OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 24 September 1998 *

1. By order of 17 February 1997, the Tiroler Landesvergabeamt (Procurement Office of the *Land* of Tyrol) submitted to the Court two questions for a preliminary ruling concerning the interpretation 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 [1] (hereinafter 'the Review Directive').

Community and national legislation

2. Article 1(1) of the Review Directive, as amended by Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, [2] requires the Member States to take the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively and in particular as rapidly as possible on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

3. Article 2(7) requires the Member States to ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

4. The next paragraph of that article has particular relevance in this case. It will therefore be helpful to reproduce it in full:

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

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary

* Original language: Italian.

1 — OJ 1989 L 395, p 33.

2 — OJ 1992 L 209, p. 1.

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.'

5. Article 5 of the directive requires Member States to bring into force the measures necessary to comply with the directive before 21 December 1991. Under Article 168 of the Act of Accession, [3] the time-limit laid down for the Republic of Austria was 1 January 1995.

6. The Review Directive was transposed into Austrian law at Federal level by the Bundesgesetz über die Vergabe von Aufträgen (Federal Law on the Award of Public Contracts). [4] Each of the nine *Länder* then adopted its own law relating to the award of public contracts; in the case of the *Land* of Tyrol, the law in question is the Tyrolean Vergabegesetz (hereinafter 'the TVerG') of 6 July 1994. [5]

7. The second part of that law (Paragraphs 5 to 14) governs the procedures for the review of decisions awarding public contracts. Paragraph 6 entrusts the conduct of review procedures to the Landesvergabeamt (*Land* Public Procurement Office; hereinafter 'the Office'). Under Paragraph 6(1), that body consists of seven members: a president, who must be familiar with the business of public procurement; a public servant of the Office of the Tyrolean *Land* Government with a knowledge of law, acting as rapporteur; a member drawn from the judiciary; and four other members, one each proposed by the Tyrolean Chamber of Commerce, the Chamber of Architects and Consulting Engineers for Tyrol and Vorarlberg, the Tyrolean Chamber of Workers and Employees and the Tyrolean Association of Municipalities.

8. Paragraph 6(3) provides that the members of the Office are appointed by the Tyrolean Government and remain in office for five years. They leave office early by resignation or if they are removed. In that regard, Paragraph 6(4) provides that an appointment must be revoked if the conditions for appointment are no longer fulfilled or if factors arise which prevent proper performance of the duties and 'are likely to do so for a long time'.

9. Under Paragraph 6(6), the Office may take decisions when it has been properly convened and when the president, the rapporteur, the member drawn from the judiciary and at least one other member are present. Decisions are

3 — OJ C 241, p. 21.

4 — The Federal law, which was originally published in BGBl. No 639/1993, was subsequently republished following the codification of public contracts legislation by the Law of 27 May 1997 (BGBl. No 56/1997).

5 — In LBGl. No 87/1994.

taken by a simple majority of the votes cast. In the event of a tie, the president's vote is decisive. Abstention is not allowed.

10. In accordance with Paragraph 6(7), the members of the Office are not to be bound by instructions in the performance of their duties. Their decisions are not liable to be set aside through administrative channels.

11. Paragraph 7(1) provides that it is for the Tyrolean *Land* Government to adopt the Office's rules of procedure. Those rules must, in particular, contain detailed provisions on the organisation and conduct of hearings, the discussion and voting processes, the drawing up of minutes and the preparation and drawing up of decisions. According to Paragraph 4 of the rules, [6] the hearing begins with the report by the rapporteur who is also responsible for gathering evidence and conducting other preparatory inquiries. All decisions adopted by the Office must be in written form and state reasons.

12. Paragraph 10 of the law specifies the powers conferred on the Office. Upon application, it may review the legality of decisions taken by contracting authorities and, in particular, may set aside such decisions prior to the award of the contract (Paragraph 12(1)); moreover, after the contract has been awarded, it may examine whether the fact that it was not awarded to the best bidder was due to a breach of the law (Paragraph 12(2)). In the course of that procedure, the Office must assess whether the contract would not in any case have been awarded to the successful bidder even if there had been no breach of the law as alleged in the application. If the contracting authorities' decision is set aside, the competitor whose bid was rejected in breach of the provisions in force may claim damages in the civil courts.

