OPINION OF ADVOCATE GENERAL ALBER

delivered on 7 February 2002 [1]

I — Introduction

1. In the present proceedings for a preliminary ruling, the Tribunale Amministrativo Regionale per la Lombardia (Lombardy Regional Administrative Tribunal) (hereinafter 'the national court') asks whether it can disregard the validity of an invitation to tender for a public supply contract which has not been challenged within the time-limit set by national law so that it can take into account the infringement of Community law by a clause in the invitation to tender in (subsequent) proceedings brought by a tenderer for review of his elimination when the award was made. The present case concerns proof of a tenderer's technical capacity under Article 22 of Directive 93/36/EEC coordinating procedures for the award of public supply contracts [2] (hereinafter 'Directive 93/36'). The national court asks whether a national rule which provides for the disapplication of unlawful administrative acts (Article 5 of Law No 2248 of 20 March 1865) also applies to clauses in an invitation to tender which are contrary to Community law. It also asks whether that principle follows from Article 6 of the Treaty on European Union in conjunction with the right to a fair hearing and effective judicial protection under Articles 6 and 13 of the European Convention on Human Rights. Consideration of the reference for a preliminary ruling also necessitates interpreting Directive 89/665/EEC 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 [3] (hereinafter 'Directive 89/665').

II — Facts and procedure

2. The main proceedings are at the instance of Santex S.p.A. (hereinafter 'the claimant') against Unità Socio Sanitaria Locale n. 42 di Pavia (hereinafter 'the defendant') on the ground that it was eliminated from a procurement procedure relating to a supply contract. It contests the decision as to the award of the contract as well as the invitation to tender which, in its opinion, contained a precondition for admission which was contrary to Community law.

1 — Original language: German.

2 — Council Directive of 14 June 1993, OJ 1993 L 199, p. 1.

3 — Council Directive of 21 December 1989, OJ 1989 L 395, p. 33.

3. According to the order for reference, the defendant published an invitation to tender for 'direct supplies to people's homes of absorbent incontinence products' for a sum expected to amount to ITL 1 067 372 000 annually in the *Official Journal of the European Communities* on 23 October 1996. According to the order, the invitation to tender contained a clause to the effect that only undertakings which could prove aggregate turnover over the previous three-year period, for services identical to the one tendered for, of three times the basic estimated contract figure would be admitted to the tendering procedure.

4. The claimant stated in a letter dated 25 November 1996 addressed to the chairman of the defendant's special committee that that clause gave rise to an improper restriction on competition. Having regard to the very recent introduction of that kind of service by local health institutions (aziende sanitarie locale), the application of that clause would give rise to the exclusion of numerous tenderers, including the applicant, which had nevertheless in the last year achieved aggregate turnover amounting to double the estimated contract figure.

5. In view of those comments, the defendant's committee postponed the opening of the envelopes and requested the undertakings concerned to forward comprehensive documentation, taking the view that the clause in question could be interpreted as referring to the overall turnover of the participating undertakings and that the supply of products identical to those called for did not constitute a precondition for admission to the tendering procedure, but could be taken into consideration solely as a basis for awarding points for quality. [4]

6. That interpretation was objected to by Sca Mölnlycke S.p.A., which had the contract for the supply of identical products for the previous period. By a letter to the defendant, it called on the latter to comply strictly with the disputed clause of the invitation to tender.

7. Thereafter, the defendant called on the participating undertakings to supplement the documentation already submitted with a declaration as to the turnover achieved in respect of exactly the same products, with a list of the health institutions to which the products had been supplied.

8. The procurement procedure was terminated when the claimant and two other firms were excluded and the contract was awarded to Sca Mölnlycke.

9. The claimant observed that, had it been admitted, it would have been awarded the contract, and challenged both its exclusion from the procedure and the subsequent

4 — Protocol No 1 of the award committee of 12 December 1996.

award of contract, and also contested the notice of invitation to tender on grounds of infringement of legal provisions and misuse of powers.

10. The defendant and Mölnlycke, which was joined to the proceedings, assert that the objection to the terms of the invitation to tender was out of time and should be rejected as unfounded.

11. The national court granted the application included in the action to suspend the operation of the contested measures, on the ground that there had been a breach of the Community competition principles. In so far as the invitation to tender set turnover as a parameter, it restricted participation by competing undertakings in an unlawful and excessive way. Even if the challenge to the notice of invitation to tender was out of time, the clause in the invitation to tender was none the less to be disapplied on the ground of infringement of Community law.

12. That order was set aside by the Fifth Chamber of the Consiglio di Stato (Council of State) by order of 29 August 1997, which did not contain a statement of the factual or legal grounds on which it was based.

13. After the proceedings for interim protective measures had been concluded, the defendant, which had in the meantime suspended the supply service previously provided by Sca Mölnlycke, entered into a definitive contract with that company for the subsequent period.

14. In the main proceedings, the national court has requested a preliminary ruling from this Court as to whether Article 22 of Directive 93/36 or Article 6(2) EC in conjunction with Articles 6 and 13 of the European Convention on Human Rights are to be interpreted as meaning that clauses of an invitation to tender which are contrary to Community law can be disapplied even if they have not been challenged within the time-limit laid down by national procedural law.

15. The Italian, French and Austrian Governments as well as the Commission participated in the written procedure before the Court.

III — The reference for a preliminary ruling

16. In the grounds of its order for reference, the national court states that the fact that the invitation to tender includes a clause which infringes Community law and

the corresponding national transposition provisions is decisive. [5] In particular, the precondition for admission requiring turnover over the previous three-year period, for services identical to those in the invitation to tender, three times as high as the amount specified in the tender, infringes the principles of proportionality and of non-discrimination as between tenderers. However, national procedural law requires it first to adjudicate on the objection that the application was out of time.

