OPINION OF ADVOCATE GENERAL LÉGER

delivered on 13 June 2002 [1]

1. By this action, the Commission of the European Communities seeks a declaration that the Kingdom of Spain has failed to fulfil its obligations under Articles 1 and 2 of Directive 89/665/EEC. [2] It claims, in essence, that Spain has failed to transpose those articles correctly and completely into national law, because the national implementing measures preclude:

— a priori from their field of application public bodies governed by private law;

— review of certain decisions adopted by the contracting authorities during the procedure for the award of public contracts, and

— the possibility of all types of appropriate interim measures being granted in relation to decisions adopted by the contracting authorities, by requiring that an action must first be brought against the unlawful measure.

I — Legal framework

Community legislation

2. The aim of Directive 89/665 is to ensure the effective application of the Directives on public procurement, [3] in particular of Directive 71/305/EEC, [4] repealed and replaced by Directive 93/37/EEC, [5] of Directive 77/62/EEC, [6] repealed and replaced by Directive 93/36/EEC, [7] and of

1 — Original language: French.

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, hereinafter called 'the review directive').

3 — See the first, third and fourth recitals.

4 — Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

5 — Council Directive 93/37/EEC of 14 June 1993 (OJ 1993 L 199, p. 54).

6 — Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1).

7 — Council Directive 93/36/EEC of 14 June 1993 (OJ 1993 L 199, p. 1).

Directive 92/50/EEC.[8] Directives 92/50, 93/36 and 93/37 are designed to coordinate procedures for the award of public contracts for works, supplies and services in the Member States.

3. Article 1(1) of Directive 89/665, as amended by Article 41 of Directive 92/50, provides:

'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 provisions set out in the following Articles and, in particular, Article 2(7), [9] on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

4. Article 2(1) of the review directive states:

'The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.'

8 — Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1). Directives 92/50, 93/36 and 93/37 will hereinafter be called 'the procedure directives' or 'the directives applicable in the "traditional" sectors' (for the meaning of the latter expression, see point 48 of this Opinion).

9 — Under that provision, '[t]he Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.'

5. Under Article 2(8) of Directive 89/665, '[w]here bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review... .'

6. The term 'contracting authorities' is defined in Directives 92/50, 93/36 and 93/37.

7. Article 1(b) of Directive 93/37, which is essentially identical in content to Article 1(b) of Directives 92/50 and 93/36, provides:

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

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

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

— having legal personality, and

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

National legislation

8. The scope *ratione personae* of the Spanish legislation on public procurement is established by Article 1 of Ley 13/1995 de Contratos de las Administraciones Públicas, [10] which covers all territorial public authorities, whether the State authorities or the authorities of the Autonomous Communities and regional or local authorities. Article 1(3) provides:

'This law shall also apply in every case to the awarding of contracts by autonomous bodies and by other bodies governed by public law having legal personality and connected with or under the control of a public authority, which fulfil the following criteria:

(a) they were established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they are financed, for the most part, by public authorities or other bodies governed by public law, or are subject to management supervision by those bodies, or have an administrative, managerial or supervisory board, more than half of whose members are appointed by public authority or by other bodies governed by public law.'

9. The sixth additional provision of Law 13/1995, entitled 'Rules applicable to the award of contracts in the public sector', reads as follows:

'Commercial companies in which public administrations or their autonomous bodies, or bodies governed by public law, hold, directly or indirectly, a majority shareholding, shall, when awarding contracts, comply with the advertising and competition rules, unless the nature of the operation to be carried out is incompatible with those rules.'

10. Since the present action was lodged, the Kingdom of Spain has adopted a new consolidated version of the aforementioned law, [11] which merely brings together and organises the previous provisions, without amending their substance.

10 — BOE No 119, 19 May 1995, p. 14601, hereinafter 'Law 13/1995'.

11 — The Texto Refundido de la Ley de Contratos de las Administraciones Públicas (BOE No 148, 21 June 2000, p. 21775).

11. As regards administrative appeals, Article 107 of Ley 30/1992 de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común, as amended by Ley 4/1999, [12] provides that the following measures are subject to direct appeal:

'... procedural measures, if they decide, directly or indirectly, the substantive issues, render it impossible to continue the procedure, render it impossible to conduct a defence, or cause irreparable harm to legitimate rights or interests.'

12. So far as concerns administrative appeal proceedings, Article 25(1) of Ley 29/1998 Reguladora de la Jurisdicción Contencioso-Administrativa [13] (Law governing contentious-administrative jurisdiction), using the same wording as Law 30/1992, provides:

'Administrative appeal proceedings are admissible in respect of provisions of a general nature and express and implicit measures, whether definitive or procedural, adopted by the public authority which bring an end to the administrative procedure, if they decide, directly or indirectly, the substantive issues, render it impossible to continue the procedure, render it impossible to conduct a defence, or cause irreparable harm to legitimate rights or interests.'

13. Article 111 of Law 30/1992, provides, under the heading 'Suspension of operation':

'1. Unless otherwise provided, the commencement of an action will not suspend the operation of the contested measure.

2. Notwithstanding the provisions of the previous paragraph, the body responsible for carrying out review may, having weighed up the harm which suspension would cause the public interest or third parties as against the harm caused to the applicant by the immediate implementation of the contested measure, and given adequate reasons, suspend operation of the contested measure, on its own initiative or at the request of the applicant, in one of the following circumstances:

(a) Operation is likely to cause harm which is irreparable or reparable only with difficulty.

(b) The dispute is based on one of the legal grounds for automatic nullity... .

12 — BOE No 12, 14 January 1999, p. 1739 (hereinafter 'Law 30/1992').

13 — BOE No 167, 14 July 1998, p. 23516 (hereinafter 'Law 29/1998').

3. If the competent authority has not given an express decision on the application for suspension of operation of the contested measure within a period of 30 days from the date on which the application was entered in the case-list, suspension will be deemed to have been granted.'

14. Article 129 et seq. of Law 29/1998 establish a system for the expeditious adoption of protective measures. Under Article 129(1):

'The parties concerned may request, at any stage of the proceedings, the adoption of any measures to ensure the effectiveness of the judgment to be given.'

