OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 2 April 1998 *

I — Introduction

1. This case relates to the award of a contract for the supply of buses for a regular inter-urban express bus service in Austria. It raises, in particular, questions regarding the bodies competent to review such contracts, the availability of remedies and the application of national time-limits for bringing proceedings where the relevant Community directive has not been implemented in time.

II — Legal and factual context

A — *Community law*

2. Article 1 of 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 [1] (hereinafter referred to as 'the Utilities Review Directive'), as amended, provides as follows:

'(1) The Member States shall take the measures necessary to ensure that decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(8), on the grounds that such decisions have infringed Community law in the field of [2] procurement or national rules implementing that law as regards:

(a) contract award procedures falling within the scope of Council Directive 93/38/EEC; [3] and

* Original language: English.

1 — OJ 1992 L 76, p. 14.

2 — The word 'or' appears here in the Official Journal but is clearly a typographical error.

3 — This provision originally referred to 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. Article 45(3) and (4) of Council Directive 93/38/EEC, cited below, provides that Directive 90/531/EEC shall cease to have effect from the date the former Directive is applied by the Member States and that references to Directive 90/531/EEC shall be construed as referring to that Directive.

(b) compliance with Article 3(2)(a) of that Directive in the case of the contracting entities to which that provision applies.

(2) Member States shall ensure that there is no discrimination between undertakings likely to make a claim for injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

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

Article 2 of the Utilities Review Directive provides, in relevant part, as follows:

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

either

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

(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any

other document relating to the contract award procedure in question;

or

(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

(d) and, in both of the above cases, to award damages to persons injured by the infringement.

Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.

(2) The powers referred to in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

...

(8) The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

(9) Where [4] bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the Treaty and independent of both the contracting entity and the review body.

4 — The word 'whereas' appears here in the Official Journal but is clearly a typographical error.

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

3. Article 2 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [5] (hereinafter 'the Utilities Directive') provides, in relevant part, as follows:

'(1) This Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

(b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

(2) Relevant activities for the purposes of this Directive shall be:

...

(c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service; ... .'

5 — OJ 1993 L 199, p. 84.

B — *Implementation in national law*

4. By virtue of Article 65 of and Annex XVI to the Agreement on the European Economic Area signed at Oporto on 2 May 1992, the Republic of Austria was obliged to transpose into national law, by 1 January 1994 at the latest, [6] a number of Community acts in the field of public procurement, including Council Directive 90/531/EEC [7] and 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 [8] (hereinafter 'the Review Directive'). These directives were transposed at federal level by the Bundesgesetz über die Vergabe von Aufträgen or Bundesvergabegesetz (Federal Procurement Law, hereinafter 'the BVergG'), [9] which entered into force on 1 January 1994. Part 4 of the BVergG, on legal protection (Rechtsschutz), establishes a review procedure before the Bundesvergabeamt (Federal Procurement Office). Paragraph 92(3) provides that proceedings against the award of a contract must be introduced by an aggrieved tenderer before the Bundesvergabeamt within two weeks of his being informed of the award. The second sentence of Paragraph 7(2) of the BVergG expressly excluded the application of the provisions of Part 4 to the water, energy, transport and telecommunications sectors.

5. By virtue of Article 168 of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, of 24 June 1994, [10] the Utilities Directive and the Utilities Review Directive were required to be transposed into Austrian law by the date of accession, viz. 1 January 1995. [11] Transposition of the Utilities Review Directive at federal level took place by means of an amendment of the BVergG by a law of 30 December 1996, [12] which extended the review competence of the Bundesvergabeamt to awards of public contracts for the utilities in question and which entered into force on 1 January 1997, without altering the rules applicable to proceedings already commenced before the Bundesvergabeamt.

C — *Facts and proceedings*

6. The Niederösterreichische Verkehrsorganisations Gesellschaft m. b. H. (hereinafter 'NÖVOG') is a body governed by private

6 — The date when the Agreement on the European Economic Area came into force. This was one year later than the date initially foreseen by Article 129(3) of that Agreement.