6 — Rules published in the *Tiroler LGBl.*, 1995, No 47.

Facts and the questions submitted

13. The main proceedings arose from the award by the Gemeindeverband Bezirkskrankenhaus Schwaz (association of municipalities for the Schwaz district hospital) of a contract for works in connection with the extension to the said hospital. The undertakings Josef Köllensperger GmbH&Co. and Atzwanger AG brought review proceedings against that decision on 6 April 1995, claiming that the award should be set aside on the ground that it was in breach of the relevant provisions on the award of public contracts.

14. By decision of 27 June 1995, the Office rejected the application on the ground that the contract had in any case been awarded to the firm which had submitted the best bid, with the consequence that, even if the provisions of the law had been complied with, the contract would not in any event have been awarded to the applicants. The latter then

challenged that decision before the Constitutional Court which, by judgment of 12 June 1996, set it aside on the ground that it had infringed the right, guaranteed by the Austrian constitution, to proceedings before the court specified by law. The Constitutional Court observed that the composition of the Office was not in accordance with the requirements of the review directive since its president did not have the necessary legal and professional qualifications for judicial office.

15. The composition of the Office was therefore modified. The president previously in office was replaced by an official of the administrative authority, who was qualified to practise law. Following resumption of the proceedings, the Office, which had reservations as to whether its composition (in particular as regards the members proposed by the organisations) satisfied the requirements of the directive, decided to submit the following two questions to the Court for a preliminary ruling:

'(1) Is Article 2 of Council Directive 89/665/EEC of 21 December 1989 to be interpreted as meaning that the Procurement Office of the *Land* of Tyrol, established by the Law of the *Land* of Tyrol on the award of contracts of 6 June 1994 (LGBl. No 87/1994), is a review body within the meaning of Article 2(8) of the Directive?

(2) Does the abovementioned law on the award of contracts adequately provide for the transposition into national law 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, in relation to the review procedures mentioned in Article 1 thereof?'

Admissibility

16. It is necessary, first of all, to establish whether the Office has the power, by virtue of the provisions governing its structure and forms of procedure, to make a reference to the Court under the preliminary ruling procedure. In its written observations, the Commission expresses reservations as to the admissibility of the questions in so far as they were submitted by a body which, for a number of reasons, could not be regarded as a 'court or tribunal' within the meaning of Article 177 of the EC Treaty. [7]

7 — It should, however, be pointed out that the Commission stated at the hearing that it had changed its view in the light of the position adopted by the Court in its judgment in Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraphs 22 to 38.

17. It is well known that, for reasons connected with the uniform application of Community law, the concept of a 'court or tribunal' which is competent to submit questions for a preliminary ruling has a meaning independent of the definitions to be found in the national legal systems. [8] As the Court has consistently held, [9] in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it acts as a third party and is independent. It is therefore appropriate at this stage to determine whether the conditions to which I have just referred are fulfilled by the body which has requested the Court's intervention in this case.

18. It should be pointed out in this connection that the Austrian law assigns the task of reviewing the legality of decisions concerning the award of contracts exclusively to the Public Procurement Office (Paragraphs 5 and 10 of the TVerG). That law also provides that its decisions are binding by operation of law (Paragraph 12 of the TVerG); in addition, since the Office constitutes a 'collegiate body with a judicial element' as referred to in Article 133 of the Austrian Constitution, its decisions are not liable to be set aside or varied through administrative channels (Paragraph 6(7) of the TVerG). It therefore follows that the Office is established by law and that its jurisdiction is compulsory. A similar positive assessment is also called for with regard to its permanence, since the Office sits permanently. The fact that its members remain in office for a limited number of years (five) is irrelevant in that regard since it is well known that the term of office of the members of a court can be limited to a specified period, provided only that the period in question is predetermined by law and not left to the discretionary choice of the person who has the power of appointment. Finally, there is no doubt that the Office applies rules of law when it reviews the legality of decisions relating to the award of contracts (Paragraph 8 of the TVerG).