17. The defence is founded on the fact that what prevented the claimant from taking part was the clause in the invitation to tender itself. Thus, it was immediately and directly harmful to the claimant's interest in taking part in the tender and should therefore have been challenged within 60 days from the date on which the claimant became aware of it, pursuant to Article 36 of Royal Decree No 1054 of 26 June 1924. [6]

18. However, the national court considers that it must guarantee effective protection of the rights and interests of applicants in procedures for the award of public contracts both when Community law applies and when national law applies. Therefore, it should disapply provisions in notices of invitation to tender that are unduly restrictive of the principle of maximum participation in public tendering procedures.

19. For that purpose a twofold criterion is consistently applied. First, the automatic inclusion of mandatory provisions in legislation governing tenders by analogous application of Article 1339 of the Civil Code, [7] which does not appear feasible in the present circumstances. Second, disapplication pursuant to Article 5 of Law No 2248 of 20 March 1865, Annex E, [8] which is still in force.

20. As regards the second principle, the Consiglio di Stato has indicated in general terms that, where a regulatory provision conflicts with legislation of higher order which has an impact on a personal right of an individual, the administrative courts may, in the same way as the ordinary judicial authorities under civil law, disapply it. However, there being no personal right involved, the Consiglio di Stato did not apply this rule to the present invitation to tender for the award of public contracts. It follows that the invitation to tender should have been challenged within 60 days, such that after that period expired the conditions in the invitation to tender were to be applied mandatorily.

5 — The national court considers that there is an infringement of both Article 22 of Directive 93/36 and Article 3(1)(c) of Decree No 358 of 24 July 1992.

6 — Royal Decree No 1054 of 6 June 1924 containing the consolidated version of the laws governing the Italian Consiglio di Stato, which also applies to the procedure to be followed before Regional Administrative Courts by virtue of Article 19 of Law No 1034 of 6 December 1971.

7 — Clauses and prices of goods or services that are imposed by law are *de jure* to be inserted in contract, if need be being substituted for unlawful clauses inserted by the parties.

8 — The [judicial] authorities are to give effect to general and local administrative acts and regulations to the extent to which they are in conformity with primary legislation.

21. Italian law distinguishes between legitimate interests (which always necessitate a timely challenge against the measure adversely affecting them) and subjective rights (which can be protected by disapplication). It appears that this distinction customarily drawn in national law is not justifiable under Community law.

22. The national court refers to the judgment in *Simmenthal*, [9] in which the Court of Justice held that a court called upon to apply provisions of Community law is under an obligation to guarantee the effectiveness of such provisions and, if necessary, to decline to apply any conflicting provisions of national legislation, without having to seek or await their prior repeal.

23. Moreover, on the basis of the decisions of the Court in *Van Schijndel and van Veen* [10] and *Eco Swiss*, [11] the national court considers that it is necessary first to verify whether in fact any rights had been seriously adversely affected or whether it had been made impossible to apply Community law as a result of the specific course of the administrative procedure laid down as a precondition for the award of the contract in question, which had had a negative impact on the effectiveness of judicial protection in relation to the application of the European provisions.

24. By the approach it had initially appeared to take, namely to interpret the contested clause restrictively, or to amend it, the defendant gave the claimant the impression that it was not necessary to challenge the invitation to tender. By its conduct, the defendant had created a situation of objective legal uncertainty for the claimant. For that reason, the principles this Court developed in *Peterbroeck* [12] must apply here.

25. In the present case there is a public interest finding the contested exclusion to be illegal, both having regard to the effective enforcement of Community law, on the one hand, and because of the interest of the public administration in opening the tendering procedure to wider competition, as a way of obtaining the best product at the most favourable price, on the other.

26. There are ample grounds for intervention by the national court of its own motion. Thus, the Court of Justice has held in *Océano Grupo Editorial*, [13] in relation to consumer contracts, that the national court is entitled to determine of its own motion whether a term of the contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed.

9 — Case 106/77 *Simmenthal* [1978] ECR 629.

10 — Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen* [1995] ECR 1-4705.

11 — Case C-126/96 *Eco Swiss China Time* [1999] ECR I-3055.

12 — Case C-312/93 *Peterbroeck* [1995] ECR I-4599.

13 — Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941.

27. The conclusion to be drawn from *Eco Swiss*, [14] namely that, where certain rules of national procedural law are not observed, the application *ex proprio motu* of Community law is not called for, does not apply in the factual and legal circumstances of the present case.

28. The national court has referred the following questions to the Court for a preliminary ruling:

(1) May Article 22 of Directive 93/36/EEC of 14 June 1993 be interpreted as meaning that the competent national courts are required to protect citizens of the Union adversely affected by measures adopted in breach of Community law, by resorting, in particular, to disapplication as provided for in Article 5 of Law No 2248 of 20 March 1865 with respect to clauses of an invitation to tender which are contrary to Community law but were not challenged within the short limitation period laid down by national procedural law for the application of Community law by the court of its own motion, whenever it is found, first, that the application of Community law has been seriously impeded or rendered difficult in any way, and second, that there is a public interest, of Community or national origin, which justifies such application?

(2) Does Article 6(2) of the Treaty [15] which, by providing for respect of the fundamental rights safeguarded by the European Convention on Human Rights and Fundamental Freedoms, has adopted the principle of effective judicial protection provided for in Articles 6 and 13 of that Convention, lead to the same conclusion?

IV — Legal framework

A — *Community law*

29. Article 22 of Directive 93/36 provides:

'1. Evidence of the supplier's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

(a) — (b)...

14 — Judgment in *Eco Swiss* (cited above, footnote 11).

15 — The Treaty of European Union (footnote added).

(c) a statement of the supplier's overall turnover and its turnover in respect of the products to which the contract relates for the three previous financial years.

2. The contracting authorities shall specify in the notice or in the invitation to tender which reference or references mentioned in paragraph 1 they have chosen and which references other than those mentioned under paragraph 1 are to be produced.

3. If, for any valid reason, the supplier is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

30. In the present case, Article 1(1) and (3) and Article 2(1)(b) and (6) of Directive 89/665 are also relevant. They provide:

'*Article 1*

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

2. ...

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

'*Article 2*

1. The Member States shall ensure that the measures taken concerning the review pro-

cedures 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.