15. Article 136 of the law provides:

'1. In the circumstances referred to in Articles 29 and 30, a protective measure shall be adopted, unless it is evident that the criteria laid down in those articles are not fulfilled or that the measure will seriously affect the general interest or the interests of third parties, which the court shall assess in detail.

2. In the circumstances mentioned in the previous paragraph, measures may also be applied for before the appeal is lodged, and the application shall be examined in accordance with the provisions of the previous article. In that event, the party concerned shall request confirmation of the measures when he lodges the appeal, which he is required to do within 10 days from the date of notification of the adoption of the protective measures... .

If no appeal ensues, the measures granted will be automatically void, and the applicant will be required to pay compensation for the damage caused by the protective measure.'

16. Articles 29 and 30 of Law 29/1998 apply to: (a) cases in which the authority is required, pursuant to a provision, a contract or a measure, to provide a particular service to one or more specific persons; (b) cases in which the authority does not implement its definitive measures, or (c) blatantly unlawful conduct.

II — Procedure

A — *The pre-litigation stage*

17. By letter of 18 December 1991, the Spanish Government notified the Commission of the legislation in force at the time which it considered transposed Directive

89/665 into national law, namely the Ley reguladora de la Jurisdicción Contencioso-Administrativo (Law governing administrative courts) of 27 December 1956, the Ley de Procedimiento Administrativo (Law governing administrative procedure) of 18 July 1958, the Ley de Contratos del Estado (Law on public procurement) and the Spanish Constitution.

18. Following various exchanges during 1994 between the Commission's departments and the Spanish authorities regarding the compliance of the national legislation with the Community provisions, on 29 May 1996 the Commission, considering that the replies given by the Spanish authorities were unsatisfactory, sent the Spanish Government a letter of formal notice.

19. In that letter, the Commission makes the following complaints about the Spanish transposition measures:

— their scope *ratione personae* is not the same as that of the review directive;

— 'procedural' measures are subject to direct appeal only in exceptional circumstances, and

— an appeal on the merits must first be brought against an unlawful administrative measure before suspension can be granted.

20. On 9 October 1996, in reply to the letter of formal notice, the Spanish Government pointed out, with regard to the first point, that Law 13/1995 contained a literal transcription of the term 'body governed by public law' referred to in Directives 92/50, 93/36 and 93/37. As regards the two other points, it reiterated the circumstances in which a procedural measure may be subject to direct appeal and stressed the legal requirement that an action must first be brought against the unlawful decision before that decision may be suspended.

21. In spite of the various exchanges which took place during 1998, the Spanish authorities and the Commission maintained their respective positions in respect of the first and third complaints — relating to scope of application and to interim measures. With regard to the second complaint, which alleged that the notion of renewable measures had been incorrectly transposed, the authorities informed the Commission, on 14 January 1999, that the new law on administrative courts partly amended the rules applicable to procedural measures.

22. On 2 February 1999, the Spanish authorities sent the Commission official notification of Laws 29/1998 and 4/1999.

23. The Commission considered that the new legislation still did not enable it to conclude that the Kingdom of Spain had put an end to the infringements alleged in the letter of formal notice and, on 25 August 1999, sent it a reasoned opinion. In that opinion, the Commission repeated the content of the letter of formal notice and invited the Spanish Government to adopt the measures necessary to comply with it within two months of the date of its notification.

24. On 8 November 1999, in reply to the reasoned opinion, the Spanish Government denied the alleged infringements and disputed the Commission's assessment.

25. The Commission considered that the reply given did not enable it to conclude that the Kingdom of Spain had complied with its obligations under the review directive and decided to bring the present action.

B — *Forms of order sought by the parties*

26. The Commission's action was lodged at the Registry of the Court of Justice on 30 May 2000.

27. The Commission claims that the Court should:

'1. Declare that, by failing to adopt the measures needed to comply with Articles 1 and 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, and in particular by failing to:

— extend the system of review procedures provided for by that directive to decisions adopted by all contracting authorities, within the meaning of Article 1(1) of Directives 92/50/EEC, 93/36/EC and 93/37/EC, including companies governed by private law established for the specific purpose of meeting needs in the general interest which do not have an industrial or commercial character, have legal personality, and are financed for the most part by public authorities or other entities governed by public law, or are subject to management supervision by the latter, or have an administrative, management or supervisory board more than half of whose members are appointed by the public authorities or other entities governed by public law;

— allow review to be sought of all decisions adopted by the contracting authorities, including all procedural measures, during the procedure for the award of public contracts;

— provide for the possibility of appropriate interim measures being granted in relation to decisions adopted by the contracting authorities, including measures aimed at enabling administrative decisions to be suspended, removing for that purpose difficulties and obstacles of any type and in particular the need first to bring an action against the decision of the contracting authority,

the Kingdom of Spain has failed to fulfil its obligations under Community law;

2. Order the Kingdom of Spain to pay the costs.'

28. The Kingdom of Spain contends that the Court should:

'— Dismiss the action;

— Order the Commission to pay the costs.'

III — The first plea, concerning the incorrect transposition of the scope *ratione personae* of the review directive (infringement of Article 1(1) of the directive)

A — *Arguments of the parties*

1. The Commission's arguments

29. The Commission alleges that the Kingdom of Spain was wrong to consider that entities governed by private law were excluded a priori from the scope *ratione personae* of the review directive.

30. The Commission points out that, when transposing Community directives into national law, the Member States are required to respect the meaning of the terms and definitions contained in them, in order to ensure uniform interpretation and implementation of the legislation in the different Member States.

31. Consequently, the Spanish authorities are required to give the term 'body governed by public law', used in the procedure directives, the meaning that it has in Community law. According to the Commission, Directives 92/50, 93/36 and 93/37 make no mention of the regime, public or private, under which the bodies governed by public law were set up, nor the legal form adopted, but focus rather on other criteria, including the purpose for which the bodies in question were created. That interpretation was confirmed in the judgment in *Mannesmann Anlagenbau Austria and Others*. [14] In that case, the Court of Justice held that the expression must be interpreted in functional terms. Therefore, the legal form of an entity is irrelevant.

