OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 1 October 1998 *

1. By order of 8 July 1997, the Unabhängiger Verwaltungssenat für Kärnten (Independent Administrative Senate for Carinthia) referred to the Court for a preliminary ruling five questions 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 ('the Review Directive') [1] and Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts ('the Services Directive'). [2]

Legislative context

2. Article 1(1) of the Review Directive, as amended by Article 41 of the Services Directive, requires the Member States to take the measures necessary to ensure that decisions taken by contracting authorities may be reviewed effectively and rapidly 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 following 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.

* Original language: Italian.

1 — OJ 1989 L 395, p. 33.

2 — OJ 1992 L 209, p. 1. The Services Directive was last amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ L 328, p. 1).

The members of such an independent body 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.'

5. A number of provisions of the Services Directive are also relevant to the present case. That directive contains rules for the award of public service contracts, which must be observed within the Community for all public service contracts with a value exceeding the minimum threshold provided for in Article 7. Article 8 requires contracts which have as their object services listed in Annex I A to be awarded in accordance with the provisions of Titles III, IV, V and VI, whereas those listed in Annex I B are to be awarded in accordance only with Articles 14 and 16. If the contract has as its object services listed in both annexes, the choice of the applicable rules is to be determined by the service with the greater value. The services listed in Annex I A include, in Category No 12, architectural services; engineering services and integrated engineering services; related scientific and technical consulting services; technical testing and analysis services.

6. Under Article 168 of the Act of Accession, [3] both directives should have been transposed into Austrian law by the date of accession, that is, 1 January 1995. The Review Directive was transposed at Federal level by the Bundesgesetz über die Vergabe von Aufträgen (Federal Law on the Award of Public Contracts), [4] which entered into force on 1 July 1994. At the regional level, each of the nine *Länder* has adopted its own law on the award of public contracts. In the case of Carinthia, the law in question is the Carinthian Auftragsvergabegesetz, which entered into force on 1 January 1994, [5] Section VIII of which governs the procedures for reviewing award decisions.

Under Paragraph 59 of that Law, the body responsible for review procedures is the Unabhängiger Verwaltungssenat für Kärnten, an independent administrative authority charged with reviewing the legality of acts of the *Land* administration (hereinafter: 'the UVK'). The Law of 20 November 1990 (the Carinthian Verwaltungssenatsgesetz) [6] governs the powers, composition and operation of the UVK. The provisions of the Austrian Constitution relating to the structure and operation of the independent administrative senates of the *Länder* are also applicable. [7]

3 — 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 (OJ 1994 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 procurement legislation by the Law of 27 May 1997 (BGBl. 1997, No 56).

5 — LGBl. 1994, No 55.

6 — LGBl. 1990, No 104.

7 — See point 14 below.

7. The law implementing the Services Directive, [8] which was adopted by the Carinthian *Landtag* (Parliament of the *Land* of Carinthia) on 22 April 1997, entered into force on 1 July 1997, that is, after the end of the period provided for in the Act of Accession. That law expressly excludes from its scope procurement procedures already completed and is therefore not applicable to the facts of the main proceedings, which date back to 1996.

Facts and main proceedings

8. The main proceedings concern the award to the company CMT Medizintechnik Gesellschaft mbH, of Vienna, of a service contract relating to the construction of a children's hospital in Klagenfurt. The contract, which was awarded by the Landeskrankenanstalten-Betriebsgesellschaft (the company responsible for the management of regional hospitals), related to a number of engineering services, including planning and consultancy in connection with the installation and operation of various medical facilities.

9. HI Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH, of Munich, was a competing tenderer for the same contract. Following its exclusion, it brought review proceedings before the UVK, claiming that the award should be set aside as being in breach of the Community legislation on public service contracts. In particular, it alleged that the conditions included in the contract notice and the rules applied in carrying out the procedure for the award of the contract did not conform with the provisions of the Services Directive.

10. The UVK considered it necessary, in order to resolve the dispute, to refer to the Court of Justice for a preliminary ruling five questions worded as follows:

'1. Is Article 2(8) 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 to be interpreted as meaning that the Unabhängiger Verwaltungssenat für Kärnten fulfils the conditions for a body responsible for review procedures with respect to services?

2. Are these or other provisions of Council Directive 89/665/EEC on the coordina-

8 — LGBl. 1997, No 58.

tion of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, from which there derives an individual right to have review proceedings conducted before authorities or courts which comply with the provisions of Article 2(8) of Directive 89/665/EEC, to be interpreted as being sufficiently precise and specific that, in the event of non-transposition of the directive in question by the Member State, an individual may successfully assert that legal right against the Member State in legal proceedings?