2. — 5....

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

7. — 8....

'*Article 3*

1. The Commission may invoke the procedure for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of Directives 71/305/EEC and 77/62/EEC.

2. — 5....'

B — *Italian Law*

31. Article 13 of Legislative Decree No 358 of 24 July 1992, which is headed 'Consolidated text of the provisions relating to public supply contracts implementing Directives 77/62/EEC, 80/767/EEC and 88/295/EEC', transposes Article 22 of Directive 93/36 and provides as follows:

'*Article 13*

1. Evidence of the competing undertakings' financial and economic standing may be furnished by one or other of the following documents:

(a) — (b)...

(c) a statement of the undertaking's overall turnover and its turnover in respect of the products to which the contract relates for the three previous financial years.

2. The contracting authorities shall specify in the notice or in the invitation to tender which of the documents mentioned in paragraph 1 must be produced and any other references which are to be produced....

3. If, for any valid reason, the supplier is unable to provide the references requested, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

32. Article 36(1) of Royal Decree No 1054 of 26 June 1924 (hereinafter Article 36 of the Law of 26 June 1924), which consolidates the laws relating to the Consiglio di Stato and whose application was extended to the administrative courts by Article 19 of Law No 1034 of 6 December 1971, is also material in the present dispute. It provides:

'*Article 36*

1. Except where time-limits are prescribed by specific laws relating to applications for review, the time-limit for submitting an application for review to the Consiglio di Stato in its judicial capacity shall be 60 days from the date on which the administrative decision was notified in the form and manner laid down by regulation or from the date on which it is apparent that the person concerned became fully aware of it... .'

33. Finally, it is necessary to cite Article 5 of Law No 2248 of 20 March 1865 in the present proceedings:

'Article 5

The judicial authorities shall apply general and local administrative acts and regulations in so far as they are in conformity with primary legislation.'

V — Submissions of the parties

34. The *Italian Government* submits that the national court is proceeding on the basis that the Community law provisions have direct effect and that the protection provided by the Community legal order thus requires the national judge to ensure the effective application of those provisions irrespective of whether national procedural law was observed.

35. However, the Italian Consiglio di Stato has recently confirmed its case-law on invitations to tender, stating in a judgment of 7 April 1998 that an act which adversely affects a tenderer's right to take part in a public procurement procedure must be challenged within the usual time-limit of 60 days. If that period has expired, it is no longer possible to disapply the administrative act. The administrative act becomes immune to challenge, every action against it becomes inadmissible, and every cause of action based on the act's illegality had to be rejected.

36. The validity of the administrative act is a sanction for the failure of the person who considered his rights to be affected to act, and strengthens faith in the legality of the authority's conduct. Legal certainty requires that the administrative act be valid, in the same way as it requires the legal institutions of prescription and finality of judgments. If the invitation to tender could still be challenged, competitors' legitimate expectations and economic interests would be infringed.

37. The main dispute depends not so much on the legal nature of Article 22 of Directive 93/36 as on whether the requirements in the invitation to tender as regards financial and economic standing are lawful. The Italian Government considers that to be beyond doubt. In any case, Article 22 of the directive does not have direct effect.

38. The question arises as to the relationship between the general obligation of Member States under Article 10 EC to cooperate in the implementation of Community law, which is incumbent on national courts as well, and the principles of national procedural law.

39. The Italian Government points out that the Court has consistently held that in the absence of Community rules governing this matter, it is for the domestic legal system of each Member State to lay down the detailed rules of procedure governing actions for safeguarding rights which individuals derive from the direct effect of Community law. According to that case-law, those procedural rules must not be less favourable than those governing similar rights conferred by national law, and must not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

40. Italian law provides that administrative acts may be challenged within 60 days. Any infringement of either national or Community law may result in the administrative act being declared unlawful. Thus, there is no discrimination and there is nothing preventing the effective application of Community law. If judges were allowed to ignore national procedural law in cases of infringement of directly effective Community law there would be unjustified discrimination against national provisions of comparable content.

41. The principle of effective legal protection which derives from Articles 6 and 13 of the European Convention on Human Rights applies only in respect of Community acts and national acts giving effect to them; it cannot be applied in a way that is detrimental to national procedural rules.

42. Therefore, the Italian Government proposes that the questions referred should be answered as follows:

In the absence of any objective justification for applying different procedural rules to actions based on directly effective Community law, on the one hand, and actions based on national laws having the same content, on the other, it is not possible to disapply national procedural rules relating to the judicial enforcement of rights alleged to have been infringed.

43. The *Austrian Government* considers that the first question seeks to ascertain whether applicable Community law in the field of public procurement precludes the application of national limitation provisions. For that reason, the legal framework depends on the directive relating to review procedures in the field of public procurement, namely Directive 89/665.

44. The Republic of Austria submits that it is permissible to make applications to the competent review body for a procurement procedure subject to time-limits, provided this does not undermine the objectives of Directive 89/665 or infringe the principles of effectiveness and equal treatment that derive from the Treaty on European Union. The directive itself contains no exclusive rules as to the organisation of review bodies and the procedure to be followed in applications to them. For that reason, it is for each Member State to lay down the detailed procedural rules.

45. Nor is the legal protection given to other candidates and tenderers impaired by the 60-day time-limit for challenging administrative decisions at issue in the present case. Instead, its purpose is to ensure that unlawful decisions are declared as such and set aside as soon as possible once the person seeking legal protection has become aware of them, and this in the interest of the other candidates and tenderers, in the public interest of the proper functioning of the administration, and indeed in the interest of those taking the legal proceedings.

46. The Republic of Austria submits that the questions referred should therefore be answered as follows:

Directive 89/665 does not preclude national law under which, in the event of knowledge being acquired of the irregularities in the award, a time-limit is laid down for bringing review proceedings in respect of a specific decision of the contracting authority, with the effect that, if that time-limit is not complied with, that decision can no longer be challenged in subsequent stages of the procurement procedure. The time-limit laid down must not be such that the bringing or the pursuit of review proceedings is rendered virtually impossible or excessively difficult. In the event of knowledge being acquired of the irregularities in the award, it may be provided that every defect must be challenged within the time-limit laid down for that purpose, failing which any interests affected will be forfeited.

