OPINION OF ADVOCATE GENERAL TESAURO

delivered on 15 May 1997 *

1. The question referred to the Court for a preliminary ruling in this case has been submitted by the Vergabeüberwachungsausschuß des Bundes (Federal Public Procurement Awards Supervisory Board, hereinafter 'the Federal Supervisory Board') and concerns the interpretation of Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (hereinafter 'the services directive'). [1]

The Federal Supervisory Board has asked the Court to determine whether that article means that the bodies set up by the Member States for the purposes of Council Directive 89/665/EEC of 21 December 1989 governing review procedures (hereinafter 'the review directive'), [2] are competent, as from the final date for transposition stipulated in the services directive (and where no national implementing measures have been taken), also to review procedures for the award of public service contracts where infringements of the relevant provisions of Community law are alleged.

Relevant Community and national legislation

2. In order better to understand the point of this question, it is first necessary to place it in its proper legal context, by briefly looking at the relevant provisions of both Community and national law.

— *Community legislation*

3. Article 36 of the services directive lays down the criteria which a contracting authority is required to follow in awarding a contract. In particular, Article 36(1)(a) provides that, where the award is made to the economically most advantageous tender, the contracting authority must take into account 'various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price'. In other cases, subparagraph (b)

* Original language: Italian.

1 — OJ 1992 L 209, p. 1.

2 — 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 (OJ 1989 L 395, p. 33).

provides that 'the lowest price only' is to be taken into account.

Article 44 of the services directive sets 1 July 1993 as the date by which Member States are required to adopt and communicate the necessary transposition measures.

4. The review directive requires Member States to take the measures necessary to ensure that award procedures for public works contracts and public supply contracts governed by the relevant Community directives [3] may be reviewed rapidly and effectively where the grounds of alleged illegality involve (directly or indirectly) Community law (Article 1(1)).

Following the entry into force of the services directive, the review directive also applies to procedures for the award of service contracts; Article 41 of the services directive, which the referring body is now asking the Court to interpret, amended the wording of Article 1 of the review directive to extend its scope to include the review of service contract awards.

5. Article 2(8) of the review directive provides that, where bodies responsible for review procedures are not judicial in character, written reasons for their decisions must be given. In such a case, the Member States must also guarantee that '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'.

In order to ensure the independence of such bodies, the second subparagraph of Article 2(8) further requires that their members be subject to the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office and their removal; and that at least the President shall have the same legal and professional qualifications as members of the judiciary. Finally, the subparagraph provides that the body in question is to adopt its decisions following a procedure in which both sides are heard and that its decisions are to be legally binding.

3 — These are, of course, contracts covered by Directives 71/305/EEC (OJ 1971 L 185, p. 5) and 77/62/EEC (OJ 1977 L 13, p. 1), now Directive 93/37/EEC (OJ 1993 L 199, p. 54) and Directive 93/36/EEC (OJ 1993 L 199, p. 1) respectively.

— *The national legislation*

6. The Community public procurement directives were transposed into German domestic law by means of an amendment of the Haushaltsgrundsätzegesetz (Budget Principles Law, hereinafter 'the HGrG'). In particular, the Second Law Amending the HGrG, which came into effect in 1993, [4] inserted new Paragraphs 57a to 57c, which were intended by the German legislature to give effect to the directives on the award of public works contracts and public supply contracts, and to the review directive. [5]

The services directive, however, has not been transposed into German law, and this is confirmed by the order for reference.

7. Paragraph 57a of the HGrG constitutes the general legal basis for the adoption of the measures implementing the Community directives on public procurement. It confers power on the Federal government to issue regulations, with the assent of the Bundesrat, governing the award of public supply contracts, public works contracts and public services contracts, which are put out to tender by the bodies listed in the said Paragraph.

The ensuing provisions (Paragraphs 57b and 57c), which deal with the remedies available in the case of infringement of rules of Community law (or of national provisions transposing them), set up a two-tier review procedure for this purpose. Initial recourse lies to the award review bodies (Vergabeprüfstellen) whilst their decisions may in turn be challenged before the supervisory boards (Vergabeüberwachungsausschüsse) set up by each of the Länder, or, in cases where the impugned contract-award procedure falls within a Federal authority's province, before the Federal Supervisory Board.

8. Paragraph 57b of the HGrG regulates, in particular, the operation of the review bodies. According to subparagraph (2) thereof, the terms of reference of these bodies are to be determined by the Federal Government by means of regulations and with the prior assent of the Bundesrat. Subparagraphs (3), (4) and (5) contain a series of provisions concerning the commencement of the review procedure, the suspension of award procedures adjudged suspect and the information which applicants are required to provide to the review bodies.

Subparagraph (6) provides that the lodging of an application with a review body does not preclude the right of the individual concerned to bring an action in the ordinary courts for damages for loss suffered as a result of an award procedure.

9. Paragraph 57c of the HGrG lays down a series of rules applicable to the supervisory

4 — BGBl. 1993, I, p. 1928 et seq.

5 — This legislative technique is commonly referred to as the 'budget solution' by German academic writers.

boards; [6] the members of such boards, the composition of which is regulated in detail in subparagraphs (2), (3) and (4) of this provision, perform their functions independently and on their own responsibility. In particular, Paragraph 57c(3) provides that certain provisions of the Deutsches Richtergesetz (Law on the Judiciary, hereinafter 'the DRiG') are to apply by analogy to the official members of the supervisory boards as regards annulment or withdrawal of their appointment and their independence and dismissal. [7]

The supervisory boards review only the legality of the award procedures and do not examine the findings of fact on which the determinations of review bodies are based; they may, where appropriate, set aside the determinations of review bodies and direct them to make fresh determinations (Paragraph 57c(5)). Any person claiming that provisions governing the award of contracts have been infringed may make an application to a supervisory board (subparagraph (6)).