19. With regard to the principle that its procedure must be *inter partes*, it is clear from the relevant legislation that the Office is also required to observe that principle in connection with its activity.

In this regard, it should be borne in mind that, in its judgment in the *Dorsch Consult* case, the Court observed, first of all, that the requirement in question is not an 'absolute criterion', [10] and that it also considered it sufficient for the parties to the procedure before the procurement review body to be heard before any determination is made by the chamber concerned. It therefore held that a procedure in which the authority required to settle a dispute is obliged to hear the parties before making its determination is '*inter partes*'.

8 — The independence of the Community concept of 'court or tribunal' has been maintained by the Court since the judgment in Case 61/65 *Vaassen-Göbbels* [1966] ECR 377.

9 — See, in particular, the judgments in the *Vaassen-Göbbels* case, cited above; in Case 14/86 *Pretore di Salò* [1987] ECR 2545; in Case 109/88 *Danfoss* [1989] ECR 3199; in Case C-393/92 *Almelo and Others* [1994] ECR I-1477; and, most recently, the judgment in the *Dorsch Consult* case, cited above, paragraph 23.

10 — Judgment cited above, at paragraph 31.

I am of the opinion that the same conclusion can be reached in this case, given that the Tyrolean law provides, in Paragraph 7(1), that hearings with the participation of the parties must be conducted before the Office and that more specific rules on the organisation and conduct of those hearings must be inserted, as has in fact been the case, in the internal rules of procedure. [11]

20. In accordance with those rules, the parties in the main proceedings were heard and had the opportunity to submit observations before the Office made its determination on the substance of the application. There can therefore be no doubt that, in this case, the proceedings were conducted in observance of the *inter partes* principle, as the Court understands that principle.

21. Finally, it remains to be established whether the structure and operation of the Office satisfy the conditions concerning the third-party status and independence of the judicial body.

It is well known that any body which purports to exercise judicial functions must, in principle, guarantee a high degree of imperviousness to any outside influence which could, if only potentially, compromise its independence of judgment in relation to the disputes which it is called upon to determine. That requirement is even more evident in cases such as this, where, on the one hand, the administrative authority has the power to appoint and remove the members of the Office and, on the other, it is also a party in the cases brought before the latter. [12]

22. In accordance with the shared legal traditions of the Member States, the Community concept of a court or tribunal implies that the provisions governing the composition and activities of any judicial body must guarantee, in strict terms, the independence and third-party status of its members. [13] That applies, in particular, to provisions conferring on the administrative authority the power to remove members of the body. Clearly, a power of that kind must be exercised only in exceptional cases, and the provisions conferring it on the executive must therefore specify, as transparently and exhaustively as possible, the grounds on which the members of the body may be removed.

11 — See Paragraph 4 of the Tyrol *Land* Government Regulation of 24 April 1995, *Tiroler LGBl.* 1995, No 47.

12 — This is, of course, the situation which normally arises in the field of public contracts. It is precisely in order to avoid any adverse consequences stemming from the 'structural' proximity between the 'reviewer' and the reviewed that the Review Directive lays down additional conditions to be satisfied by the body, a court or tribunal within the meaning of Article 177 of the Treaty, called upon to resolve disputes concerning public contracts in the two-tier system. In particular, at least the president of the body is required to have the same legal and professional qualifications as a member of the judiciary. This system will be discussed below, at point 32 et seq.

13 — The judgments which stress the importance of the conditions of independence and third-party status include those in the *Pretore di Salò* case, cited above, paragraph 7, Case C-24/92 *Corbiau* [1993] ECR I-1277, paragraph 15, and the *Almelo* case [1994], cited above, paragraph 21.