47. The *French Government* pleads the first question as asking whether a national court is required to verify the compatibility of a national act with Community law of its own motion where the act has not been challenged within the time-limit laid down by national procedural law. The French Government submits that this question should be answered in the negative.

48. The French Government, too, refers to the Court's judgment in *Peterbroeck* [16] and concludes that a time-limit of 60 days for bringing proceedings, such as is provided for in Italy in respect of challenges to

16 — *Peterbroeck* (cited above, footnote 12), paragraph 12.

administrative acts, does not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

49. By providing a legal framework for challenges and fixing a time-limit for raising them, limitation provisions serve the principle of legal certainty for the benefit of all parties. Legal certainty is one of the fundamental principles of the Community legal order. Those principles are of a public-policy nature and must be observed by the parties and the Court.

50. As regards the national court's view that the contracting authority's conduct in the present case after the invitation to tender had been published contributed to the inadmissibility of the proceedings brought by the claimant, the French Government referred to the case of *Edis*.[17] Admittedly, it was recognised in this case that the conduct of a national authority, combined with a time-limit, could have the effect of depriving a claimant of any opportunity of asserting his rights before the national courts. However, an undertaking such as the claimant could not mistake the necessity of bringing legal proceedings within the applicable time limits in order to protect its position, even if it was negotiating with the contracting authority at the same time.

17 — Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 48.

51. The French Government suggests that the questions referred for preliminary ruling should therefore be answered as follows:

Community law does not require a national court seised of a matter within its jurisdiction to verify the compatibility of a national legal act with Community law of its own motion where the person affected has not challenged that act within the time-limit laid down by national procedural law.

Article 6(2) of the Treaty on European Union, in so far as it refers to Articles 6 and 13 of the European Convention on Human Rights, does not create any additional obligations in this regard.

52. In its observations, the *Commission* notes first that the criteria laid down in the case-law of the Court for the assessment of national systems of legal protection, such as the prohibition of discrimination and the requirement that they do not render virtually impossible or excessively difficult the exercise of rights, can be applied only where Community law does not, whether directly or by means of harmonised laws, contain the rules that must be applied in national law. Directive 89/665 applies in the field of public procurement and the reference for a preliminary ruling must be considered the light of that directive.

53. The Commission therefore suggests that the question referred for a preliminary ruling should be reformulated as follows:

Is Directive 89/665 to be interpreted as meaning that the competent national courts are required to protect citizens of the Union whose rights have been infringed by a measure taken in breach of Directive 93/36 by disapplying clauses in an invitation to tender which are incompatible with Community law but which have not been challenged within the time-limits laid down by national law, in order to apply of their own motion Community law at every stage of the procurement procedure, including the award decision?

54. Given that Directive 89/665 lays an obligation on the Member States to ensure that effective and rapid legal procedures are available against a contracting authority's decisions and allow unlawful decisions to be set aside irrespective of whether an earlier decision has been challenged within the applicable time-limits, the question whether the award and elimination decisions are 'decisions' within the meaning of the directive must be considered.

55. The list in Article 2(1)(b) of Directive 89/665 of unlawful decisions that can be challenged is given by way of example only and is not exhaustive. As regards the award decision, the Commission refers to the case of *Alcatel*[18] in which it was held that the award decision was a decision within the meaning of Directive 89/665.

56. As regards the elimination decision, the Commission observes that this is the act by which the contracting authority responds to the undertaking's application to take part in the procurement procedure. In making this decision, the contracting authority refers to the general and special clauses in the invitation to tender and thereby takes a view as regards their interpretation. Therefore, this step constitutes a new, autonomous decision. If the invitation to tender infringes Community law, the contracting authority is actually obliged to give direct effect to Community law and make a lawful decision.

57. It followed that an elimination decision is a decision within the meaning of Directive 89/665 which must be capable of being challenged by rapid and effective legal remedies, and it is not necessary to have regard to an unlawful invitation to tender, which therefore is not to be given effect.

58. In the present case, moreover, the contracting authority initially gave the

18 — Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671.

impression that the disputed clause in the invitation to tender could be regarded as an award criterion and not as a selection criterion and that it thus interpreted the invitation to tender in conformity with Community law or applied that law directly.

59. The preparatory acts to Directive 89/665 confirm the view expressed above. The Commission's original proposal provided: 'Member States shall take the measures necessary to ensure, at all stages of the contract award procedure, effective administrative and/or judicial remedies...' [19]. In the Council, the phrase, 'at all stages of the contract award procedure' was deleted without explanation, and the Italian delegation requested that the expression 'decisions' should be replaced by 'every decision'. This request was subsequently withdrawn as a result of the common position on Article 1, which was included in the minutes. The common position stated in substance that the Council and the Commission declared that for the purposes of that directive every person excluded from taking part in a procedure for the award of a public contract because of an alleged infringement was a person who had or had had an interest in the award of a public contract and whose rights had been or risked being infringed.

19 — OJ 1987 C 230, p. 6.

60. The Commission proposes that the request for a preliminary ruling should be answered as follows:

Directive 89/665 requires a competent national court to ensure the protection of citizens of the Union whose rights have been infringed by administrative acts taken in breach of Directive 93/36 by disapplying clauses in an invitation to tender which are incompatible with Community law but which have not been challenged within the time-limit laid down by national procedural law, in order to apply of its own motion Community law at every stage of the procurement procedure, including the award decision.

VI — Assessment

61. If one reads the questions referred in the context of the reference for preliminary ruling, it becomes clear that, contrary to the formulation of the first question the national court is in fact not seeking an interpretation of Article 22 of Directive 93/36. The national court appears to be convinced that the disputed clause in the invitation to tender is unlawful. It considers that the clause infringes both Article 22 of Directive 93/36 and Article 3(1)(c) of Legislative Decree No 358 of 24 July 1992,

which was enacted in order to transpose the Community-law provision into national law.