7 — Cited in footnote 2.

8 — OJ 1989 L 395, p. 33.

9 — *Bundesgesetzblatt für die Republik Österreich* No 462/1993.

10 — OJ 1994 C 241, p. 21.

11 — Austria was already under an obligation to transpose the Utilities Directive, replacing Directive 90/531/EEC, into its law from 1 July 1994 at the earliest, and to transpose the Utilities Review Directive by 1 July 1994, by virtue of Articles 1 and 3 of, and Annex 14(b)(4) and (5a) to, Decision of the EEA Joint Committee No 7/94 of 21 March 1994 amending Protocol 47 and certain annexes to the EEA Agreement, OJ 1994 L 160, p. 1. However, the present case does not relate to the period between 1 July 1994 and 1 January 1995.

12 — *Bundesgesetzblatt für die Republik Österreich* No 776/1996.

law. It operates bus routes on the basis of a licence granted by the Amt der Niederösterreichischen Landesregierung (Office of the Provincial Government of Lower Austria). It enjoys, according to the Bundesvergabeamt, special rights, thus bringing it within the scope of the Utilities Directive. [13] Since NÖVOG operates a network for the provision of public bus transport services, the Bundesvergabeamt deems it to be a contracting entity. [14]

7. By a letter of 26 April 1996 to the Office for Official Publications of the European Communities, NÖVOG solicited, by way of open invitation, tenders for the supply of 36 to 46 buses for the regular inter-urban express bus service in the Bundesland Niederösterreich (Federal Province of Lower Austria). The opening of the tenders took place on 27 June 1995. Unsuccessful tenderers were informed to that effect by registered letter recorded as having been sent on 16 November 1995. EvoBus Austria GmbH (hereinafter 'EvoBus') applied to the Bundesvergabeamt on 19 July 1996 for a review of the contract award procedure to be conducted. EvoBus complained of a subsequent amendment of the successful tender, through the alteration of the repurchase price of the buses in question from the initial rate of 34% to 55%.

8. The Bundesvergabeamt referred the following questions for a preliminary ruling in accordance with Article 177 of the Treaty establishing the European Community:

'1. May an individual derive, from Article 1(1) to (3), Article 2(1), (7) to (9) or any other provisions of Directive 92/13/EEC, a specific right to have review proceedings conducted before authorities or courts or tribunals complying with Article 2(9) of Directive 92/13/EEC which is so sufficiently precise and specific that, in the event of non-transposition by a Member State of the provisions of the directive in question, an individual may rely on that provision?

If Question 1 is answered in the affirmative:

2. In conducting a review procedure, must a national court having the attributes of the Bundesvergabeamt disregard provisions of national law such as Paragraph 7(2) in conjunction with Paragraph 67(1) of the Bundesvergabegesetz which preclude it from conducting a review procedure even where such review procedure is intended by the national legislature solely to serve the purpose of transposing Directive 89/665/EEC?

13 — See Article 2(1)(b) of the Utilities Directive.
14 — See Article 2(2)(c) of the Utilities Directive.

If Question 1 is answered in the affirmative:

3. Must the adjudicating court disregard those or any comparable procedural provisions of national law in such circumstances, if they impede or prevent a review procedure from being effectively conducted?'

9. Written and oral observations were submitted by the Republic of Austria and the Commission of the European Communities. Oral observations were also submitted by NÖVOG.

III — Analysis

A — *Jurisdiction*

10. For the reasons stated in my Opinion in *Walter Tögel* v *Niederösterreichische Gebietskrankenkasse*, [15] which draw upon the Opinion of Advocate General Léger and the judgment of the Court in *Mannesmann Anlagenbau Austria AG and Others* v *Strohal Rotationsdruck GesmbH*, [16] I would first observe that the Bundesvergabeamt is, in my view, 'a court or tribunal of a Member State' for the purposes of Article 177 of the Treaty.