32. The Commission maintains that the wording of Article 1 of Law 13/1995, which reproduces almost verbatim the content of the corresponding provisions of the procedure directives, nevertheless contains one essential difference. Under the provision, entities governed by private law are excluded from the field of application of that law. In that regard, the Commission states that, in the Spanish legal system, the term 'body governed by public law' is linked to the method by which those entities are set up. It therefore infers that Law 13/1995, read in conjunction with its sixth additional provision, adds a prerequisite which is not provided for in the Community legislation, namely that the entity should be governed by public law. Consequently, entities governed by private law are, by definition, always excluded from the scope of application of that law, even if they otherwise comply with the provisions of Article 1(3) of the Law in every respect.

33. Since public bodies incorporated under private law are excluded from the scope of that Spanish legislation, they likewise fall outside the scope of the provisions governing the procedures for awarding public contracts and, therefore, of the review procedures relating to public contracts, whether they were set up to meet needs of general interest or purely industrial or commercial needs. That exclusion therefore infringes the provisions of Directives 92/50, 93/36 and 93/37 which define their scope, and also the provisions of Directive 89/665, since it precludes the application of the procedural safeguards provided by that directive.

34. As regards the Spanish Government's argument that the solution to the problems of interpretation regarding the term 'needs in the general interest which are not of an industrial or commercial character' requires a detailed case-by-case assessment, in order to determine whether a body or an entity complies with the conditions for applicability of the directives, the Commission points out that those problems cannot provide a reason for excluding a priori, as that Government has done, a whole group of bodies — entities governed by private law which fulfil the three conditions laid

14 — Case C-44/96 *Mannesmann Anlagenbau and Others* [1998] ECR I-73, paragraphs 17 to 35.

down by Directives 92/50, 93/36 and 93/37 — from the scope of Directive 89/665, even if that exclusion is subject to a case-by-case review.

2. The arguments of the Kingdom of Spain

35. As its principal argument, the Spanish Government states that the Commission's action is ill-founded and therefore that it is wrong to maintain that the term 'contracting authorities' contained in Article 1 of the review directive has been incorrectly transposed into the Spanish legal system.

36. According to the Spanish Government, the Commission, although formally complaining that it has infringed the provisions of Article 1 of the review directive, is in fact complaining that Article 1 of the procedure directives has been incorrectly transposed. However, since it has failed to bring the matter of the infringement of those provisions before the Court of Justice, the Commission has forfeited the possibility of obtaining a decision from the Court on that point. The Spanish Government maintains, therefore, that it is for the Commission to bring more suitable proceedings, and consequently to initiate a different form of procedure to establish the infringement of Directives 92/50, 93/36 and 93/37 if it intends to proceed against the Kingdom of Spain for incorrectly transposing their scope *ratione personae*.

37. In any event, the Spanish Government maintains that Article 1 of the procedure directives is irrelevant to an interpretation of the term 'contracting authorities' contained in Article 1 of the review directive, for two reasons. First, the review and procedure directives do not have the same subject-matter. Secondly, they take effect at different stages in the procedure of awarding public contracts. Directive 89/665 provides expressly that Member States must introduce efficient and rapid review procedures in the event of infringement of the rules contained in the directives concerning public procurement procedures. Directive 89/665 therefore takes effect after the procedure directives. The term 'contracting authorities' contained in Directive 89/665 cannot, therefore, be interpreted in the light of the term 'body governed by public law' previously defined in the procedure directives.

38. In the alternative, the Spanish Government contends that the scope *ratione personae* of the procedure directives has been correctly transposed.

39. As regards, first of all, the interpretation of the applicable rules, the Spanish Government points out that the expression 'body governed by public law', which is used in the procedure directives, refers to an entity governed by public law and that, in Spain, the terms 'entity governed by public law' and 'body governed by public law' are used indiscriminately.

40. The term 'body governed by public law' does not lend itself to a general autonomous definition.

41. The Spanish Government accordingly states that, in Directives 92/50, 93/36 and 93/37, the term 'body governed by public law' does not include commercial companies under public control. It submits that the fact that Directive 93/38/EEC [15] concerning public procurement in particular sectors makes a distinction between the term 'body governed by public law', which is the same in the four directives, and the term 'public undertaking', the definition of which corresponds to that of 'public commercial company', shows that there are two distinct concepts. The Spanish Government considers that commercial companies with mostly publicly-held capital are covered by the term 'public undertaking' to which only Directive 93/38 applies. Those companies can never fall within the scope of Directives 92/50, 93/36 and 93/37 since the term 'public undertaking' appears only in Directive 93/38 although it could also have appeared in the other two directives adopted on the same day (namely Directives 93/36 and 93/37) if the legislature had so wished.

42. The Spanish Government also points out that, in order to define the term 'body governed by public law', it is first necessary to specify the commercial or industrial nature of the 'need in the general interest' which it is designed to meet. It states that, in the Spanish legal system, public commercial companies have, in principle, the task of meeting needs in the general interest, which explains why they are under public control. However, those needs are of a commercial and industrial character, because, if that were not the case, they would not be the subject of a commercial company. In other words, in Spain, the legal form of the entity is crucial in determining the rules applicable to its activity. Thus, in Spain, a public entity, incorporated in public form, is governed by public law. On the other hand, a private entity, incorporated in private form, is governed by private law. It cannot be regarded as a body governed by public law and, in principle, is not covered by the rules governing public procurement.

43. Since the interpretation of the term 'body governed by public law' is not uniform in the various Member States, the Spanish Government considers that it is not possible to provide an overall definitive solution to determine the scope *ratione personae* of the procedure and review directives. It submits that, on the contrary, it is necessary to consider each specific case and, in particular, the context in which it evolves. The Spanish Government therefore concludes that, in order to determine whether or not a body or entity fulfils the conditions which would bring it within the scope *ratione personae* of the Community directives, each case must be examined separately.