10. Finally, Paragraph 57c(7) lays down specific rules applicable to the Federal Supervisory Board. Its official members are selected from the chairmen and assessors serving in the decision-making departments of the Bundeskartellamt. [8] The chairmen of the chambers of the supervisory board are appointed from the chairmen of the Bundeskartellamt decision-making departments. The president of the Bundeskartellamt appoints lay assessors [9] on a proposal from the top public-law trade boards, decides on the formation and composition of chambers and exercises administrative supervisory control on behalf of the Federal Government.

6 — These rules also apply to the Federal Supervisory Board, save for the specific provisions contained in Paragraph 57c(7) (see *infra*).

7 — The relevant Paragraphs of the DRiG are:
- Paragraph 18(1) and (2), which specifies the circumstances in which the appointment of a judge is void (appointment by an authority acting outside its powers, appointment of a person who is not a German national or is not qualified to hold public office); however, Paragraph 18(3) (which provides that the nullity of an appointment may not be relied upon until declared in a court decision having the force of *res judicata*) is not applicable and in its place Paragraph 57c(3) provides that the nullity of an appointment may not be relied upon until it has been declared by the authority which made the appointment and that decision has become final;
- Paragraph 19(1) and (2), which deal with the cases in which appointments can be withdrawn. Paragraph 19(3), which makes withdrawal of an appointment subject to the consent of the party concerned or a court decision having the force of *res judicata*, does not apply, however;
- Paragraph 26(1) and (2), which provides that administrative supervisory control over members of the judiciary may not limit their independence;
- Paragraph 27(1), (judges are assigned to a particular court);
- Paragraph 30(1) and (3), Paragraphs 31 to 33, and Paragraph 37, which lay down the conditions for removing a judge from his office or for transferring him; in general, this may happen pursuant to formal disciplinary proceedings or on the grounds of court restructuring. It is to be noted that Paragraph 30(2), which provides that removal from office or transfer other than for organizational reasons shall require a court order having the force of *res judicata*, does not apply.

8 — The national administrative authority responsible for competition matters.

9 — As well as the "official" members (Bundeskartellamt personnel), the Federal Supervisory Board also has outside or lay assessors. At present it is composed of a single chamber, presided over by a Bundeskartellamt department chairman, and has four official members, five lay members and five alternate lay members (see Stockmann, *Die Vergabeüberwachung des Bundes*, WUW 1995, p. 572 et seq.; the author is the president of the Federal Supervisory Board).

This subparagraph also provides that the Federal Supervisory Board is to adopt its own internal rules of procedure to regulate the allocation and conduct of cases.

11. On the basis of the provisions described above, the Federal Government adopted two implementing regulations on 22 February 1994, after having obtained the assent of the Bundesrat. The first regulation, governing the award of public procurement contracts, expressly applies only to public works contracts and public supply contracts and does not therefore apply to public service contracts. [10]

The second regulation, however, is of general application and contains provisions fulfilling the obligation to provide for appropriate review procedures in the field of public procurement (hereinafter 'the review regulation'). [11] Paragraph 1 of this regulation designates the bodies competent to conduct reviews in respect of each of the awarding authorities listed in Paragraph 57a of the HGrG. Under Paragraph 2, the review body has power to suspend the award procedure; its determinations are to be given in writing, contain a statement of reasons and be notified to the awarding authority and to the person claiming an infringement of the procurement rules; the review body must draw the latter's attention to the possibility of challenging the determination before a supervisory board and specify the supervisory board competent to hear such a challenge.

10 — BGBl. 1994, I, p. 321 et seq.

11 — BGBl. 1994, I, p. 324 et seq.

12. Finally, Paragraph 3 of the review regulation deals with the operation of the supervisory boards. It provides that the supervisory boards must make a reference to the Court of Justice under Article 177 when they consider that a ruling on the interpretation of the Treaty or on the validity or interpretation of legal acts adopted on the basis of the Treaty is necessary.

It also provides that the supervisory boards are to adopt internal rules of procedure in the light of the principles set out in the Law amending the HGrG. They must issue reasoned determinations in writing after having heard the parties. Finally, Paragraph 3(4) provides that the supervisory boards, unlike the review bodies, shall not be empowered to suspend a procedure for the award of a contract.

13. The rules of procedure of the Federal Supervisory Board came into effect on 1 August 1995 and have not been published. The version produced by the German Government in these proceedings consists of five sections regulating the organization and allocation of cases within the Board, the conduct of procedure, which includes a written stage and an oral hearing, and its decisions and other technical matters, including formalities relating to final determinations.

This version of the internal rules of procedure seems to be an amended version of rules which came into effect in June 1994 and was likewise not published. According to the Commission, which supplied this information without challenge at the hearing, there are a number of differences between the original version and the one now in force, in particular as regards the openness and necessity of hearings and procedural time-limits. [12]

14. To complete this survey of the legal background it should be noted that the transposition of the Community public procurement directives has been the subject of two recent judgments of this Court, in which it found that the German Government had failed to comply with its obligations under the Treaty. The first judgment concerned the incorrect transposition of the directives on the award of public works contracts and public supply contracts [13] and the second concerned the failure to transpose the services directive. [14]

As regards transposition of the review directive, the Commission has commenced enforcement proceedings which are still pending. [15] The Commission contends, essentially, that in the national measures transposing the directive the German Government has provided individuals with less judicial protection than the corresponding directive.

Facts

15. Unlike the legislative background, the facts which led to the main proceedings are straightforward and may be summarized as follows.