B — *The first and second questions*

11. It is common ground that the Utilities Review Directive should have been, but had not been, implemented in Austria on the date that the contract was awarded and on that on which EvoBus sought to initiate review proceedings pursuant to that directive, viz. 19 July 1996. In the first and second questions, the national court asks whether an individual has a directly effective right to bring review proceedings of the type provided for in Article 2 of the Utilities Review Directive, similar to those enacted into national law by Part 4 of the BVergG, before the Bundesvergabeamt in respect of an award of a public contract in the transport sector. In *Tögel*, [17] the Court has been asked to address an almost identically worded question referred by the Bundesvergabeamt regarding Article 1(1) of the Review Directive (the equivalent of Article 1(1) of the Utilities Review Directive), in so far as it had been extended to public service contracts by Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of

15 — Case C-76/97, Opinion of even date, hereinafter '*Tögel*'.

16 — Case C-44/96, Opinion of 16 September 1997, paragraphs 34 to 45; judgment of 15 January 1998.

17 — Cited above.

procedures for the award of public service contracts [18] (hereinafter 'the Services Directive'). The two cases differ in so far as the BVergG is silent as to the jurisdiction of the Bundesvergabeamt in respect of services, whereas the application of Part 4 of the BVergG is expressly excluded in respect of utilities. For reasons outlined below, this makes it necessary in the present case to address more fully the second question regarding the obligations and restrictions imposed by Community law when interpreting national law which is within the scope of an unimplemented directive.

12. In essentially similar circumstances to those of *Tögel*, in *Dorsch Consult Ingenieurgesellschaft mbH* v *Bundesbaugesellschaft Berlin mbH* [19] the German Vergabeüberwachungsausschuß des Bundes (Federal Public Procurement Awards Supervisory Board) referred a question as to whether bodies set up by Member States under the Review Directive to review the procedures for the award of public contracts for works and supplies were competent, by virtue of Article 41 of the Services Directive, also to review the procedures for the award of public service contracts. The Court answered that such a result did not follow from Article 41. [20] It observed that it was for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. Member States must ensure that those rights are effectively protected in each case. Otherwise, the Court does not involve itself in the resolution of questions of national jurisdiction. [21] Although Article 41 of the Services Directive requires the Member States to ensure effective review in the field of public service contracts, 'it does not indicate which national bodies are to be the competent bodies for this purpose or whether these bodies are to be the same as those which the Member States have designated in the field of public works contracts and public supply contracts'. [22] This conclusion excluded the possibility of Article 41 of the Services Directive giving rise to a directly effective right to have review proceedings conducted before the Vergabeüberwachungsausschuß des Bundes, because one of the essential elements was missing, that is, an identifiable person or body under a duty to conduct the review proceedings in question. [23]

13. The Court referred in *Dorsch Consult* to the duty of 'all the authorities of Member States, including, *for matters within their jurisdiction*, the courts', to take all appropriate measures to achieve the result envisaged by a directive, which gives rise to the judicial obligation to interpret national law 'as far as possible, in the light of the wording and purpose

18 — OJ 1992 L 209, p. 1.

19 — Case C-54/96, judgment of 17 September 1997, hereinafter '*Dorsch Consult*'.

20 — Paragraph 46.

21 — Paragraph 40. The Court cited Case C-446/93 *SEIM* v *Subdirector-Geral das Alfândegas* [1996] ECR I-73, paragraph 32. See also Case 13/68 *Salgoil* v *Italy* [1968] ECR 453, p. 463, and Case 179/84 *Bozzetti* v *Invernizzi* [1985] ECR 2301, paragraph 17.

22 — Paragraph 41.