15 — Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

B — *Assessment*

44. It is apparent from Article 1 of Law 30/1992, read in conjunction with its sixth additional provision, that public bodies incorporated under private law are, in principle, excluded from the rules governing public procurement.

45. However, the wording of Article 1(1) of the review directive and also its objectives preclude a body's legal form and regime as a private entity being such as to exclude it from the scope *ratione personae* of the review directive.

46. Article 1(1) of the review directive expressly provides that the term 'contracting authorities' is defined by reference to the scope of the procedure directives as established in Article 1(b) of those directives.

47. Article 1(1) of the review directive provides:

'The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives [92/50, 93/36 and 93/37], 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... on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

48. That article thus states, in substance, that the *decisions of the contracting authorities* must be subject to effective and rapid review. It does not *directly* define the term 'contracting authorities' but refers especially to the provisions relating to the scope of the directives governing public procurement procedures in the 'traditional' sectors, as opposed to 'special' sectors. [16] The procurement procedures for entities operating in special sectors are set out in Directive 90/531/EEC, [17] repealed and replaced by Directive 93/38. Directive 92/13/EEC [18] was especially [19] adopted in order to establish procedures for appeals against decisions taken by the contracting authorities pursuant to Directive 93/38. It adapts to the public utility sectors the

16 — The 'special sectors' are the public utility sectors, such as water, energy, transport and telecommunications.

17 — Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1).

18 — Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

19 — The fourth recital in the preamble to Directive 92/13 makes it clear that Directive 89/665 is limited to public procurement procedures in the so-called 'traditional' sectors.

appeal remedies provided for the traditional sectors by Directive 89/665 and also provides specific grounds of appeal. [20]

49. The scope of the review directive is therefore clearly restricted to the scope of the procedure directives operating in the 'traditional' sectors. In consequence, the rules laid down in Directive 89/665 do not concern the appeal proceedings brought against decisions adopted by contracting authorities pursuant to Directive 93/38. The Spanish Government's argument that the distinction made in Directive 93/38 between the terms 'contracting authorities' and 'public undertaking' supports the conclusion that it is impossible to give the term 'contracting authorities' contained in Article 1(1) of the review directive an independent definition is therefore irrelevant.

50. It follows from the above that the term 'contracting authorities' contained in Article 1(1) of the review directive must be evaluated in the light of Article 1(b) of the procedure directives which define the scope *ratione personae* of those directives.

20 — See attestation procedure (Articles 3 to 7 of Directive 92/13), corrective mechanism (Article 8 of Directive 92/13) and conciliation procedure (Articles 9 to 11 of Directive 92/13).

51. The objective of the review directive confirms the wording of Article 1(1), and thus the close link between that directive and the procedure directives.

52. It is clear, in fact, from the first, third and fourth recitals of the review directive, that the objective of Directive 89/665 is to establish grounds for effective and rapid review of decisions taken by contracting authorities pursuant to directives on public contracts for works, supplies and services, in order to ensure the effective application of the procedure directives.

53. The fact that the scope of the review directive and that of the procedure directives adopted previously are identical also justifies the use of a legislative technique which makes it possible to avoid needlessly overloading a provision, thereby rendering it easier to comprehend. A shared term for the same subject, such as public works, already defined in previous directives, may be explained by express reference to the relevant provisions of the directives adopted earlier, and that legislative technique cannot be criticised for not fulfilling the requirements of clarity and legal certainty.

54. It is apparent from the foregoing arguments that the term 'contracting authorities' contained in Article 1 of the review

directive is defined in Article 1(b) of the procedure directives. It remains to define what is meant by that term.

55. Under Article 1(b) of Directives 92/50, 93/36 and 93/37 contracting authorities are:

'... the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

Body governed by public law means any body:

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

— having legal personality and

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

56. In respect of that definition, the Court has consistently held [21] that '... "contracting authority", including a body governed by public law, must be interpreted in functional terms.' [22]

57. The Court has also invariably held that 'a body governed by public law' means a body which satisfies the three cumulative conditions set out in the second subparagraph of Article 1(b) of the procedure directives. [23]

58. Furthermore, according to the Court, the third condition set out in the third

21 — Since the judgment in *Mannesmann Anlagenbau and Others*, cited above, paragraphs 20 to 29.

22 — Case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraph 43.

23 — *Ibidem*, paragraphs 39 and 40.

indent of the second subparagraph of Article 1(b) of the procedure directives lists the alternative conditions which each reflect the close dependency of a body on the State, regional or local authorities or other bodies governed by public law. [24]

59. It is in the light of that case-law that the Court assesses whether or not a body should be classified as a contracting authority within the meaning of Article 1(b) of the procedure directives.

60. In *Commission* v *France*, cited above, the French Republic prevented 'sociétés anonymes d'habitations à loyer modéré' (low-rent housing corporations), [25] falling within the scope of Article L. 411-1 et seq. of the French Construction and Housing Code, from being classified as bodies governed by public law, within the meaning of Directive 93/37. Although it accepted that SA HLMs definitely satisfied the first two conditions, it contended that they did not fulfil the third condition set out in the third indent of the second subparagraph of Article 1(b) of the Directive, since they did not have sufficiently close links with the public authorities to allow the latter to influence their decisions in relation to public contracts. Consequently, the French Government maintained that SA HLMs could not be regarded as contracting authorities and that, therefore, the procedures for awarding public works contracts were not applicable to them.

61. The Court did not focus on the legal form and regime of those bodies covered by private law, but assessed whether the three cumulative conditions set out in Article 1(b) of Directive 93/37 were fulfilled. In that regard, it considered, unlike the French Government, that the third condition was also fulfilled since the management of SA HLMs was subject to supervision by the public authorities which allowed the latter to influence the decisions of the SA HLMs in relation to public contracts. [26]

62. Similarly, in *Mannesmann Anlagenbau Austria*, cited above, the Court held that an entity such as the Österreichische Staatsdruckerei (ÖS) should be classified as a body governed by public law and, consequently, as a contracting authority within the meaning of Article 1(b) of Directive 93/37. The Court noted, however, that under the law which had created it, that entity had the status of a trader within the meaning of the Commercial Code, was listed in the Register of Companies of the Commercial Court of Vienna, Austria and carried on its activities in accordance with the rules governing commerce.