62. Admittedly, the Italian Government has indicated that it considers the disputed clause to comply with the relevant provisions. However, if the disputed provision were not to be regarded as incompatible with Community law, the national court's further question as to whether and if so under what conditions the clause could be disapplied would have no purpose. Therefore, for the purposes of further examination of the questions referred for a preliminary ruling it must be assumed, as does the national court, that the disputed clause is unlawful under both Community law and the national transposition provisions.

63. As regards the decision in the proceedings before it, the national court finds itself confronted with the problem that it considers the clause that led to the elimination of the claimant from the procurement procedure to be unlawful but to have become unchallengeable by virtue of national procedural law. [20] It appears from the Italian Government's submissions that not only is a belated challenge to the administrative act inadmissible, but also any causes of action in other proceedings based on the alleged unlawfulness of the administrative act must be rejected as inadmissible. This means that even incidental examination of the administrative act in question is usually impossible in subsequent administrative proceedings.

64. As a result of questions posed by the Judge-Rapporteur, there was a discussion at the hearing which led to the following being acknowledged. It is, under Italian law, possible to consider the validity of an allegedly unlawful administrative act incidentally. In civil law proceedings, for example concerning a claim for damages founded on the unlawful administrative act, such incidental consideration is clearly possible. It is only in administrative proceedings, where the public interest in the validity of the administrative act must take precedence, that its unlawfulness cannot be founded on as a cause of action.

65. The national court pointed out in the order for reference that the Italian Consiglio di Stato has held that where a regulatory provision conflicts with legislation of a higher order, the administrative courts as well may, in the same way as the ordinary judicial authorities under civil law, disapply it, in order to protect subjective rights. The national court has no doubt that this applies also in respect of administrative acts which conflict with Community law.

20 — See Article 36 of Royal Decree No 1054 of 26 June 1924, according to which a person must challenge an administrative act within 60 days of becoming aware of it; otherwise the administrative act becomes unchallengeable.

66. Therefore, it appears that under national law, whether an incidental challenge to an unlawful administrative act is admissible depends on the classification of the potential claimant — whether he can claim subjective rights or 'merely' legitimate interests.

67. Since the claimant's legal position following the infringement of Article 22 of Directive 93/36 and the accompanying infringement of the transposition provision is clearly not an infringement of 'subjective rights' within the meaning of Italian law, it is not possible for the national court to take into account what it considers to be the illegality of the invitation to tender within the framework of the proceedings to challenge the elimination decision.

68. Against this background, and contrary to the views of the participants in the proceedings before the Court, the national court's first question may be understood as asking whether Article 22 of Directive 93/36 grants a tenderer subjective rights. Thus, it concerns the classification of the legal position of participants in a procurement procedure as delimited by Article 22 of Directive 93/36.

69. On this approach, the Italian Government's submissions as to the legal nature of Article 22 of Directive 93/36 and, potentially, its direct effect would also be relevant, since the Court's doctrine of the direct effect of the provisions of a directive is based on the premiss that legal rights granted to individuals by a directive merit protection. According to established case-law, an individual can rely on provisions of a directive against the State if, as far as their subject-matter is concerned, they are unconditional and sufficiently precise, provided that they define rights. [21]

70. Article 22 appears in Chapter 2 of Title IV of Directive 93/36, 'Criteria for qualitative selection'. The provision states what references may be required by a contracting authority as to the potential suppliers' financial and economic standing. The directive provides three possibilities:

'(a) appropriate statements from bankers;

(b) the presentation of the supplier's balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the supplier is established;

21 — In this regard, see the leading case, Case 8/81 *Becker* [1982] ECR 53, paragraph 25.

(c) a statement of the supplier's overall turnover and its turnover in respect of the products to which the contract relates for the three previous financial years.'

71. It appears from paragraph 2 of this provision that the various types of reference can be required either alternatively or cumulatively, and that the list of types of reference is not exhaustive. Accordingly, the contracting authority must also state in the contract notice or in the invitation to tender which references **other** than those mentioned under paragraph 1 are to be produced. In addition, paragraph 3 gives a potential supplier the right to prove his economic and financial standing by any other document which the contracting authority considers appropriate, if for 'any valid reason' he is unable to provide the references requested by the contracting authority.

72. In short, the provision clearly contains guarantees for the potential supplier as regards the opportunity to take part in the procurement procedure.

73. None the less, the present case does not concern the direct effect of provisions of a directive, since there is no doubt that the relevant provision was correctly[22] transposed into national law. The problems which arise in the main proceedings from the infringement of these provisions arise at the level of legal protection.

74. Legal protection against an unlawful clause in an invitation to tender can be relevant at different levels. On the one hand, it might concern a direct challenge to the invitation to tender which, under Italian law, must be made within 60 days, as has already been explained. On the other hand, however, the unlawfulness may also continue, become reinforced or indeed first come to light at later stages of the procedure, in which case the subject of the challenge is not the invitation to tender as such but the decision regulating or terminating the particular stage of the procedure. In the main proceedings, it is the elimination decision which directly affects the claimant and which is the subject of its challenge.

75. In those circumstances, the question is whether and, if so, in what circumstances the initial unlawfulness of a clause in an invitation to tender can lead to the subsequent decision being set aside.

76. In principle, it is for the Member States to regulate challengeability to adminis-

22 — At least, there was no suggestion of any error in the transposition of the provision and no such error is otherwise apparent.

trative acts. However, as regards the transposition of Community law, the principles the Court has developed in its consistent case-law must be observed. These are the principles of equivalence and effectiveness. These principles, which were not described as such in the case-law of the Court until recently,[23] state that procedural rules governing actions for safeguarding rights which individuals derive from Community law must not be less favourable than those governing similar rights conferred by national law and must not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.[24]

77. The Court has repeatedly stated in a consistent line of decisions[25] that, under the principle of cooperation, it is for the national courts to ensure the legal protection which individuals derive from the direct effect of Community law. '*In the absence of Community rules governing a matter*, it is for the domestic legal system to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law'.[26]

78. Therefore, one must first ascertain whether there are any Community rules governing the facts of the present case. Directive 89/665 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 lays down minimum requirements for the legal protection to be conferred. Article 1(1) of the directive provides that the Member States are to take the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively, and, in particular, as rapidly as possible, on the grounds that such decisions have infringed Community law in the field of public procurement. Under Article 1(3), the Member States are to ensure that the review procedures are available 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.