23 — See Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraphs 12 and 23 to 27; see also paragraph 48 of the Opinion of Advocate General Tesauro of 15 May 1997 in *Dorsch Consult*.

of the directive so as to achieve the result it has in view'. [24] This requires the national court to 'determine whether the relevant provisions of its *domestic law* allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts ... [and] in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts'. [25]

14. I refer to my Opinion, also pronounced today, in *Tögel*, [26] in which I address certain additional arguments regarding the possible direct effect of Article 41 of the Services Directive and the effectiveness of judicial protection, and propose that the Court should respond to the Bundesvergabeamt's first two questions in that case in the same terms as the operative part of the judgment in *Dorsch Consult*.

15. The same reasoning applies, in principle, to Article 1(1) of the Utilities Review Directive, although its application by a national court may be complicated by the fact that Article 2(1) contains alternatives regarding the remedies to be made available which are not contained in Article 2(1) of the Review Directive. However, the conclusion proposed in *Tögel* must be modified in the light of the issue expressly raised by the Bundesvergabeamt in the second question, that is, the permissibility *in Community law* of disregarding national legal provisions such as Paragraph 7(2) of the BVergG which expressly exclude it from conducting review proceedings in respect of contract awards in the sectors governed by the Utilities Review Directive. [27]

16. The interpretative obligation of national courts, to which the Court referred in *Dorsch Consult*, was first identified by the Court in *Von Colson and Kamann* v *Land Nordrhein-Westfalen*, [28] in which the Court also remarked that it was for the national court alone to rule on a question concerning the interpretation of its national law [29] and that it must comply with the obligation to interpret national law in conformity with the requirements of Community law, 'in so far as it is given discretion to do so under national law'. [30]

24 — Paragraph 43, emphasis added. The Court cited Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20; and Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325, paragraph 26.

25 — Paragraph 46, emphasis added.

26 — Cited above.

27 — This situation may also be contrasted with the situation in *Dorsch Consult*, cited above, paragraphs 18 and 42, where the relevant German regulation referred only to the competence of the Federal Public Procurement Awards Supervisory Board in respect of supply contracts and works contracts and the Court remarked that it was common ground that the German Federal Government intended to extend its competence to public service contracts.

28 — Case 14/83 [1984] ECR 1891, hereinafter '*Von Colson*', paragraph 26.

29 — Ibid., paragraph 25.

30 — Ibid., paragraph 28.

17. In *Kolpinghuis Nijmegen*, [31] the Court introduced a significant qualification to the interpretative obligation of national courts first outlined in *Von Colson* and continued:

'However, that obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity.' [32]

The Court stated that its ruling concerned 'the limits which Community law might impose on the obligation *or power* of the national court to interpret the rules of its national law in the light of the Directive'. [33] Although that case concerned the liability in criminal law of persons who act in contravention of the provisions of a directive, those principles are also of application in situations where Community law has purely civil consequences.

18. The limits imposed on the national court's interpretative obligation, having regard to the degree of discretion accorded by national law and to the general principles of Community law, are summed up, in my view, by the vital qualification of that obligation in *Marleasing* and subsequent cases as one of interpreting national law, '*as far as possible*, in the light of the wording and the purpose of the directive'. [34] The Court acknowledged in both *Wagner Miret* [35] and *Faccini Dori* v *Recreb* [36] that national courts may sometimes be unable to interpret national provisions in a way which conforms to a directive and that, in such cases, following *Francovich and Others*, [37] the Member State concerned may be obliged to make good the loss and damage sustained as a result of the failure to implement the directive.

19. The limits imposed by the Court on national courts' interpretative obligation in *Von Colson* and in *Kolpinghuis Nijmegen* are not of the same character. The judgment in *Von Colson* refers to the extent of the national court's interpretative discretion as a matter of national law. In *Kolpinghuis Nijmegen*, on the other hand, the Court identified a negative restriction on the national court's obligation and power arising from Community law itself, a restriction which, therefore, is applicable irrespective of the discretion accorded by the

31 — Case 80/86 [1987] ECR 3969, paragraph 12.