24 — *Ibidem*, paragraph 44.

25 — Hereinafter 'SA HLMs'.

26 — *Commission* v *France*, cited above, paragraph 60.

63. In the same way, in *BFI Holding*,[27] the Court held that ARA, a limited company incorporated in accordance with private law, to which the Municipalities of Arnhem and Rheden (Netherlands) had decided to entrust tasks in the field of waste collection and cleaning of the municipal road network, could fall within the scope of the term 'body governed by public law' and, in consequence, be regarded as a contracting authority within the meaning of Article 1(b) of Directive 92/50, if it fulfilled the conditions laid down in that provision. In that judgment, the Court stated that 'the wording of the second subparagraph of Article 1(b) of Directive 92/50 makes no reference to the legal basis of the activities of the entity concerned'[28] and that, 'with a view to giving full effect to the principle of freedom of movement, the term "contracting authority" must be interpreted in functional terms.... In view of that need, no distinction should be drawn by reference to the legal form of the provisions setting up the entity and specifying the needs which it is to meet.'[29]

64. It is apparent from the above that bodies, entities and undertakings[30] which fall within the scope of the procedure directives are concerned by the review directive. In other words, those bodies must be regarded as contracting parties within the meaning of Article 1(1) of the review directive, if they fulfil the three cumulative conditions set out in Article 1(b) of the procedure directives. In that regard, it should be pointed out that, under Article 1(b) of the procedure directives, the legal form and regime of a body is not one of the criteria for classifying that body as a body governed by public law or as a contracting authority.

65. I therefore consider that the Spanish legislation transposing the review directive, by excluding a priori from the scope *ratione personae* of that directive bodies whose legal form and regime fall under by private law, is not complying with the meaning of 'contracting authority' laid down in Article 1 of the review directive and defined in the directives on public procurement procedures, particularly in Directives 92/50, 93/36 and 93/37.

66. From all the foregoing considerations I conclude that, by failing to extend the system of review procedures provided for by Directive 89/665 to decisions adopted by contracting authorities, within the meaning of Article 1(b) of Directives 92/50, 93/36 and 93/37, incorporated as private-law companies, which fulfil the conditions set out in that article, the Kingdom of Spain has failed to fulfil its obligations under Articles 1 and 2 of Directive 89/665.

27 — Case C-360/96 *Gemeente Arnhem and Gemeente Rheden* v *BFI Holding*'[1998] ECR I-6821.

28 — *Ibidem*, paragraph 61.

29 — *Ibidem*, paragraph 62.

30 — The terminology used in the case is unimportant.

IV — The second plea, alleging that the term 'measures against which appeals can be brought' has been incorrectly transposed (infringement of Article 1(1) and Article 2(1) of the review directive)

A — *Arguments of the parties*

1. The Commission's arguments

67. The Commission complains that the Kingdom of Spain limits the possibility of challenging certain decisions taken by the contracting authorities, particularly certain procedural measures.

68. The Commission points out that Directive 89/665 does not provide for any derogation from the possibility of challenging an unlawful decision taken by contracting authorities. Accordingly, it argues that, since the Spanish review provisions preclude the possibility of challenging certain unlawful decisions taken by contracting authorities, the scope of Directive 89/665 has been improperly reduced. The Commission points out that the Court of Justice, in its judgment in *Alcatel Austria and Others*,[31] held that it is clear from Article 1(1) of Directive 89/665 that the subject-matter of those review procedures will be decisions taken by the contracting authorities, on the ground that they infringe Community law on public procurement or the national rules transposing it, and that the provision does not lay down any restriction with regard to the nature and content of those decisions.

69. The relevant Spanish provisions (namely, Article 107 of Law 30/1992 and Article 25(1) of Law 29/1998) limit the possibility of bringing actions challenging procedural measures, that is to say, administrative measures which do not bring an administrative procedure to an end.

70. In support of that view, the Commission refers to two types of procedural measure which, contrary to the provisions of the review directive, are not subject to appeal.

71. The first example refers to a decision given by the Tribunal Supremo (Supreme Court) (Spain) concerning the request for additional documentation. According to the Commission, the request for production of additional documents made to a company competing in a tender procedure can be challenged only if the undertaking concerned is excluded from the procedure because it has not produced the additional documents requested. The Commission argues that that undertaking, even if it is not excluded from the procedure, could still

31 — Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraph 35.

be put in a weak position in relation to the other undertakings competing. That is why the Commission considers that the request for production of additional documents should itself be subject to appeal.

72. The second example relates to proposals for awards from committees which are subject to the control of the contracting authority. According to the Commission, the proposals put forward by those committees entrusted by the contracting authority with the preparation of the award document cannot be challenged, in infringement of the review directive.

73. The Commission concludes that the Spanish transposition legislation excludes from any judicial review certain decisions taken by the contracting authority on account of their nature and content. By so doing, it infringes the provisions of Article 1 of the review directive.

2. The arguments of the Kingdom of Spain

74. The Kingdom of Spain disputes that plea on the ground that the Commission has not established the existence of an infringement. It submits that the measures to which the Commission refers cannot be regarded as open to appeal because they do not have an adverse effect or are not preparatory measures. It states that Articles 1 and 2 of the review directive expressly provide that only decisions which have an adverse effect may be subject to appeal. The case-law cited by the Commission does not contradict that. The judgment in *Alcatel Austria and Others*, cited above, is therefore irrelevant in the present case.

75. The Spanish Government claims that the Commission's position fails to take account of the meaning of the term 'procedural measure' in Spanish law.

76. Under Spanish law, by definition, a procedural measure does not result in harm to the party concerned but, at the very most, prepares a definitive decision which will be favourable or unfavourable to him. Thus, a procedural measure does not involve adopting a position, but forms part of a procedure initiated in order to prepare a decision. The Spanish Government states that if a measure which is ostensibly a procedural measure in itself involved adopting a position, it would cease to be a procedural measure in the strict sense and would be open to appeal. Indeed, if that were not the case, the fundamental right to effective legal protection would be jeopardised.