79. There is no question that under that provision a tenderer who has been elimin-

23 — See *Edis* (cited above, footnote 17), paragraph 34.

24 — See the judgments referred to in *Peterbroeck* (cited above, footnote 12), paragraph 12, and in the written observations of the Italian Government, p. 9.

25 — See, *inter alia*, Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5, Case 45/76 *Comet* [1976] ECR 2043, paragraphs 12 to 16, Case 68/79 *Just* [1980] ECR 501, paragraph 25, Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 14, Joined Cases 331/85, 376/85 and 378/85 *Bianco and Girard* [1988] ECR 1099, paragraph 12, Case 104/86 *Commission* v *Italy* [1988] ECR 1799, paragraph 7, Joined Cases 123/87 and 330/87 *Jeunehomme and EGI* [1988] ECR 4517, paragraph 17, Case C-96/91 *Commission* v *Spain* [1992] ECR I-3789, paragraph 12, Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 43 and *Peterbroeck* (cited above, footnote 12), paragraph 12.

26 — See *Peterbroeck* (cited above, footnote 12), paragraph 12 (emphasis added).

ated comes therefore within the class of persons who can initiate a review procedure. However, what is not clear is what decisions may or must be the subject of the review. The directive does not contain an exhaustive list of decisions which may be challenged. Article 2(1)(b) simply states: '[T]he Member States shall ensure that the measures taken... include provision for the powers to 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'.

80. Even if the main proceedings may concern discriminatory economic or financial specifications, it is not clear at what stage in the procurement procedure these must be challenged. Therefore, it depends on whether the elimination decision as such is, for the purposes of the directive, a decision which may be challenged and, if so, whether the discriminatory nature of the economic or financial specifications may be raised in these proceedings.

81. In *Alcatel*,[27] the Court had to take a view on the question whether the award decision was a decision for the purposes of Directive 89/665. The Court answered this question in the affirmative. In considering the question, the Court based itself on the various stages in the procurement procedure referred to in Directive 89/665. 'Directive 89/665 thus draws a distinction between the stage prior to the conclusion of the contract, to which Article 2(1) applies, and the stage subsequent to its conclusion, in respect of which a Member State may, according to the second subparagraph of Article 2(6), provide that the powers of the body responsible for the review procedures are to be limited to awarding damages to any person harmed by an infringement'.[28]

82. An elimination decision is logically prior to the award decision, even if in practice this is sometimes only by a theoretical second. That being so, from the point of view of the course of the procedure, there appears to be no reason why an elimination decision should not be subject to full review.

83. Given the purpose of Directive 89/665, as defined in Article 1(3) thereof, namely that the review procedure must be available at least to any person having or having had

27 — Case C-81/98 (cited above, footnote 18).

28 — See paragraph 37 of the judgment.

an interest in obtaining a particular public contract, the decision relating directly to the further participation in or elimination from the contract award procedure must be capable of review. An elimination decision is also a decision in which the contracting authority interprets the clauses in the invitation to tender and applies them autonomously to a candidate. This individual application of conditions previously laid down has clearly an independent, regulatory content which must be amenable to review. [29]

84. This approach is confirmed by the directive's legislative history, to which the Commission expressly referred in the present proceedings. [30] The common position, which was ultimately taken into the Protocol, stated in substance that the Council and the Commission declared that for the purposes of the directive every person excluded from taking part in a procedure for the award of a public contract because of an alleged infringement was a person who had or had had an interest in the award of a public contract and whose rights had been or risked being infringed.

85. Having regard both to the person entitled to initiate review proceedings and to the nature of the challengeable decision, this declaration suggests that legal protection against decisions by a contracting authority should be comprehensive.

86. For these reasons, the elimination decision is to be regarded as a decision against which review proceedings must be available. Where a Member State has exercised its powers under Article 1 of Directive 89/665 in such a way that the national review proceedings take the form of a challenge before the administrative courts to have the decision set aside, such a challenge must be available against an elimination decision. A failure to challenge earlier actions in the procedure cannot itself preclude the admissibility of a challenge to an elimination decision.

87. What is none the less in doubt is what effects the validity of an administrative measure adopted at an earlier stage in the procurement procedure have on the question whether the challenge to the elimination decision is well founded. Specifically, the validity of the invitation to tender has in substance the same effect as a limitation provision since, as explained above, [31] causes of action founded on its unlawfulness must be rejected as inadmissible.

29 — For a view in favour of extensive legal protection against all decisions made in a procurement procedure see the Opinion of Advocate General Tizzano in Case C-92/00 *HI* [2002] ECR I-5553, paragraph 21 et seq.; for the view, by implication, that decisions in a procurement procedure which follow from an earlier decision may be reviewed, see the Opinion of Advocate General Mischo in Case C-81/98 *Alcatel Austria and Others* (cited above, footnote 18), point 46.

30 — See above, paragraph 59.

31 — See above, paragraph 63.

88. The Court has already had a number of opportunities to state its view on the validity of national limitation provisions as regards enforcing Community law. [32] In each case, the Court has examined the conditions and circumstances of the individual exclusion of the Community-law claim closely and has determined the validity or invalidity of the exclusion provisions in the light thereof. It follows that there is no standard answer to the question as to the validity of a limitation provision.