In 1995, the Bundesbaugesellschaft Berlin mbH (hereinafter 'the contracting authority') issued an invitation to tender for the award of a general planning services contract relat-

12 — The Commission indicated in fact that it had doubts as to which version of the rules of procedure was to be regarded as in force. It explains that the only version officially submitted by the German Government which has not been followed by any official revision or amendment is that of June 1994, which was produced as an official document in the course of an enforcement action brought by the Commission against Germany under Article 169 (regarding which, see *infra*).

13 — Case C-433/93 *Commission* v *Germany* [1995] ECR I-2303; the directives applicable at the time of the relevant facts were Council Directive 88/295/EEC of 22 March 1988 in respect of public supply contracts (OJ 1988 L 127, p. 1) and Council Directive 89/440/EEC of 18 July 1989 in respect of public works contracts (OJ 1989 L 210, p. 1). In line with its established case-law, the Court confirmed the breach of obligations by reference to the legal position existing at the expiry of the period set by the Commission in its reasoned opinion (in this case, 3 February 1993).

14 — Case C-253/95 *Commission* v *Germany* [1996] ECR I-2423.

15 — The letter of formal notice dated 31 December 1995 has been published, in German, in *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis*, N. 23/95, p. 1940 et seq. The reasoned opinion in the case was delivered on 29 July 1996 (see Commission press release No IP/96/614).

ing to new government buildings in Berlin. [16] As the services in question were of an intellectual nature, the contracting authority opted to use a negotiated procedure with prior publication of the contract notice, as permitted by Article 11(2)(c) of the services directive.

16. Dorsch Consult Ingenieurgesellschaft mbH (hereinafter 'the applicant') took part in the tendering procedure and submitted its tender on 25 August 1995.

The contracting authority examined the 18 tenders received and drew up a short list of seven. It then decided to award the contract to two of the other firms which had submitted a tender, which were required to form a working party to provide the services in question. The contract was signed on 12 January 1996, after the working party had already commenced its work.

17. The applicant took the view that the elimination of its tender constituted a breach of the services directive and of the relevant national legislation and applied to the Federal Ministry for Regional Planning, Building and Urban Planning (in its capacity as the competent review body) seeking, by way of interim relief, to have the contract-awarding procedure suspended and, by way of primary relief, to be awarded the contract. In support of its claim, the applicant contended that it had been repeatedly informed by the contracting authority that it was technically competent to perform the contract and that its tender was the most attractive in terms of price.

By letter of 20 December 1995, the review body declined jurisdiction and dismissed the application without consideration of the merits of the claim. The decision was based on the grounds that the federal regulation provided for under the legislation, by which the Federal Government was to have extended the jurisdiction of the review bodies to include the hearing and determination of disputes concerning service contracts, had still not been enacted.

18. In its notification to the applicant of the outcome of its application, the review body also informed it of its right to challenge the legality of the decision before the Federal Supervisory Board. The applicant thereupon made an application to that Board for the setting aside of the review body's decision to decline jurisdiction, the suspension of the contract-awarding procedure and the award of the contract to the applicant; alternatively, it asked for a reference to be made to the Court of Justice for a preliminary ruling on the point in issue.

16 — Published in the *Amtsblatt Berlin* of 23 June 1995 and in OJ 1995 S 120, p. 166.

The Federal Supervisory Board decided to stay the proceedings and to refer to the Court of Justice the question whether Article 41 of the services directive is to be interpreted as meaning that the bodies set up by the Member States for the purposes of the review directive are also competent, from the date by which the services directive ought to have been transposed into national law, to review procedures for the award of public service contracts.

The issue was the subject of lively argument between the parties, both in their written observations and at the hearing. It is noteworthy that the applicant itself, which had expressly requested (albeit as an alternative relief) a reference to be made to the Court of Justice for a preliminary ruling on the point in issue, accepted that the Federal Supervisory Board *does not constitute a court or tribunal* within the meaning of Article 177; it submitted none the less that the Court should in any case answer the question referred to it, but — not without self-contradiction — on grounds relating to the effective protection of individual rights *by the courts*.

Admissibility

19. Before considering the substance of the question referred, it is necessary to determine whether the Court has jurisdiction to entertain the reference made by the Federal Supervisory Board. From the foregoing survey of the legislation establishing the Board and of the rules governing its procedure serious doubts arise as to whether that body can be regarded as a 'court or tribunal' within the meaning of Article 177 of the Treaty and, accordingly, whether the reference is admissible. [17]

The Commission considered that the question was so clearly inadmissible that it felt it unnecessary to address its substance. The German Government, for its part, argued that the body in question does constitute a court or tribunal within the meaning of Article 177. But it explicitly conceded in the course of the hearing that it had begun the process of amending the relevant provisions to allow, *inter alia*, determinations of the supervisory boards to be challenged in the ordinary courts in order to ensure the effective protection by the courts of the rights of the persons concerned. [18]

17 — The sole purpose of this examination is, incidentally, to determine whether the subjective conditions for acceptance of the reference are satisfied and not to establish whether the review directive was properly transposed, which may eventually be the subject of separate proceedings. Of course, the enforcement action brought by the Commission against the German Government for failure correctly to transpose the review directive, which I mentioned earlier, has points in common with the present case; but there are also many dissimilarities, so that a rigorous distinction between the two cases should be maintained, with regard to both form and substance.

18 — This point was raised at the hearing by the Commission, which saw it as further proof that the supervisory boards as presently constituted are not courts; this was disputed by the German Government, which at the hearing argued that the amendments in question were aimed solely at making a number of improvements to a system already providing satisfactory legal protection, and it pointed out that this information had been supplied in the course of other, separate proceedings.

