contracts more transparent (see the 10th to 12th recitals of the Directive). However, even this interpretation does not achieve the aim sought by the applicants in the main proceedings. For once the contracting authority gives equal weight to two criteria, the order in which they appear no longer corresponds to the weight attached to them. Moreover, 'order' cannot be equated to 'details of a scoring procedure'. Therefore, even a strict observance of Article 30(2) does not require the details of the 'scoring procedure' applied by EBS to be indicated. Thus, it must be stated that the abovementioned provisions of Directive 93/37 do not support the legal argument of the plaintiffs in the main proceedings.

86. Nor is it possible to derive support for Universale's and the consortium's legal argument from the Directive's purpose of attaining freedom of establishment and freedom of movement for persons in respect of public works contracts (see the second recital). For this objective is intended to be achieved by the advertisement of the individual works contracts to be awarded. The fourth question does not concern the advertisement of a works contract for the purpose of giving domestic and foreign undertakings the same opportunity to submit their applications. Instead, it goes beyond that and concerns an insight into the evaluation scheme which the contracting authority intends to use when selecting candidates.

87. The procedure followed by EBS, namely to state in the contract notice the criteria for the ordering of the applications to participate (technical capacity and award to the most economically advantageous tender), as well as the statement in the tender documents that the bids submitted by the candidates would be evaluated according to a method lodged with a notary, precludes the possibility that national candidates are better placed than candidates from other Member States. The award criteria are known to all the candidates but not the details of the scoring procedure. In this way, the attainment of the objective of the transparency requirement in Directive 93/37 is secured. The text in force provides no warrant for more extensive requirements as regards publication of the evaluation procedure.

88. The restricted obligation here proposed of advertising the applicable award criteria, where possible, in the order of importance

attached to them is not only consistent with the wording of Directive 93/37. It also meets the concern of determining the 'best' tenderer in the course of a tender procedure. If the method of award is advertised in advance then it must be expected that candidates will base their tenders on it and provide evidence of their capability particularly as regards the points given a heavier weighting. Only in this way can they obtain admission to the category of those subsequently invited to submit a tender. However, tailoring the application to the selection method in this way creates a risk that the contracting authority may obtain a distorted impression of the candidates from the documents submitted. Yet the purpose of this part of the procedure is to give the contracting authority a comprehensive picture of the candidates' technical capability. This is best done if the candidates give as comprehensive a picture of themselves as possible, admittedly on the basis of the award criteria indicated, but without knowing the selection method, that is to say the details of the evaluation.

89. It is important to emphasise that under Article 8(3) of Directive 93/37 the contracting authority is obliged to draw up a written report. It includes the reasons for selecting a candidate and the reasons for rejecting the other candidates. That ensures the reviewability by the courts of the contracting authority's decision, and thus also the previously unpublished evaluation criteria. The solution here suggested takes into account the various interests of the participants in the selection procedure. It prevents any possible discrimination, does not impose any requirements in regard to transparency on the procurement procedure that are not justified by either the wording of the Directive or the general principles of Community law and are thus excessive, and ensures reviewability by the courts.

90. Accordingly, it is proposed that the fourth question should be answered as follows: It is sufficient for the purposes of Directive 93/37 for the body inviting tenders to determine that the applications will be evaluated according to a method lodged with a notary. The details of the weighting of the selection criteria need not be published either in the contract notice or in the tender documents, but must be capable of being reviewed by the courts.

VI — Conclusion

91. For the foregoing reasons, it is proposed that the questions referred by the Vergabekontrollsenat Wien should be answered as follows:

(1) A legal person constitutes a 'contracting authority' within the meaning of Article 1(b) of Directive 93/37/EEC even if it was not established for the specific purpose of meeting needs in the general interest, but which subsequently meets such needs, provided that the assumption of such tasks is founded on objectively ascertainable circumstances.

(2) A contractual provision which describes the work only by reference to the function to be fulfilled and at the same time is the continuation of an existing contract for services is not a public works contract within the meaning of Article 1(a) of Directive 93/37.

(3) Directive 89/665/EEC does not preclude a national provision which fixes a time-limit for the review of an individual decision of the contracting authority in such a way that, on expiry of that time-limit, the decision can no longer be challenged in the course of the ongoing contract award procedure, provided that it is ensured that the legal protection afforded is not less favourable than

for comparable rights conferred by national law and the exercise of the rights conferred by Directive 89/665 is not rendered impossible in practice. In that connection every defect in the procedure must be pleaded by the persons concerned, subject to loss of the right to object in the event of failure to do so.

(4) It is sufficient for the purposes of Directive 93/37 for the body inviting tenders to determine that the applications will be evaluated according to a method lodged with a notary. The details of the weighting of the selection criteria need not be published either in the contract notice or in the tender documents, but must be capable of being reviewed by the courts.