89. The case of *Peterbroeck*, [33] which has already been referred to a number of times, was between a company and the Belgian State and concerned the applicable rate of non-resident tax. In the main proceedings, the complaint of an infringement of Community law was raised for the first time before the Cour d'Appel (Court of Appeal). According to the relevant domestic law, a litigant could no longer raise a new plea based on Community law before the Cour d'Appel once the 60-day period with effect from the lodging by the Director of a certified true copy of the contested decision had elapsed. [34]

90. The Court considered that a period of 60 days so imposed on a litigant was not objectionable *per se*. [35] However, it stated that for the purposes of applying the principles of equivalence and effectiveness, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult has to be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In that connection, account is to be taken, where appropriate, of the basic principles underlying the national system of legal protection, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure. [36]

91. After having considered the particular features of the procedure in question, the Court came to the conclusion in that case that Community law precluded application of a domestic procedural rule whose effect was to prevent the national court, seised of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law was compatible with a provision of Community law when the latter provision had not been invoked by the litigant within a certain period. [37]

92. Joined Cases *Van Schijndel and van Veen* [38] concerned the applicability of the

32 — See, for example, Case C-312/93 *Peterbroeck* (cited above, footnote 12); Joined Cases *Van Schijndel and van Veen* (cited above, footnote 10); *Edis* (cited above, footnote 17); and *Eco Swiss* (cited above, footnote 11).

33 — Case C-312/93 (cited above, footnote 12).

34 — See paragraph 15 of the judgment.

35 — See paragraph 16 of the judgment.

36 — See paragraph 14 of the judgment.

37 — See paragraph 21 and the operative part of the judgment.

38 — See Joined Cases C-430/93 and C-431/93 (cited above, footnote 10).

competition rules under the Treaty in a dispute concerning compulsory participation in an occupational pension scheme. In that case, the complaint of infringement of Community law was first raised in cassation proceedings before the Netherlands Hoge Raad (Supreme Court). The nature of cassation proceedings is that they exclude new submissions unless on points of law. In support of their complaint, the claimants relied on facts and circumstances which had not been relied on before the lower courts. [39] For the national court, the question arose as to whether it was none the less required to take Community law into account of its own motion.

93. On that point, the Court stated: '[W]here, by virtue of domestic law, courts or tribunals must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned... The position is the same if domestic law confers on courts and tribunals a discretion to apply of their own motion binding rules of law'. [40] In considering the principles of equivalence and effectiveness, the Court stated that each case 'must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances'. [41]

94. The Court reached the conclusion that the national court had to take into account of its own motion mandatory rules of Community law in the same way as it had to take into account mandatory rules of national law. However, this applied only to the extent that the courts were not obliged 'to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties'. [42]

95. The case of *Edis* [43] concerned the repayment of amounts paid, though not due, in respect of a registration charge in breach of Community law. The fact that the charge infringed Community law came to light only in a judgment of the Court. [44] In reliance on a three-year limitation period which applied in tax law, the authority rejected the franchise debtor's claim to recover the money. The Court held that Community law did not prohibit a Member State from resisting actions for repayment of charges levied in breach of Community law by relying on a time-limit under national law of three years, provided that that time-limit applied in the same way to actions based on Community law for repayment of such charges as to those based on national law.

96. The case of *Eco Swiss* [45] concerned, *inter alia*, the question whether a national

39 — See paragraph 11 of the judgment.

40 — See paragraph 13 et seq. of the judgment.

41 — See paragraph 19 of the judgment.

42 — See the operative part of the judgment.

43 — See Case C-231/96 (cited above, footnote 17).

44 — Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915; see paragraph 5 of the judgment in *Edis* (cited above, footnote 17).

45 — See Case C-126/96 (cited above, footnote 11).

court was required to disapply a national procedural rule under which a divorce decree became final on the fulfilment of certain conditions, in order to be able to apply the applicable Community law to the relevant facts. [46] The Court answered that question in the negative. The Court considered that the time-limit laid down in national law for raising an action to have the decree set aside did not render excessively difficult or virtually impossible the exercise of rights conferred by Community law. [47]

97. In order to decide what consequences this case-law has for the present case, it must be recalled that limitation provisions are not objectionable *per se*. As in the case of *Peterbroeck*, a limitation period of 60 days is not as such objectionable. Nor, so far as Community law is concerned, is the application of limitation periods in the context of procedures for the award of public contracts in itself open to criticism. I expressed this view in my Opinion in *Universale-Bau* as well. [48]

98. However, it appears from the judgments referred to above [49] that the principles of equivalence and effectiveness must be observed, and the specific circumstances and legislative context of the individual case must be taken into account, when considering whether limitation provisions are compatible with Community law. [50]

99. It has already been shown above [51] that the principles of equivalence and effectiveness apply in particular where there are no Community rules governing a matter. In that connection, Directive 89/665 fell to be considered as regards the possibility of challenging an elimination decision. However, there must now be considered the question of the validity of limitation provisions applicable within the framework of procedures for the award of public supply contracts. Directive 89/665 does not contain any express provision in that regard. [52] Thus, the decision as to the validity of limitation provisions depends on whether the principles of equivalence and effectiveness are observed.

100. As regards the principle of equivalence, in the absence of any information to the contrary it is to be assumed that the limitation period relates in the same way to claims to enforce rights under national law as it does to claims to enforce rights under Community law.

46 — See paragraph 43 of the judgment.

47 — See paragraph 45 of the judgment.

48 — C-470/99 [2002] ECR I-11617, paragraph 68.

49 — See above, paragraphs 89 to 96.

50 — See *Peterbroeck* (cited above, footnote 12), paragraphs 12 and 14; *Van Schijndel and van Veen* (cited above, footnote 10), paragraphs 17 and 19; and *Edis* (cited above, footnote 17), paragraph 19.

51 — See point 77 et seq.

52 — See my Opinion in *Universale-Bau* (cited above, footnote 48), paragraph 69.

101. The principle of effectiveness requires in substance [53] that national procedural rules must not render virtually impossible or excessively difficult the exercise of rights conferred by Community law. If the fact that an earlier administrative act infringed Community law comes to light in the context of an invitation to tender, it must be assumed that the 60-day limitation period does not prevent the effective application of Community law. Considerations of legal certainty and the proper course of procedure favour this approach. These require that competing tenderers' reliance on the regularity of previous stages of the procedure be protected.