23. That having been said in general terms, coming now to the case in point, it should be noted that, in its written observations, when it contested the admissibility of the questions, the Commission cast doubt, from several points of view, on whether the condition of independence was fulfilled by the rules governing the composition and operation of the Office. At the hearing, however, the Commission indicated that it had modified its position, which it justified by a (general) reference to the judgment in the *Dorsch Consult* case.

24. In the written procedure, the Commission relied, firstly, on the fact that the member of the Office who acts as rapporteur is an official of the administrative authority who is on leave of absence, arguing that, in view of the importance of the role played by the rapporteur within the Office, such a situation was not compatible with the position of the judicial body as a third party.

I do not consider that criticism well founded. The fact that a member of the Office is drawn from the administrative authority is not, by itself, sufficient to compromise his freedom of judgment, which must be guaranteed by the set of rules governing the operation of the body. It should be added that the Austrian legislature itself has taken account of that requirement by providing in the law establishing the Office that, irrespective of their background, its members are not to be subject to instructions in the exercise of their functions (Paragraph 6(7)).

25. Secondly, the Commission observes that the fact that the Tyrolean law contains no provision for members of the Office to be challenged or to withdraw is not compatible with the condition of independence. Such provisions should, for example, be applied when members have participated, as officials of the administrative authority, in the award of the contract in question. According to the Commission, that gap in the law is all the more serious in view of the 'structural' proximity of the Office to the administrative authority whose actions it is required to review.

The absence of any rules governing challenges to and withdrawals by members of the judicial body compromises that body's independence, as the Commission concluded in its written observations. Moreover, that gap cannot be remedied by applying by analogy the corresponding provisions relating to members of the judiciary, since that subject is bound up with the principle of the court specified by law and therefore needs an explicit and exhaustive set of rules.

26. Finally, the Commission disputes the compatibility of the rules governing removal from office of members of the body with the principle of the independence of the judicial body. It points out that the provisions on removal contained in Paragraph 6(4) of the law establishing the Office are worded too vaguely. In addition to a reference to circumstances in which the conditions required for appointment are no longer fulfilled, which obviously does not give rise to any problems of interpretation, Paragraph 6(4) also provides that

the administrative authority may annul the appointment if factors arise which prevent proper performance of the duties and 'are likely to do so for a long time'. It is this latter provision which, according to the Commission, appears difficult to reconcile with the principle of the independence of the judicial body.

The Commission's position seems reasonable. The provision cited above actually renders identification of the judge uncertain because the power of the government authority to remove members of the judicial body is not contingent upon clearly defined situations, and that is manifestly contrary to the principle of the court specified by law. Nor does it seem to me to be possible to compensate for that by the application by analogy of rules relating to the removal of members of the judiciary, since the provision as it stands shows the intention to confer an extremely wide power on the government authority. The vagueness of the provision and the consequent broad discretion conferred on the executive also make it very difficult, if not impossible, to institute a judicial review of any steps taken to remove a member of the Office.

In conclusion, the provision of the law establishing the Office which governs the sensitive matter of the removal of its members uses a formula which appears too vague to serve as a guarantee against undue interference or pressure on the part of the executive. [14]

27. That conclusion is not contradicted, but rather confirmed, by the judgment given recently by the Court in the *Dorsch Consult* case. In that case, the judicial nature of the German body responsible for reviewing public procurement awards (the Vergabeüberwachungsausschuss des Bundes) had been called into question precisely on the ground that it did not satisfy the criteria of independence and third-party status in relation to the executive. However, that precedent does not seem to me to be relevant. The Court considered that the doubts expressed by both the Commission and the Advocate General [15] were unfounded, on the ground that the German legal system expressly provides that the provisions on the removal of judges apply to the members of the Federal body competent to review public procurement awards and that they also govern directly the questions of challenge and withdrawal. The Court gave the following reasons for its position: [16]

'Under Paragraph 57c(3) of the HGrG, the main provisions of the Richtergesetz con-