20. My first observation in considering this issue is that, in German domestic law itself, the Federal Supervisory Board (as well as the supervisory boards of the Länder) are described as 'quasi-judicial bodies' (gerichtsähnliche Einrichtungen) and not as courts or tribunals *strictu sensu*. [19]

This fact, whilst not being conclusive on its own since the concept of court or tribunal within the meaning of Article 177 is a term of Community law [20] within the ambit of which the Court of Justice has seen fit (on occasion) to include bodies which were not so regarded in the eyes of their own national law, [21] none the less calls for a detailed analysis of the nature of the body in question and the manner in which it is required to carry out its functions, in order to ascertain whether it possesses those organizational and functional characteristics which the Court has in previous cases held to be necessary in order for a body which is not a court to still be able to fall within the scope of Article 177.

21. I shall therefore begin by briefly reviewing those leading decisions of the Court in this area which are relevant here, but it should be borne in mind that the case-law developed by reference to the individual cases that have come before the Court has not led to a general, exhaustive definition of the concept of court or tribunal within the meaning of Article 177.

22. The first case concerned a Dutch industrial arbitration tribunal (Scheidsgericht) which made a reference to the Court of Justice for a preliminary ruling even though it stated that it did not consider itself to be a judicial body under Dutch law. In the now landmark judgment of *Vaassen-Göbbels*, [22] the Court decided that it had jurisdiction to rule on the questions submitted to it, having found that the referring body in question possessed the characteristics of a court or tribunal within the meaning of Article 177.

The Court expressly took the following factors into account: the Scheidsgericht was a body duly established under Dutch law; it was permanent; it was charged with the settlement of disputes and had to follow rules of *inter partes* procedure similar to those applying in the ordinary courts of law; it was required to apply rules of law; furthermore, all those belonging to the relevant industry had to bring any dispute with their insurer before the Scheidsgericht; finally, the members of the body in question were

19 — See the preamble to the Second Law Amending the HGrG, which inserted new Paragraphs 57a to 57c, discussed above (BT-Drucksache 12/4636, p. 12). The designation is not surprising if one has regard to the particularities of German Constitutional law. Were a fully-fledged Federal "court" to have been established by means of an ordinary law (such as the HGrG) this would have been in breach of the relevant Constitutional provisions (at least as regards the Federal Supervisory Board); this is because the German Basic Law (Articles 95 and 96) contains an exhaustive list of all Federal courts, any addition to which would require a constitutional amendment.

20 — The definition of which, in the obvious interests of the uniform application of Community law, cannot be left to the discretion of the courts of the Member States (see in general Case 49/71 *Hagen* [1972] ECR 23).

21 — See, for example, Case 61/65 *Vaassen (neé Göbbels)* [1966] ECR 261

22 — Loc. cit., footnote 21.

appointed by the Minister responsible, who also designated its chairman and laid down its rules of procedure. [23]

23. By adopting this approach, the Court thus made it clear from the outset that in deciding whether a referring body is a court or tribunal for the purposes of the Treaty it does not attach importance to its formal designation but considers its substantive characteristics (establishment by law, permanence, compulsory jurisdiction, transparent rules of procedure and the application of rules of law). This approach was entirely justified, especially in view of the historical context in which it evolved. For at the time of the *Vaassen-Göbbels* case the mechanism of cooperation between national courts and the Court of Justice had only just begun to operate and the Court of Justice was very mindful of the need to encourage the use of the mechanism in order to ensure the spread and uniform application of Community law, with the aid — if necessary — of a broad interpretation of the category of bodies entitled to make references to it.

24. A number of subsequent judgments should also be read in this light, like that in, for example, *Broekmeulen*, [24] in which the Court held to be admissible a question submitted to it by a (Netherlands) appeals committee which heard appeals from medical practitioners who had been refused authorization to practise or enrolment on the medical register. In this case, too, the Court found that the appeals committee possessed a number of organizational and functional characteristics which warranted it being treated as having a judicial function. The Court took into account the fact that the appeals committee concerned was permanent, that the public authorities were involved in deciding its composition, that it had internal rules of procedure providing for *inter partes* procedure, that its jurisdiction was exclusive and that its determinations were final. Given also the fact that it was called upon to apply Community law, which had been pleaded by the applicants in the main proceedings, the Court held that it was necessary, in the interest of the practical effect of Community law, to answer the question submitted.

25. The line of judgments beginning with *Simmenthal* [25] is to be viewed in the same light. In that case, a reference was made to the Court by the Preture di Alessandria in proceedings for an interlocutory order. The Italian Government contested the jurisdiction of the Court to reply to the questions submitted by the Preture on the grounds that the procedure was not *inter partes*, pointing out that the judge in question had

23 — In more recent decisions the Court also confirmed that employment arbitration tribunals which satisfy the aforementioned criteria are courts or tribunals within the meaning of Article 177. See, for example, Case 109/88 *Danfoss* [1989] ECR 3199, in which the Court found that the body making the reference, a Danish industrial arbitration board, had been established by law (which laid down detailed rules governing its composition, the number of members to be nominated by the parties and the manner of appointment of the umpire), had exclusive and final jurisdiction over the relevant disputes and could hear a case brought by either party irrespective of the objections of the other. Advocate General Lenz also pointed out that the board was also required to apply rules of law, such as the provisions of the relevant collective agreements.

24 — Case 246/80 [1981] ECR 2311, discussed in greater detail in paragraphs 39 and 40 *infra*.