102. *A priori*, Directive 89/665, which requires there to be 'effective' and 'rapid' measures for the review of a contracting authority's decisions, [54] does not provide a basis for criticising a 60-day limitation period. On the other hand, it has already been pointed out in the consideration of whether an elimination decision may be challenged that a subsequent decision in a procurement procedure can amount to the practical application of an earlier decision, with its own independent regulatory content.

103. Therefore, a purely theoretical consideration of the limitation period is not appropriate in the context of the problems in the present case. Instead, what is crucial is the specific circumstances and course of the procedure prior to the challenge to the elimination decision. Admittedly, the clause which led to the dispute was published with the invitation to tender. It was thereby announced to the parties interested in the award. The claimant had doubts already at that stage as to the lawfulness of the condition and indeed informed the contracting authority thereof.

104. The contracting authority reacted to the doubts the claimant expressed by postponing the opening of the envelopes and requesting the undertakings affected by that problem to forward comprehensive documentation, '*taking the view that the clause in question could be interpreted as referring to the overall turnover of the participating undertakings and that the supply of products identical to those called for... could be taken into consideration, not as a precondition for admission to the tendering procedure but solely as a basis for awarding points for quality*'. [55]

105. The contracting authority thereby gave it to be understood that it would take the claimant's objections into account and created an expectation that it would apply

53 — See the settled case-law on this point (cited above, footnote 25).

54 — See Article 1(1) of the directive.

55 — Quoted from the order for reference, referring to document No 1 of 12 December 1996 of the awards committee.

the clause in question in a way that conformed with Community law. Only in the shape of the elimination decision did it take a definitive view as regards the interpretation it puts forward of the terms of the invitation to tender. In doing so, the contracting authority put forward an interpretation of the terms of the invitation to tender which made them appear unlawful (under Community law), at least in the estimation of the national court, whose task it is to decide the dispute.

106. What is highly significant is the fact that a different interpretation of the terms of the invitation to tender could have prevented the clause from being unlawful *and* that the contracting authority initially created the impression that it would proceed accordingly. Only through the elimination decision did the claimant obtain final clarity concerning what it considered to be the unlawful interpretation of the clauses in the invitation to tender. It was only by means of that decision that an illegality, admittedly already latent in the terms of the invitation to tender, was made specific.

107. It is therefore also arguable that it was only through the elimination decision that it became absolutely clear to the claimant that the clauses in the invitation to tender were unlawful. That knowledge, in its turn, could have consequences for the time from which the 60-day limitation period started to run. Whether it starts to run on publication of the invitation to tender in every case, or, possibly, in the circumstances in point here, only once it became known that the particular clause was unlawful, is ultimately a question to be answered by reference to national procedural law.

108. On the present facts, one must in any case assume that the exercise of rights conferred on the claimant by Community law has been rendered excessively difficult. It would therefore be unjust if the claimant were no longer permitted to raise in proceedings challenging the elimination decision the infringement of Community law which was admittedly already imminent in the terms of the invitation to tender but which breached the claimant's rights only by means of the elimination decision.

109. However, the French Government has pointed out that the claimant could have raised a protective action against the terms of the invitation to tender even though it was in negotiations with the contracting authority as regards the particular clause in the invitation to tender which it considered to be unlawful. That might have been true if the contracting authority had not reacted to the doubts the claimant expressed. However, given the way in which the authority initially approached those doubts, the claimant was entitled to believe that its request would be considered and, if appropriate, even be acted upon. One must also remember that the claimant was waiting for the contract to be awarded and it would perhaps not have been opportune

for it to endanger its future relationship with the contracting authority by raising an action. [56]

110. Nor does raising a purely protective action appear to conform to the spirit of Directive 89/665. Article 1(3)(2) of the directive provides: '[I]n particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.' That power granted to the Member States suggests that parties should not be hindered from seeking an amicable settlement before an action is raised. In any case, it is not in the interests of the participating parties to surprise the contracting authority by raising an action.

111. As regards the consequences of that situation, the question arises as to whether the 60-day period for challenging the invitation to tender had not already been stopped from running. It is also conceivable that the contracting authority's conduct interrupted the time-limit for bringing proceedings, since it was evident that it initially considered the claimant's doubts and requested supplementary information not only from the claimant but also from the other tenderers affected. Since the exercise of the rights conferred on it by Community law was rendered excessively difficult for the claimant in the specific circumstances of the present case, it is in any case inappropriate to apply the 60-day time-limit rigidly.

112. It is incumbent on the national court to exhaust all the avenues available under national law in order to render the Community provisions applicable to the case before it. If there are no less drastic means available, the national court may have to apply the doctrine of disapplication under Article 5 of Law No 2248 of 20 March 1865, as it has already suggested. Any further legal consequences if the elimination decision is set aside are a matter for national law.

113. The proposed approach means that the national court's second question need not be considered, since the interests of the eliminated tenderer in terms of legal protection in the correct application of Community law are taken into account by the exhaustion of remedies available under national law.

56 — See, concerning a comparable situation, the Opinion of Advocate General Mischo in *Alcatel Austria and Others* (cited above, footnote 29), point 38.

VII — Conclusion

In conclusion, I suggest on the basis of the above considerations that the reference for a preliminary ruling should be answered as follows:

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 is to be interpreted as meaning that the competent courts are obliged to grant an effective and rapid remedy against any decision of a contracting authority, including a decision eliminating an undertaking, irrespective of whether a previous decision has been challenged, if and to the extent that the contracting authority has by its conduct rendered it virtually impossible or excessively difficult for a citizen of the Union whose rights have been infringed by measures taken in breach of Community law to enforce the rights conferred on him by Community law before a court. It is for the national court to decide in the present proceedings whether this requires that the remedy of disapplication under Article 5 of Law No 2248 of 20 March 1865 be granted.