32 — Ibid., paragraph 13.

33 — Ibid., paragraph 15, emphasis added.

34 — *Marleasing*, cited above, paragraph 8, emphasis added; see also *Wagner Miret*, cited above, paragraph 20; and *Faccini Dori* v *Recreb*, cited above, paragraph 26.

35 — Cited above, paragraph 22.

36 — Cited above, paragraph 27.

37 — Joined Cases C-6/90 and C-9/90, cited above.

national canons of construction. Advocate General Van Gerven, in his Opinion in *Marleasing*, drew attention to the way in which the interpretative obligation was 'restricted by Community law itself'. [38] This can be explained by the fact that national authorities, including national courts, are subject to the general principles of Community law when implementing Community law or interpreting national provisions implementing such law. [39]

20. The agent for Austria suggested at the oral hearing that the principle of attributed competence in Austrian law made it unlikely that the BVergG could be construed in order to extend the competence of the Bundesvergabeamt to types of contract which were not expressly referred to in the relevant provisions, and that this argument applied *a fortiori* in the case of expressly excluded sectors. [40] It is, therefore, merely in order to furnish the fullest possible answer to the second question from the point of Community law that I express my view that, quite independently of the level of interpretative discretion accorded by national law, it would be contrary to the Community-law principle of legal certainty for a directive to be deemed to be implemented in national law by legislation which, on its face, as in Paragraph 7(2) of the BVergG, expressly excludes the application of the relevant legislative provisions to the fields governed by the directive. Such an interpretation would leave individuals in a state of uncertainty as to their rights. As well as being contrary to the general principles of Community law, that uncertainty would endanger the achievement of the result envisaged by the directive. Such an interpretation could not, therefore, deprive individuals of a right to compensation in respect of injury suffered due to the non-implementation of the directive in question, pursuant to the Court's judgment in *Francovich and Others*. [41]

21. To conclude my analysis in this section, I propose that the Court respond to the first and second questions referred by the Bundesvergabeamt by reiterating the first two sentences of the operative part of its judgment in *Dorsch Consult*, appropriately amended to refer to Article 1(1) of the Utilities Review Directive, and supplemented by the following statement:

It would, however, be contrary to the principle of legal certainty for Article 1(1) of the Utilities Review Directive to be deemed to be implemented by national legislation establishing bodies to hear appeals concerning the award of public supply contracts and public works contracts which, on its face, expressly

38 — Paragraph 8 of the Opinion. The Advocate General repeated the formula used in paragraph 13 of the Court's judgment in *Kolpinghuis Nijmegen* but added that legal certainty precluded an unimplemented directive from introducing a civil penalty, such as nullity.

39 — Case 5/88 *Wachauf* v *Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, paragraphs 17, 19 and 22.

40 — See also Decision B 3067/95-9 of the Verfassungsgerichtshof (Austrian Constitutional Court) of 11 December 1995, discussed at paragraph 27 of my Opinion in *Tögel*.

41 — Cited above.

excludes the application of the relevant legislative provisions to the fields governed by that Directive.

C — *The third question*

22. The third question essentially relates to the applicability of the time-limit established by Paragraph 92(3) of the BVergG for the commencement of review proceedings before the Bundesvergabeamt. The Bundesvergabeamt made the question conditional upon an affirmative answer to the first question. In the light of my recommendation to the Court that Community law precludes the competence of the Bundesvergabeamt in the present case, the time-limit for the introduction of an action before that body is irrelevant. It is not, therefore, necessary to propose a formal response to the third question. For the sake of completeness, however, I will address briefly the possibility raised by the Court's case-law of the exceptional non-application of national time-limits for the commencement of proceedings in respect of rights contained in an unimplemented directive.