25 — Case 70/77 [1978] ECR 1453, paragraph 10.

power in the course of it to make a determination based solely on the plaintiff's submissions. Having found that the Preture was 'exercising the functions of a court or tribunal within the meaning of Article 177', the Court held that the Preture's capacity to make a reference for a preliminary ruling could not depend on whether or not the proceedings in which the reference was made were defended; it did, however, add that 'it may where necessary prove to be in the interests of the proper administration of justice that a question should be referred for a preliminary ruling only after both sides have been heard'. [26] In other words, the Court established that, whenever a referring body is unquestionably a court or tribunal, the fact that a reference is made before any *inter partes* hearing does not render it inadmissible.

26. While adopting this broad interpretation, the Court has none the less set clear limits to the concept of court or tribunal within the meaning of the Treaty. In its order in *Borker*, [27] subsequently confirmed in *Regina Greis Unterweger*, [28] the Court held that it had jurisdiction to give preliminary rulings only on questions submitted by a court or tribunal called upon to give judgment 'in proceedings intended to lead to a decision of a judicial nature'. [29] The referring bodies in question in those cases were, respectively, the Paris Bar Council (which had been requested by a lawyer on its register to issue a declaration to be produced as evidence in legal proceedings pending before the courts of another Member State) and the Italian Consultative Committee for Currency Offences (whose function was to give reasoned, non-binding opinions to the Italian Treasury), and in both cases the Court found that this condition was not satisfied. [30]

27. In addition, the Court subsequently held that, in order to qualify as a court or tribunal within the meaning of Article 177, the body making the reference must be independent. This criterion, perhaps because it goes to the very essence of the judicial function, was explicitly identified for the first time only in *Corbiau*, in which the Court declined jurisdiction on the ground that the body making the reference, although a court under national law, did not, in the Court's view, offer the necessary guarantees of impartiality between parties to disputes which it was called upon to resolve. [31] That case involved Luxembourg's Director of Taxation and Excise who had jurisdiction under the law to hear at first instance disputes between taxpayers and the departments (of which he was Director) which had charged them to tax.

26 — *Simmenthal*, paragraph 10.

27 — Case 138/80 [1980] ECR 1975.

28 — Case 318/85 [1986] ECR 955.

29 — *Borker* (loc. cit. footnote 27), paragraph 4.

30 — See also, on this point, the recent judgment in Case C-111/94 *Job Centre* [1995] ECR I-3361, which concerned voluntary proceedings involving an application for approval of a company's memorandum of association with a view to its registration. The Court held that the Tribunale di Milano, which made the reference, was in this instance performing the functions of an administrative authority rather than those of a judicial body.

31 — Case C-24/92 [1993] ECR I-1277. There had, in fact, already been some fairly explicit references to the criterion of independence in previous decisions: see, for example, the judgment in *Pretore di Salò*, in which the Court had regard, among other factors, to the referring court's independence in reaching the conclusion that it constituted a court or tribunal within the meaning of Article 177 (Case 14/86 [1987] ECR 2545, paragraph 7).

The criterion of independence also appears to have been a key factor, albeit with the opposite result, in *Asociación Española de Banca Privada*. [32] In that case the body making the reference was Spain's Tribunal de Defensa de la Competencia, which Advocate General Jacobs, in his Opinion, found to present a number of characteristics constitutive of a court or tribunal within the meaning of Article 177; these included the adversarial nature of the procedure which was clearly laid down by law, the independent exercise by its members of their functions and the fact that its members could not be removed from office. [33] In its judgment the Court did not specifically address the issue; but the fact that it replied to the questions submitted indicates that the Court implicitly endorsed the view of the Advocate General.

28. These decisions therefore clearly show that, even in the absence of a general definition of the concept of court or tribunal within the meaning of Article 177, the Court has developed a number of tests which must be satisfied in order for a body to be entitled to make a reference for a preliminary ruling.

These tests concern the manner of establishment of the body, which must have been established by law and not by agreement between the parties; its connection to the exercise of public authority; its permanent nature, in the sense that it must not exercise a judicial function only on an occasional basis; its competence to resolve a dispute by a decision of a judicial nature; the conduct, before it, of a procedure analogous to that which is followed in ordinary courts of law, involving (within the limits discussed above) exchange of argument *inter partes*; the application by the body in question of rules of law (rather than principles of fairness); compulsory jurisdiction, which means that alternative remedies are not available; and finally independence, in the sense that it acts as a third party in relation to the parties to the dispute and that its members may not be removed from office.

29. To return to the case in hand, it is now therefore necessary to establish whether the Federal Supervisory Board possesses the characteristics allowing it to be regarded as performing a judicial function, as required by the Court for the purposes of Article 177 of the Treaty.

As already mentioned, the Commission takes the view that the Federal Supervisory Board does not satisfy any of the tests laid down by the Court in the cases referred to above. Its main argument is that the Federal Supervisory Board was established by a 'framework' Law (the Second Law amending the HGrG), which does not impose obligations or confer rights on individuals and which must be supplemented by regulations; moreover, the body in question could easily be 'deprived' of its legal basis — and thereby of its capacity to give judgment — in cases such as the

32 — Case C-67/91 [1992] ECR I-4785.

33 — Opinion of Advocate General Jacobs, delivered on 10 June 1992, [1992] ECR I-4806, paragraph 11.

present case where there is no competent review body at first instance. The Commission also makes these points: that the referring body does not make its determinations following an *inter partes* procedure, as is confirmed in the grounds of its first decision; [34] that its proceedings are governed by internal rules of procedure which have not been published and which may be amended autonomously at any time; that there is no legislative provision for its determinations to have binding legal effect; that it is not an independent body, since it is linked to the staff and organizational structure of the Bundeskartellamt, which is itself an administrative rather than a judicial body; and that the minimum term of office of its 'official' members and of its chairman is not fixed by law.