77. The distinction which Spanish law draws between procedural or preparatory measures [32] and decisions is not unusual. In

32 — In that context, the terminology used is unimportant.

fact, according to the Spanish Government, the review systems in various Member States also acknowledge the rule that procedural measures designed to facilitate the adoption of a decision cannot be disputed in isolation, but only during an action for the annulment of that decision, unless the applicant can show that it is not merely a procedural measure but rather a measure which causes him definitive harm. The Spanish system is therefore no different from other review systems existing in the various Member States.

78. In any event, the Spanish Government does not understand what benefit it is to the party concerned to challenge a procedural measure which in itself does not cause him any harm. Similarly, it maintains that the aim of the review directive cannot be to paralyse the efficient conduct of the public procurement procedure by allowing dilatory and untimely appeals against every measure taken preparatory to a decision adopted by a contracting authority.

79. As regards the Commission's assertion that the Spanish system jeopardises the uniform implementation of Directive 89/665, the Spanish Government points out that the Commission has not shown in what respect that system jeopardises the objective of the review directive. It notes that, in accordance with the settled case-law of the Court of Justice, it is for the Commission to adduce proof of the alleged infringement. In the present case, the Commission has not provided any specific example showing that the Spanish legislation does not permit the parties concerned to enjoy adequate and effective legal protection against any procedural measure which adversely affects them.

80. With regard to the first example presented by the Commission, the Spanish Government points out that the Commission has not stated the reason why the criteria applied by the Tribunal Supremo in the judgment it has cited are contrary to the objective of Directive 89/665. In that judgment, the Tribunal Supremo stated that:

— the contested measure represents both the final decision awarding the contract and an obligation imposed by the administration on the three successful undertakings to provide it with certain additional documentation (first ground of the judgment);

— that obligation is a procedural measure since it does not bring an end to the tender procedure, but is only a stage in the process which will terminate in the award of the contract. It is not a decision subject to independent appeal but merely a preliminary to the decision. The validity of that request

for additional documentation can be called in question only in proceedings to review the definitive measure (second ground of the judgment);

— the challenge to the request for information does not render the award decision invalid (fifth ground of the judgment);

— the final award of the contract was challenged because the successful undertaking had not provided the documentation requested by the administration. According to the administration, the missing documentation was not essential and its absence was an irregularity which could quite easily be remedied (fourth ground of the judgment).

81. As regards the second example, the Spanish Government maintains that the committees in question cannot be regarded as contracting authorities, since they do not take decisions, but merely take part in the decision-making process.

82. In consequence, the Spanish Government considers that, since the Commission has not shown in what respect Directive 89/665 has not been correctly transposed into Spanish law and why it cannot take full effect until the general rule that a procedural measure, within the meaning of Spanish law, is not subject to appeal, is amended, the second plea must be rejected.

B — *Assessment*

83. Under Article 1(1) of Directive 89/665, decisions taken by the contracting authorities are to be *reviewed effectively* and as *rapidly* as possible where Community law in the field of public procurement or national rules implementing that law have been infringed. Article 1(3) of the Directive specifies that the review procedures must be *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.*

84. Article 2(1) of Directive 89/665 lists the measures to be taken concerning the review procedures which the Member States must make available in national law. According to Article 2(1)(a), they must include provision for the adoption of interim measures by way of interlocutory procedures. Article 2(1)(b) refers to the possibility of setting aside or ensuring the setting aside of decisions taken unlawfully, and Article 2(1)(c) concerns the award of damages.

85. Article 2(1)(b) of Directive 89/665 does not define the *decisions taken unlawfully* which a party may ask to have set aside. The provision confines itself, in fact, to stating that such decisions include those concerning discriminatory technical, economic or financial specifications in the documents relating to the contract award procedure in question. [33]

86. It is also clear from Articles 1 and 2 of Directive 89/665, read in conjunction with its aims, [34] that appeals against decisions taken by the contracting authorities are designed to ensure, at every stage of the award procedure, the effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified. [35] Appeals which are limited to the possibility of obtaining financial compensation for harm suffered as a result of non-compliance with the Community directives on public procurement are therefore insufficient to ensure the full effectiveness of those rules.

87. The Court has inferred from those factors that all the decisions taken by contracting authorities, whatever their nature and content, may be challenged. [36] Accordingly, the review directive has been interpreted as precluding national provisions from refusing an injured applicant the opportunity to seek annulment of the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract. It has also been held that the restriction of appeals against that decision to claims for damages [37] does not make it possible to ensure the effectiveness of the provisions of the procedure directives.

88. In view of the objectives of the review directive and of the wording of Articles 1 and 2, the Court thus intended to give a broad definition of the term 'decision', within the meaning of those provisions. 'Decision' therefore means any act or measure, alleged to be unlawful in the light of the procedure directives, adopted during the procedure to award the contract in question, which produces effects or results which may be taken into account by the contracting authority in the final award decision.

89. That interpretation of the review directive is in accordance with its objective, which is to ensure the effective application

33 — *Alcatel Austria and Others*, cited above, paragraph 30.

34 — See, in particular, the first and second recitals in the preamble.

35 — *Alcatel Austria and Others*, cited above, paragraphs 33 and 34.

36 — *Ibidem*, paragraph 35.

37 — *Ibidem*, paragraph 43.

of the Community directives on public procurement, at a stage when infringements may still be corrected or avoided. That objective cannot therefore be achieved by appeals only against the measures which cause harm and, *a fortiori*, only against the measures which bring an end to the award procedure in question. At that stage, it is difficult to see what measures could be taken with the aim of 'correcting the alleged infringement or preventing further damage to the interests concerned'. [38]

90. In the present case, the Spanish Government acknowledges that, under Spanish law, including in connection with public procurement procedures, appeals may be brought only against measures which have an adverse affect. 'A measure which has an adverse effect' must be construed, in particular, as meaning the measure which brings the tendering procedure to an end. That is made expressly clear in the grounds of the judgment cited. [39] The Spanish Government also concedes — and it is expressly stated in the judgment delivered by the Tribunal Supremo [40] — that the measure by which the contracting authority requests documentation additional to the initial contract documents cannot be subject to independent appeal. In other words, a decision which may have an adverse effect and infringe Community law on public procurement, cannot as such be challenged immediately by a bidder who considers that he has been harmed. In order to do so, he must wait until the end of the tender procedure, that is to say, the adoption by the contracting authority of the award decision.