23. This possibility was first raised in *Emmott*. [42] In that case, the Court observed [43] that the laying down of reasonable time-limits which, if unobserved, bar proceedings, in principle satisfies the conditions laid down for the application of national procedural rules in *Rewe* v *Landwirtschaftskammer Saarland* [44] and in *Amministrazione delle Finanze dello Stato* v *San Giorgio*, [45] that they are not less favourable than those governing similar domestic actions and that they do not render impossible or excessively difficult the exercise of rights conferred by Community law. The Court also held in *Emmott*, however, that 'until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive, and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time'. [46]

24. However, the Court has held in a number of subsequent cases, most recent of which is *Fantask and Others* v *Industriministeriet (Erhvervsministeriet)*, [47] that 'the solution adopted in *Emmott* was justified by the particular circumstances of that case, in which the time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under a Community directive'.

42 — Case C-208/90 [1991] ECR I-4269.

43 — Ibid., paragraph 17.

44 — Case 33/76 [1976] ECR 1989, paragraph 5.

45 — Case 199/82 [1983] ECR 3595, paragraph 12.

46 — Cited above, paragraph 23.

47 — Case C-188/95 [1997] ECR I-6783, paragraph 51. See also Case C-338/91 *Steenhorst-Neerings* [1993] ECR I-5475, paragraph 20; Case C-410/92 *Johnson* [1994] ECR I-5483, paragraph 26; Case C-90/94 *Haahr Petroleum* v *Åbenrå Havn and Others* [1997] ECR I-4085, paragraph 52; and Joined Cases C-114/95 and C-115/95 *Texaco and Olieselskabet Danmark* [1997] ECR I-4263, paragraph 48.

25. For the purposes of the present case, it is necessary to note that the rules on the award of contracts by entities operating in the water, energy, transport and telecommunications sectors, set out in the Utilities Directive, appear to have been implemented in Austrian law at the material time through the BVergG. The agent for Austria observed at the oral hearing that, in the absence of an express attribution of competence to the Bundesvergabeamt, the ordinary civil courts would hear cases regarding alleged breaches of the BVergG. If that is the case, and if those courts dispose of a satisfactory range of potential remedies, it cannot be said, despite the statement in the second recital in the preamble to the Utilities Review Directive that 'existing arrangements at ... national level ... for ensuring ... application [of the Utilities Directive] are not always adequate', that EvoBus has been deprived of any opportunity whatever to rely on its rights under the Utilities Directive. The situation would be different, of course, if, pending the implementation of the Utilities Review Directive, no national court had competence to enforce the provisions of the Utilities Directive, whether as transposed by the BVergG or by virtue of the principle of the direct effect of directives, or if a competent national court did not provide adequate remedies to ensure the protection of rights under the Utilities Directive, despite its Community-law obligation to do so. In that case, however, the most appropriate response might be the initiation of proceedings for State liability in accordance with the Court's judgment in *Francovich and Others*. [48]

26. In the circumstances of the case, it is not necessary for me to address the separate issue of whether the time-limit imposed by Paragraph 92(3) of the BVergG is a reasonable one.

IV — Conclusion

27. In the light of the foregoing, I recommend that the Court respond as follows to the questions referred by the Bundesvergabeamt:

It does not follow from Article 1(1) of 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 oper-

48 — Cited above. See paragraph 48 of the Opinion of Advocate General Tesauro of 15 May 1997 in *Dorsch Consult*.

ating in the water, energy, transport and telecommunications sectors that, where that directive has not been transposed by the end of the period laid down for that purpose, the appeal bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear appeals relating to procedures for the award of contracts in those sectors. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/13/EEC and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of contracts in the relevant sectors. It would, however, be contrary to the principle of legal certainty for Article 1(1) of Directive 92/13/EEC to be deemed to be implemented by national legislation establishing bodies to hear appeals concerning the award of public supply contracts and public works contracts which, on its face, expressly excludes the application of the relevant legislative provisions to the fields governed by that Directive.