30. In view of the nature of the Federal Supervisory Board, the legislative technique by which it was established and, above all, the provisions governing the way in which it functions, I must confess that I agree with at least some of the Commission's observations, which I also consider to be particularly important.

To begin with, I do not believe that the rules governing the review procedure before the supervisory boards can be regarded as comparable to the rules governing procedure before ordinary courts of law. On the contrary, the fact that, under the legislation, rules of procedure are to be adopted autonomously by each supervisory board, which may subsequently amend them autonomously, and that in addition there is no requirement that they be published, leads me to conclude that the degree of transparency and legal certainty required in any judicial process is not guaranteed here.

31. I am not only referring here to the absence of any *inter partes* procedure, which has now been proved in practice: of far greater significance, to my mind, is the absence of the minimal 'functional' requirements which characterize judicial proceedings, as found in *Vaassen-Göbbels*. [35] In that case, as I have explained, the rules of procedure governing proceedings before the referring body were subject to the approval of the Minister responsible, so that there could be no doubt as to the certainty, transparency and ascertainability of the procedural rules applicable. That fact, which was indeed expressly mentioned was taken into consideration both by the Advocate General and by the Court in arriving at the conclusion that the body in question in that case

34 — Decision of 2 August 1994 (published in *EU Public Contract Law*, No 3/94, p. 47 et seq.), in which the Federal Supervisory Board stated that it did not conduct an *inter partes* procedure and that the parties' applications were only requests for a particular determination.

35 — Of course, in attaching less importance, in *Simmenthal* (within the limits referred to above), to the specific requirement of *inter partes* procedure, the Court certainly did not intend to dispense with the more general requirement for the procedure to be of a judicial nature. It is in fact a fundamental requirement which played a decisive role not only in *Vaassen-Göbbels*, where it was expressly addressed, but also, as we have seen, in the reasoning underlying the other decisions of the Court on this issue.

was 'bound by rules of adversary procedure *similar to those used by the ordinary courts of law*'. [36]

32. In the present case, however, I find it difficult to see similar procedural safeguards; if they do exist, they are subject to 'opaque' autonomous amendment by the decision-making body and this seems to me to run counter to the most basic requirements of legal certainty. The point is borne out, indeed, by the Commission's doubts, referred to above, as to the version of the rules of procedure now in force due to the discrepancies between the version provided by the German Government in the course of the enforcement proceedings and the version produced in this case.

In these circumstances, I do not consider that the review proceedings conducted before the Federal Supervisory Board can be regarded as having the character of judicial proceedings as required by the Court. In this regard, the present case falls clearly outside even the generously broad parameters laid down in *Vaassen-Göbbels*.

36 — See *Vaassen-Göbbels* (loc. cit. footnote 21), paragraph 1 (emphasis added), and the Opinion of Advocate General Gand in the same case, where he states: 'The procedure which is followed (...) is of a judicial nature'.

33. There are also serious doubts, in my opinion, regarding the independence of the Federal Supervisory Board, at least as regards the question of unremoveability of its members from office.

Of significance in this regard is Paragraph 57c(7) of the HGrG, which I shall recapitulate for the sake of convenience: the 'official' members of the Federal Supervisory Board are Bundeskartellamt department chairmen and assessors, with the former acting as chairmen of the chambers of the Board. The president of the Bundeskartellamt appoints the lay assessors, decides on the formation and composition of chambers and exercises administrative supervisory control by delegation from the Government. [37] The Federal Supervisory Board also uses the Bundeskartellamt's facilities and services.

34. In other words the 'official' members of the Board are also members of the Bundeskartellamt and formally remain on its staff. In practice, this means that they simul-

37 — This control is limited to reproach (Vorhalt) and reprimand (Ermahnung) and consequently, according to legal writers, should in no case concern the content of judicial determinations. The case-law appears to confirm this view, although there are exceptions in cases of purportedly manifest error. See also, in this regard, Paragraph 26(1) and Paragraph 26(2) of the DRiG, which are applicable to the body in issue and which provide that administrative supervisory control over the actions of members of the judiciary cannot limit their independence. Paragraph 26(3), which gives judges the right to challenge administrative supervisory measures addressed to them, does not, however, apply to 'official' board members (Paragraph 57c(3)).

taneously perform the functions of Federal Supervisory Board members and those of Bundeskartellamt members. Moreover, the legislation establishing the body in question does not include any provision as to the term of office of its 'official' members, and the fact that the term of office of the lay members is fixed (at five years) [38] suggests that the omission was not inadvertent.

What all this amounts to, in effect, is that not only do the members of the Federal Supervisory Board enjoy no guarantee against dismissal, but neither do they have the assurance of a fixed term of office, which is an essential prerequisite of independence. On the contrary, they can be relieved of their 'additional' duties and re-assigned to their 'ordinary' duties at any moment and by means of purely internal organizational measures. While it is true, as we have seen, that some of the provisions of the DRiG regarding the permanence and independence of members of the judiciary apply by analogy to the members of the Board when acting in that capacity, [39] it is also the case that the latter are not covered by the DRiG provisions which give members of the judiciary the right to challenge their removal from office or re-assignment, with the result that they may be freely 'dismissed' at any time by the president of the Bundeskartellamt.

35. Nor do I believe that the *petitio principii* contained in Paragraph 57c(3), which provides that the members of the Board are to be independent and unremovable, is sufficient to justify taking a different view, since it is contradicted by the fact that the Board members belong to the administrative authority and continue to belong to it, even from a functional point of view. Such a system, under which a limited number of administrative officials are, temporarily and for the performance of specific functions, given the title of judge and then made subject to an equally limited number of provisions applicable to members of the judiciary, but excluding the safeguards which ordinarily apply to the judiciary in relation to removal from office and re-assignment, appears to me to be too complicated and too intransparent to guarantee in practice the stability required to ensure the independence of those performing judicial functions.