14 — It is significant that the Austrian legal system itself contains different approaches to the operation even of bodies called upon to review, at sole instance, the legality of awards of public contracts. As is apparent from the circumstances of Case C-258/97 *Hospital Ingenieure*, in which I shall deliver my Opinion on 1 October 1998, the law on public contracts in force in Carinthia confers the abovementioned powers on the Unabhängiger Verwaltungssenat für Kärnten, a judicial body which derives the guarantees of its independence from the law establishing it, the power of removal being conferred on the senate itself and exercisable only in the circumstances expressly provided for by the law (Article 129b of the Austrian Federal Constitution).

15 — See points 33 to 37 of the Opinion of Advocate General Tesauro [1997] ECR I-4976 et seq.

16 — Judgment cited above, paragraph 36.

cerning annulment or withdrawal of their appointments and concerning their independence and removal from office apply by analogy to official members of the chambers. In general, the provisions of the Richtergesetz concerning annulment and withdrawal of judges' appointments apply also to lay members. Furthermore, the impartiality of lay members is ensured by Paragraph 57c(2) of the HGrG, which provides that they must not hear cases in which they themselves were involved through participation in the decision-making process regarding the award of a contract or in which they are, or were, tenderers or representatives of tenderers'.

28. It is clear from that passage that the Court considers it essential, in order to ensure the independence and third-party status of judges, that the exceptional circumstances justifying challenges to members of the body should in any event be specified in the provisions regulating its operation or, as in the case of removal, that an *express* reference should be made to the legislation applicable to judges. While it is true that, in its judgment in the *Dorsch Consult* case, the Court referred to the application by analogy of the German legislation concerning the removal from office of judges, that must be more correctly understood as a reference to particular provisions relating to the circumstances of a different case, in so far as applicable. There is no such reference in the Tyrolean law, which is why the passage of the judgment which I have just cited may not be relied on to support the opposite conclusion to that proposed here.

29. Nor is there any contradiction between the conclusions which I have reached and the fact that the Court has recently answered some questions submitted to it by the *Federal* Austrian authority responsible for review procedures in relation to the award of public contracts. In its judgment in the *Mannesmann Anlagenbau Austria AG and Others* case, [17] the Court examined the substance of the questions raised by the Bundesvergabeamt (Federal Procurement Office) without examining the judicial nature of the body making the reference, whereas such an examination had been carried out by the parties and the Advocate General. Consequently, even if it is accepted that the Court had implicitly intended to recognise that body's competence to submit questions for a preliminary ruling, [18] the differences which can be found between the law establishing the Bundesvergabeamt and the law establishing the Tiroler Vergabeamt suggest that no importance should be attached to the circumstance to which I have just referred. Although it is true that the bodies are structured virtually identically and operate on the basis of similar rules, it is also true that the Federal rules are much more precise as regards the guarantees of independence and irremovability enjoyed by the members of the Bundesvergabeamt. In particular, unlike the Tyrolean law, the grounds for termination of the appointment of a member of the Federal Office are expressly and exhaustively set out in Paragraph 100 of the BVergG (Paragraph 79 of the previous version of the

17 — Judgment in Case C-44/96 [1998] ECR I-73.

18 — In his Opinion delivered on 16 September 1997, at points 37 to 44, Advocate General Léger concluded in the affirmative. However, it is significant, for the purposes of this case, that at point 41 of his Opinion, in stating the grounds for his affirmative conclusion as regards the criterion of independence of the body, the Advocate General pointed out that an exhaustive list of the grounds for revocation is given in Article 79 of the BVergG (now Article 100 of the BVergG), which correspond to objective situations or, in the case of serious negligence, to omissions required by the Law to be so serious as to reduce the risk of arbitrary action or interference on the part of the administrative authorities.

same law). [19] The same can be said with regard to the grounds on which parties may challenge members of the Office, which are expressly laid down in the Federal law but not, as shown above, in the Tyrolean law.