91. In my view, by requiring the applicant to furnish proof of the harm he suffers, and by depriving him, as a consequence, of the possibility of challenging a measure which may adversely affect him, Spanish law does not correctly transpose the provisions of Articles 1 and 2 of the review directive. The national provisions do not allow a decision likely to have harmful effects, by reason of the infringement of Community law on public procurement, to be challenged at the most appropriate time. They therefore prevent an individual from obtaining the interim measures intended to correct the alleged infringement or to prevent future damage. The obligation to furnish proof of the harm suffered is therefore an additional condition not provided for by the review directive and contrary to it.

92. It is apparent from the above considerations that, by not allowing review to be sought of all acts or decisions alleged to be unlawful under the provisions of the procedure directives, adopted during the procedure for the award of public contracts, which produce effects or results which may be taken into account by the contracting authority in the final award decision, the Kingdom of Spain has failed to fulfil its obligations under Article 1 and 2 of Directive 89/665.

38 — Article 2(1)(a) of the review directive.

39 — As stated by the Spanish Government (see the second indent of point 80 of this Opinion).

40 — *Ibidem*.

V — The third plea, alleging the incorrect transposition of the provisions concerning the adoption of interim measures (infringement of Articles 1(1) and 2(1) of the review directive)

A — *Arguments of the parties*

1. The Commission's arguments

93. The Commission argues that, in contrast to the provisions of Article 2(1)(a) of Directive 89/665, under the Spanish legislation transposing that provision, namely Article 111 of Law 30/1992 and Articles 129 to 136 of Law 29/1998, it is not possible to *obtain* preventive measures unless an action is brought simultaneously against the decision adopted unlawfully by the contracting authority. The Commission notes that only in exceptional circumstances, for example under Article 136(2) of Law 29/1998, may protective measures be *sought* if there is no action on the merits against the unlawful decision. It is apparent from the Spanish legislation transposing Article 2(1)(a) of the review directive, that the adoption of interim and protective measures is linked to the commencement of an action on the merits against the unlawful measure adopted by the contracting authority. Those measures are therefore necessarily ancillary to such an action and cannot in any event be sought separately.

94. The Commission points out that it is clear from the wording of Articles 1(1) and 2(1) of the review directive, from its general organisation, from its objective and from the case-law of the Court of Justice [41] that protective measures are not ancillary to a main action, but are wholly separate measures which may be sought irrespective of the commencement of an action on the merits against the unlawful decision.

2. The arguments of the Kingdom of Spain

95. The Spanish Government does not dispute that, in its legal system, with a few exceptions, [42] the adoption of a protective measure, like suspension of operation, is linked to the prior commencement of an action on the merits. The application for interim measures must, in any event, be lodged at the time an action is brought on the merits or after it has commenced. An application for interim or protective measures is therefore not designed to be a separate action, but is linked to an action for annulment of the unlawful decision.

96. However, according to the Spanish Government, the obligation to contest the

41 — In particular, Case C-236/95 *Commission* v *Greece* [1996] ECR I-4459.

42 — In particular, Article 136 of Law 29/1998.

legality of a measure adopted by the contracting authority at the same time as lodging an application for protective measures does not negate the effectiveness of the system established by the review directive, since, in its submission, any application for protective measures involves an examination of the substance of the case, if only a prima facie assessment of the problem. Furthermore, that requirement does not detract from the effectiveness of the system or from the achievement of the objectives of that directive, since the obligation to challenge the legality of a measure adopted by the contracting authority at the same time as lodging an application for protective measures does not require the observance of strict formalities. The applicant need only write a simple letter. He is not therefore required immediately to lodge the action in accordance with the formal rules established.

97. According to the Spanish Government, the scheme adopted in Spain is, on the contrary, fully effective. Since Law 29/1998 came into force, the administrative courts may adopt, under Article 29 of that law, any type of positive protective measure, not only mere suspension.

98. The Spanish Government also disputes the assertion that the obligation to bring an action before protective measures are adopted is incompatible with the provisions of Directive 89/665, or even prohibited by them.

99. It maintains that that interpretation is supported by the fact that Community law is itself governed by criteria similar to those which underlie the Spanish legislation. In that regard, it refers to the provisions of Articles 242 and 243 EC, Article 36 of the EC Statute of the Court of Justice, Articles 83 to 90 of the Rules of Procedure of the Court of Justice and Articles 104 to 110 of the Rules of Procedure of the Court of First Instance. Citing by way of example Article 83 of the Rules of Procedure of the Court of Justice, it points out that an application for interim measures is not a separate legal remedy but rather an application which is ancillary to the main application, namely the action for annulment.

100. As regards the conclusion drawn by the Commission from the judgment in *Commission* v *Greece*, cited above, the Spanish Government maintains that the Court did not give judgment on the substance of the case. The Hellenic Republic acknowledged that it had not transposed the provisions of the review directive into its legal system within the time-limit set in the reasoned opinion. The Court did not therefore have to give a ruling on the substance of the alleged infringement. It did not therefore rule that the fact of making the grant of protective measures, such as suspension of operation, conditional on commencement of an action on the merits against the unlawful measure, constituted incorrect transposition of the review directive.

101. It thereby concludes that it makes no sense to require, as the Commission demands, interim measures to be wholly

independent, since any protective measure is by definition an ancillary measure. Therefore, it requests the Court to declare the third plea unfounded and to reject it.

B — *Assessment*

102. Unlike the Spanish Government, I consider that it is apparent from the wording of Articles 1(1) and 2(1) of the review directive, from its general organisation, from its objective and from the case-law of the Court of Justice that protective measures cannot be regarded as ancillary to an action on the merits, but are measures which it must be possible to adopt separately.