36. One can have further doubts about the specific question of the impartiality of the Federal Supervisory Board in relation to disputes falling within its area of jurisdiction. This body is, as we have seen, part of the Bundeskartellamt, which is part of the public administration, but it is given power, in spite of this, to adjudicate in disputes involving public procurement awards, that is to say in disputes between the public administration itself and citizens. This fact alone would make it impossible to regard the Federal Supervisory Board as acting as a third party, thus independently. Unless, of course, one regards judicial independence as a moral

38 — HGrG, Paragraph 57c(2).

39 — See *supra* note 7.

quality of the actual persons who sit on the bench. [40]

37. Lastly, the Commission put forward a further telling argument with which I would agree. The legislation establishing the Federal Supervisory Board makes no provision concerning the legal effects of its determinations, especially their binding force. Since the body in question is one which, under national law, is not a court, the general principle that all judicial determinations are binding does not apply. So, in the absence of express provisions, the fact that the body in question was established using the so-called 'budget solution', with the declared aim of not creating individual rights for those taking part in public tendering procedures, [41] gives rise to doubts as to the binding nature of its decisions. [42]

This is a factor which produces further doubts as to the judicial nature of the decisions which the Board is called upon to take and thus as to whether it can be regarded as having the attributes of a court or tribunal within the meaning of Article 177.

38. So, in view of all of the points I have made, I consider that the Federal Supervisory Board does not satisfy the requirements, certainly as far as procedural safeguards and guarantees of independence are concerned, for it to qualify as a court or tribunal within the meaning of Article 177 and therefore that its reference is inadmissible.

39. It could be argued, on the other hand, that when a reference is made by a body which offers the only legal remedy available to an individual relying on Community law, the Court should accept the reference in any event, in order to prevent the applicant from being deprived of an effective remedy and to ensure the uniform application of Community law.

This is, in substance, the argument put forward by the applicant. As mentioned above, even though the applicant submits that the Federal Supervisory Board is not a court or tribunal within the meaning of Article 177, it

40 — See the judgment in *Corbiau* (loc. cit. footnote 31). It is true that in that case the referring body was linked to the very departments which had made the disputed tax assessment: however, the rationale of the Court's judgment (and of the Advocate General's Opinion) is not unlike the approach which should prevail in the present case, since the Federal Supervisory Board is, after all, an integral part of the public administration and thus is not a third party in relation to disputes between the administration and citizens.

41 — See the explanatory memorandum to the Draft Amending Law to the HGrG (BT-Drucksache 12/4636, p. 12).

42 — See the doubts expressed by legal writers, in particular by Boesen, EuZW 1996, p. 586, who points out that the decisions of the Federal Supervisory Board are not enforceable; see also, on the same point, the letter of formal notice and the reasoned opinion sent by the Commission to the German Government in the enforcement proceedings referred to above.

suggests that the Court should turn a blind eye to this and nevertheless answer the question submitted by the Board on the ground that not to do so would be detrimental to the applicant. This proposal might be supported, it claims, by the judgment in *Broekmeulen* in which, as explained above, the Court accepted a reference from a professional body having the power to hear appeals concerning the registration of members of the profession and held, *inter alia:* 'in the absence, in practice, of any right of appeal to the ordinary courts, the appeals committee, which operates with the consent of the public authorities and with their cooperation, and which, after an adversarial procedure, delivers decisions which are in fact recognized as final, must, in a matter involving the application of Community law, be considered as a court or tribunal of a Member State within the meaning of Article 177 of the Treaty'. [43]

40. I cannot subscribe to the applicant's argument; the ratio of *Broekmeulen* should not be stretched too far. The subjective and objective conditions for the functioning of the system of cooperation between national courts and the Court of Justice, which was created by Article 177 of the Treaty, cannot vary in accordance with the particular circumstances of each case. If a body is not a judicial body, it does not become one simply because there is no better solution. To hold otherwise and interpret *Broekmeulen* to that effect would mean conferring crucial importance on an aspect of the procedural system of which the body in question is part rather than on features of the body itself, so that it would no longer matter whether the requirements expressly laid down by the Court were satisfied or not.

41. In any event, even with the best of will to make concessions, the circumstances of the present case are altogether different in this respect. The decisive factor in *Broekmeulen* was, as quoted above, that 'in practice' there was no right of appeal to the ordinary courts for a citizen relying on a point of Community law.

In the present case, however, a person who considers himself to have been unlawfully excluded from a contract-award procedure is expressly given the possibility of bringing an action in damages for any loss suffered, which in itself could well provide, at least in principle, a satisfactory remedy.

42. Moreover, even in the absence of any express legislative provision and despite the doubts expressed by legal writers, ordinary German courts seem to have come round to the view that they have jurisdiction to hear cases brought by participants in contract-award procedures for alleged infringements of the relevant provisions, including those of Community law. This is borne out by two

43 — *Broekmeulen* (loc. cit. footnote 24), paragraph 17.

recent decisions in which the Kammergericht (Appeal Court) of Berlin ruled admissible — before dismissing them on the merits — applications for interlocutory relief by tenderers who had been excluded from public tendering procedures and were seeking the suspension of the award procedures. [44]

Furthermore, as I have already mentioned, the German Government has notified the Commission that it has commenced the process of amending its legislation to bring it into conformity with the review directive; the new rules will make express provision for, *inter alia*, review by the ordinary courts of the determinations of the supervisory boards. [45]

43. So, as matters stand, it would not only be entirely in line with the case-law of the Court but also pose no problem for the effective judicial protection of individual rights, in the sense explained above, if the Federal Supervisory Board were held not to be a court or tribunal within the meaning of Article 177.