30. In the light of all those considerations, I propose that the Court declare that the questions raised by the Tiroler Vergabeamt are inadmissible since they have been submitted by a body lacking the status of a court or tribunal within the meaning of Article 177 of the Treaty.

The first and second questions submitted

31. Should the Court see fit, contrary to what I have suggested above, to regard the Office as a 'court or tribunal' within the meaning of Article 177, thus overcoming all the uncertainties with regard to the position as third parties and independence of the members of the body, the problem would then arise of assessing the substance of the questions raised by the Office. The following observations will therefore be devoted to that assessment.

19 — Under Paragraph 100 of the BVergG, the appointment of a member of the Bundesvergabeamt is terminated for any of the following reasons: death or resignation from office; becoming ineligible to stand for election to Parliament; a finding by the body, meeting in plenary session, that he is incapable of performing his duties on account of serious physical or mental deficiencies; expiry of his term of office; a finding by the body, meeting in plenary session, that he has committed a serious breach of duty; resignation from the judiciary or other appointing body.

32. As will be recalled, the Office seeks essentially to ascertain whether the rules governing its composition and operation comply with the requirements contained in the first subparagraph of Article 2(8) of the Review Directive.

In their written observations and during the oral procedure before the Court, the attention of the parties focused, in particular, on the profile of the president of the body in question, with a view to clarifying whether or not it satisfies the conditions set out in Article 2(8) of the Review Directive.

33. I would say at the outset that an analysis of that provision shows that the discussion referred to above is neither relevant nor necessary in this case. In order to substantiate that conclusion, it is essential to undertake a precise reading of Article 2(8) of the Review Directive.

34. The provision in question deals, it will be recalled, with the bodies responsible for review proceedings brought against decisions taken by the first-level authorities competent to award public contracts falling within the scope of the directive.

35. Article 2(8), and in particular the first sentence thereof, contemplates two different scenarios. Member States have the right to choose between two options when organising the system for reviewing decisions taken by the contracting authorities. The first option, which I shall describe as the 'single-tier system', is to confer competence to hear review proceedings on 'judicial bodies'. The second, which I shall call the 'two-tier system' and which reflects the legislative position in several Member States at the time of the adoption of the directive, is to confer competence, in the first place, on first-instance review bodies which are not judicial bodies. The subsequent text of Article 2(8) applies exclusively to this second scenario. In such a case, the provision states that 'provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body'.

36. The two-tier system is therefore characterised by the intervention, in the first place, of a non-judicial body which is required to give written reasons for its decisions concerning measures taken by the contracting authorities. In addition, those decisions must themselves be able to be the subject of judicial review or review before a body which is a 'court or tribunal' within the meaning of Article 177 and is independent both of the contracting authority and of the first-instance review body. The subsequent text of Article 2(8) of the directive refers to that independent body as a court or tribunal as referred to in Article 177, which must satisfy certain 'special' requirements relating to the conditions under which its members are appointed and leave office, the qualifications of its president, the procedure to be followed by it, and the binding nature of its decisions.

37. The task of assessing accurately the legislative purport of the provision in question is by no means a simple one. What is crucial for our purposes is to clarify what the directive meant by the phrase 'bodies ... judicial in character' in the first sentence of Article 2(8). It must be ascertained whether that phrase is to be construed as a reference to the Community concept of 'court or tribunal' or as a reference to national law.

38. I take the view that the former interpretation is the correct one, so that account is taken of the whole of Article 2(8) of the Review Directive only if the body responsible for review procedures is not a court or tribunal as referred to in Article 177 of the Treaty and is therefore not a body entitled to submit questions to the Court of Justice for a preliminary ruling. In such a case, the provision in question requires Member States which adopt the two-tier system to allow a re-examination, in any event, of the decisions taken by the first-instance review body in the form of a judicial review or a review by another body which is a 'court or tribunal' as referred to in Article 177.