103. As we have seen, the system established by the review directive is designed to ensure the effective application of the procedure directives. The review directive therefore requires appeal procedures against decisions taken unlawfully by the contracting authority to be effective and rapid. To that end, all decisions taken unlawfully by a contracting authority during the course of a public procurement procedure may be challenged in interlocutory proceedings by the injured parties.[43] Accordingly, it is a question of preventing, correcting or making good the illegalities committed.

43 — See, in that regard, the second plea raised by the Commission against the Kingdom of Spain.

104. It is clear from all the above that *not only is any decision taken unlawfully* by a contracting authority before the contract is concluded between the successful undertaking and the contracting authority open to challenge, *but* interim measures may *also* be obtained before an action on the merits is brought against the unlawful decision. In other words, it must be possible not only to lodge an application for interim measures, but also for the court to deal with that application before any action on the merits against the unlawful decision. Otherwise, the objective of the review directive, which is, in particular, to avoid or correct illegalities committed by the contracting authority, clearly could not be achieved. The need to adopt urgent and effective measures cannot easily be reconciled with a requirement that an action on the merits should be brought beforehand.

105. That interpretation was confirmed by the Court of Justice in *Commission* v *Greece*, cited above.

106. It was alleged that the Hellenic Republic had not correctly transposed the provisions of the review directive.

107. The Greek Government acknowledged that it had not taken the measures necessary to transpose the directive within the time-limit set in the reasoned opinion,

but contended that a law had since been adopted which did meet the requirements of the review directive.

108. The Court did not, however, omit to point out that the provisions of that law did not correctly transpose the provisions of the review directive. It observed, in particular, that, as far as the suspension of contract award procedures referred to in Article 2(1)(a) of the review directive was concerned, the national legislation transposing the directive, since it made suspension of the measure conditional on the introduction of an action for annulment against the contested administrative measure, did not satisfy the requirements of the review directive.

109. Paragraph 11 of the judgment in *Commission* v *Greece*, cited above, stated specifically:

'What is more, Article 52 of [Presidential Decree No 18/89] relates only to procedures for suspension of operation of measures and presupposes the existence of a main action seeking to have the contested administrative measure annulled, whereas, under Article 2 of [Directive 89/665], the Member States are under a duty more generally to empower their review bodies to take, *independently of any prior action*,[44] any interim measures "including measures to suspend or to ensure the suspension of the procedure for the award of a public contract".'

110. The Court also noted that the national legislation referred to contained no provision on damages, as provided for in Article 2(1)(c) of the review directive, for persons harmed in the event of an infringement of Community law in the field of public procurement or national rules implementing that law.[45]

111. It is clear from that judgment that, contrary to what the Kingdom of Spain contends, the Court of Justice did not merely state that the directive had not been transposed within the time-limit set in the reasoned opinion, but examined the Greek law which was to be adopted and gave the reasons why it did not correctly transpose the provisions of the review directive.

112. From the foregoing considerations, I conclude that Member States must introduce a scheme providing for the adoption of all types of urgent measures, including positive measures, intended both to avoid

44 — Emphasis added.
45 — *Ibidem*, paragraph 15.

and correct and to make good any illegalities committed by the contracting authority throughout the contract award procedure in question. That requirement is incompatible with the requirement of a prior action on the merits against the unlawful decision.

113. The Spanish Government does not deny that, in its legal system, interim or protective measures cannot be adopted before an action on the merits is brought against the unlawful decision. However, it claims that the Spanish system is not restrictive since a mere letter giving no reasons, in which the applicant states that he intends to challenge the decision on the merits, fulfils that obligation. If that were indeed the case, I must admit that I cannot understand the reasons for that 'mere formality' to which the Spanish legislature nevertheless attaches particular significance. It seems to me disproportionate to make the effective application of the directive on this point [46] conditional on the prior completion of a mere formality.

114. As regards the Spanish Government's argument that the Spanish scheme with regard to protective measures is the same as that followed by Community law in proceedings before the Court of Justice, it has to be pointed out that the provisions and judgments referred to by the Spanish Government do not relate to the special review system established by Directive 89/665 or to its transposition by the Member States. Under the principle *lex specialis derogat generali*, [47] the specific scheme provided for by Directive 89/665 must necessarily prevail.

115. It follows from the foregoing arguments that, by making the grant of protective measures conditional on the requirement to bring an action on the merits against the decision adopted unlawfully by the contracting authority, the Kingdom of Spain has failed to fulfil its obligations under Articles 1 and 2 of Directive 89/665.

VI — Costs

116. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Spain has been unsuccessful in its defence, it must be ordered to pay the costs.

46 — Namely, the adoption of interim and protective measures.

47 — See, in particular, Case C-469/93 *Chiquita Italia* [1995] ECR I-4533, paragraph 61, and Case C-372/99 *Commission v Italy* [2002] ECR I-819, paragraph 19.

VII — Conclusion

117. For the reasons stated above, I propose that the Court should:

(1) Declare that, by failing to adopt the measures needed to comply with Articles 1 and 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, and in particular by failing to:

— extend the system of review procedures provided for by that directive to decisions adopted by all contracting authorities, within the meaning of Article 1(1) of Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, Directive 93/36/EC of 14 June 1993 coordinating procedures for the award of public supply contracts, and Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, including companies governed by private law established for the specific purpose or meeting needs in the general interest which do not have an industrial or commercial character, have legal personality, and are financed, for the most part, by public authorities or other entities governed by public law, or are subject to supervision by the latter, or have an administrative, management or supervisory board more than one half of whose members are appointed by public authorities or other entities governed by public law;ì

— allow review to be sought of all decisions adopted by the contracting authorities, including all procedural measures, during the procedure for the award of public contracts;

— provide for the possibility of appropriate interim measures being granted in relation to decisions adopted by the contracting authorities, including measures aimed at enabling administrative decisions to be suspended, removing for that purpose difficulties and obstacles of any type and in particular the need first to bring an action against the decision of the contracting authority,

the Kingdom of Spain has failed to fulfil its obligations under Community law;

(2) Order the Kingdom of Spain to pay the costs.