On the contrary, I hold the view that the solution which I have advocated, that is to say that the Court should declare that it has no jurisdiction to rule on this reference, offers a wider perspective going beyond the present case and affords a greater safeguard of individual rights, for which only a court of law can provide effective protection. Underlying this conclusion is, quite clearly, the conviction that only those bodies which are able to provide all the safeguards of individual rights developed by the Court can be treated as courts or tribunals for the purposes of Article 177, and no others.

44. Lastly, one final consideration, based on the underlying purpose of the review directive, should not go unmentioned. As is well known, this directive was adopted to meet a strongly-felt need to raise and make uniform the level of judicial protection of individual rights in the field of public procurement. In some Member States, neither the award itself nor the other related administrative acts were capable of being challenged in a court of law, or if they were, then with unsatisfactory implications for subsequent contract-award procedures. It was in order to remedy these very defects that the review directive introduced the obligation for Member States to put in place a system capable of effectively ensuring the vindication of the substantive rights conferred by the relevant Community instruments (the directives on public works contracts, public supply contracts and public service contracts) on those taking part in public procurement procedures. This is the light in which the provisions of the directive should be read and, according to the Commission at least, in which the other Member States have implemented them until now. At the hearing the Commission produced a document providing an overview of the bodies to which the individual Member States have given jurisdiction in the matter of public procurement awards in order to transpose the review directive: the majority of Member

44 — Kammergericht Berlin, decisions of 10 April 1995 (KartU 7605/94, EuZW 1995, p. 645 et seq.) and of 31 May 1995 (KartU 3259/95, NVwZ 1996, p. 415 et seq.).

45 — I would point out that the legislative changes which are being enacted could mean that the ruling which the Court is now called upon to give will have only 'historical' significance, in relation, that is, to the issue of admissibility, concerning the question whether or not the existing supervisory boards are entitled to make a reference for a preliminary ruling.

States have designated the ordinary courts or, in those Member States where they exist, the administrative courts, subject to the appellate jurisdiction of the Council of State. [46]

This is a significant factor which, in my view, should be given due weight, whilst observing the distinction between this case and the enforcement action brought by the Commission under Article 169 of the Treaty.

45. Having regard to all the considerations set forth above, I propose, in conclusion, that the reference for a preliminary ruling should be declared inadmissible on the ground that the body which made it is not a court or tribunal within the meaning of Article 177 of the Treaty.

Substance

46. On the substance of the reference, which I shall consider solely for the sake of completeness, a few remarks will suffice.

The question is, as I have stated, whether, after expiry of the period for transposition of the services directive, the review bodies are also competent to review procedures for the award of public service contracts in the absence of any express measure conferring such jurisdiction upon them (in this case, a Federal regulation, although this is provided for by statute).

47. Both the applicant and the German Government argue that, since the relevant provisions of the services directive must be regarded as having direct effect, [47] the bodies set up for the purposes of the review directive should also be able to adjudicate in disputes in relation to public service contracts.

Clearly, however, this is an issue which cannot be determined by the Court in these proceedings. For the Court may not take the place of the national legislature, to which the relevant power has been expressly reserved by law, and decide whether the review bodies should also review procedures for the award of public service contracts.

46 — The Commission has thus declared itself satisfied with the transposition measures adopted by all the Member States (with the exception, of course, of the Federal Republic of Germany, against which it has commenced Article 169 proceedings).

47 — Such direct effect, besides deriving from the sufficiently precise and unconditional character of the provisions in issue, was, it is argued, confirmed by the Court, albeit indirectly, in the judgment in Case C-253/95 *Commission* v *Germany*, where it was held that the German Government had failed in its obligation to transpose the services directive (see footnote 14).

48. Relying on the direct effect of the provisions of the services directive does not change matters. Even if the Court were to find that the relevant provisions are indeed directly effective, this would merely mean that an individual had the right to rely on those provisions before *a* court; under no circumstances could it go so far as to indicate before *which* court that should be, for this would encroach on the domain of the national legislature. [48]

If an individual had no actual possibility of relying on a directly effective provision of Community law for want of a court competent to hear his case, this would, of course, indicate the existence of a clear violation of Community law. [49] Such a violation could, of course, be pursued by the competent authorities using the procedures provided for in such cases and could also bring into play the remedies which the Court has established in the area of State liability towards individuals who have suffered material loss as a result of the failure of the State in question to fulfil its obligations under Community law. But, to repeat, these are remedies which, both in form and in substance, are distinct from the procedure now in point and therefore have no bearing on the solution which I have proposed in this case.

49. In view of the considerations set out above, I therefore propose that the Court should declare the reference for a preliminary ruling inadmissible, on the ground that the Federal Public Procurement Awards Supervisory Board, which made the reference, is not a court or tribunal within the meaning of Article 177 of the Treaty.

48 — See, on this very point, Case 179/84 *Bozetti* v *Invernizzi* [1985] ECR 2301, at paragraph 17, and the more recent judgment in Case C-446/93 *SEIM* [1996] ECR I-73, where it was held that '... it is for the legal system of each Member State to determine which court has jurisdiction to hear disputes involving individual rights derived from Community law, but at the same time the Member States are responsible for ensuring that those rights are effectively protected in each case. Subject to that reservation, it is not for the Court to intervene in order to resolve questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system' (at paragraph 32).

49 — And, in all likelihood, a breach of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, which enshrines the right of access to a court of law.