39. The rationale of the system as a whole, as the Austrian Government and the Commission acknowledged at the hearing, is to ensure that, whenever decisions taken by the contracting authorities are reviewed, there can be intervention by a body which, by virtue of its 'judicial' nature, is entitled to submit questions for a preliminary ruling to the Court of Justice, even if that body is not formally part of the judicial system of the Member State in question. Thus, bodies responsible for review procedures can obtain from the Court, when they find it necessary to do so, a ruling on the interpretation of the provisions of the Community directives in the field of public procurement (including, clearly, the Review Directive).

40. However, if the Office is considered to be a body entitled to submit questions to the Court of Justice — and is therefore a court or tribunal as referred to in Article 177 —, it follows that the requirements of supervision which underlie the 'two-tier' option are irrelevant in this case since the body which deals, at first (and sole) instance, with review procedures is itself entitled to make references to the Court. It would therefore make no sense, from that point of view, to require decisions taken by a 'court or tribunal' within the meaning of Article 177 to be subject to review by another body in turn entitled to make references to the Court. I reiterate: the requirement to provide in any event for the intervention of a body which is a 'court or tribunal' within the meaning of Article 177 is clearly redundant in cases such as this, where the body responsible for review procedures is, by definition, regarded as a 'court or tribunal'; it is relevant only if, in a two-tier system, the first tier is represented by a 'purely' administrative body which, as such, falls outside the definition of a court or tribunal as referred to in Article 177.

41. The conclusion which I have reached makes it unnecessary for me to consider the substance of the two questions submitted by the Office, concerning the interpretation of the second subparagraph of Article 2(8) of the Review Directive. As will be recalled, that provision concerns the specific conditions to be satisfied by the independent body which deals with cases at second instance in the two-tier system. It is therefore clear that the clarifications sought by the national authority are not relevant in this case since that part of the provision is not applicable to the Public Procurement Office established by the Tyrolean law. The issue raised by the referring authority therefore boils down to that of the admissibility of the questions submitted, which has already been examined. It is only within that framework, and not as part of the interpretation of Article 2(8) of the Review Directive, that any assessment can be made of the status of the members of the body, their independence in relation to the executive power and to the parties, the conditions governing their appointment and removal, and so on. It is therefore not crucial, for example, to assess whether the president of the Office has the same personal and professional qualifications as a member of the judiciary and whether those qualifications must be determined by reference to a 'national' or 'Community' concept of a court. That condition is peculiar to the 'two-tier' system which the directive conceives of as a possible alternative available to Member States when establishing a national system of review procedures. However, it is

not in itself a decisive criterion for regarding a body as a 'court or tribunal' for the purposes of Article 177.

42. It should be added that, always assuming that the body in question is to be regarded as a court or tribunal within the meaning of Article 177, the conclusion which I have reached is the only one which allows the Tyrolean system of reviewing awards of public contracts to be included within the scope of the Review Directive. Indeed, if the Landesvergabeamt were to be regarded as a 'court or tribunal within the meaning of Article 177' as referred to in the last sentence of the first part of Article 2(8), and therefore as a 'second tier' in the determination of review proceedings against the award of public contracts, the interpreter would be faced with the problem of identifying the first-tier review body which is not a 'body ... judicial in character' and whose decisions would have to be the subject of review by the Office. It will be noted that no such first-instance review body exists within the Austrian system since review proceedings against decisions taken by contracting authorities are brought at first and sole instance before the Landesvergabeamt.

43. In the light of the foregoing, I propose that the Court declare the questions referred by the Tiroler Landesvergabeamt inadmissible since that body is not a court or tribunal within the meaning of Article 177 of the Treaty.

In the alternative, I propose that the Court reply as follows:

The second part of Article 2(8) of the review directive must be interpreted as meaning that the conditions set out therein apply exclusively to the composition of independent bodies responsible for the review of decisions taken by another body which is competent at first instance to hear and determine review proceedings against the award of public contracts and is not a court or tribunal as referred to in Article 177 of the EC Treaty. The provision in question is therefore not relevant for the purpose of assessing the composition and operation of the Tiroler Landesvergabeamt.