3. Are the provisions of Article 41 of Directive 92/50/EEC in conjunction with Directive 89/665/EEC, which are the basis of an individual's right to have review proceedings conducted, to be interpreted as meaning that a national court with the characteristics of the Unabhängiger Verwaltungssenat für Kärnten may, when conducting review proceedings on the basis of national provisions such as Paragraph 59 et seq. of the Carinthian Auftragsvergabegesetz and the regulations relating thereto, disregard those provisions if they prevent the carrying out of review proceedings under the Carinthian Auftragsvergabegesetz for the award of service contracts, and therefore nevertheless conduct review proceedings in accordance with Section 8 of the Carinthian Auftragsvergabegesetz?

4. Are the services mentioned in the facts of the case, with reference to Article 10 of Directive 92/50/EEC, to be classified as services coming under Annex I A, Category No 12, of Directive 92/50/EEC (architectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services)?

5. Are the provisions of Directive 92/50/EEC to be interpreted as satisfying the conditions laid down in the judgment in Case 41/74 *Van Duyn* (paragraph 12) for the direct applicability of a Community directive, with the result that services coming under Annex I A of the directive are to be awarded under the procedure therein mentioned, or are the relevant provisions of the directive in connection with the services mentioned in Annex I A capable of fulfilling the conditions laid down in the said case?'

Admissibility and the first question

11. Before considering the questions, it is necessary to determine whether the UVK is competent to make a reference to the Court of Justice under the preliminary ruling procedure. It should be pointed out in that regard

that, in these proceedings, as in the *Köllensperger* case, [9] both the order for reference and the observations of the parties display some confusion between the conditions which apply in general in relation to the concept of 'court or tribunal' in Article 177 and the special conditions laid down in Article 2(8) of the Review Directive. For ease of reference, I would reiterate that the latter conditions concern the composition and operation of the independent body responsible for reviewing, at second instance, the legality of awards of public contracts.

12. That said, I should like to make it clear at the outset that I do not share the doubts — which in fact were expressed only by the defendant in the main proceedings — concerning the competence of the UVK to submit questions to the Court for a preliminary ruling. I am of the opinion that that body fulfils all the requirements, in the light of the case-law, [10] for recognition as a court or tribunal within the meaning of Article 177. [11]

13. The UVK, which is an independent administrative senate within the meaning of Article 129 of the Austrian constitution, [12] was established by the Carinthian Verwaltungssenatsgesetz. That Law, in conjunction with the Carinthian Auftragsvergabegesetz, confers on the UVK exclusive competence to assess, upon application by a party, the legality of administrative measures, including those relating to the award of public contracts. The UVK has the power to set aside awards and to order interim measures (Article 61 of the Carinthian Auftragsvergabegesetz). It is apparent from those provisions that the UVK is established by law and that its jurisdiction is compulsory. Moreover, its enduring nature cannot be disputed since it sits permanently, notwithstanding the fact that its members, including those from the administration, remain in office for a limited number of years. Nor is there any doubt that the body in question applies rules of law, since its composition and operation are governed by the Law on independent administrative senates (Carinthian Verwaltungssenatsgesetze) and the Law on the award of public contracts (Carinthian Auftragsvergabegesetz).

The requirement that its procedure must be *inter partes*, as that criterion is understood by

9 — Case C-103/97, in which I delivered my Opinion at the hearing of 24 September.

10 — See, in particular, the judgments in Case 61/65 *Vaassen Göbbels* [1966] ECR 261; Case 14/86 *Pretore di Salò* [1987] ECR 2545; Case 109/88 *Danfoss* [1989] ECR 3199; Case C-393/92 *Almelo and Others* [1994] ECR I-1477; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961.

11 — In the light of the Court's case-law, it is necessary to take account of many different factors and specifically of 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 is impartial and independent.

12 — Under that provision, the independent administrative senates of the *Länder* and the Administrative Court, Vienna, are responsible for ensuring the legality of administrative acts. The following provision, Article 129a(1), lists the various powers of the senates, which are to be exercised after the administrative remedies have been exhausted. They include jurisdiction to determine appeals by private individuals claiming that their rights have been infringed by the exercise of administrative power of command and coercion (paragraph 1), and jurisdiction to determine all other matters assigned to them under the Federal or *Land* laws governing the individual spheres of administration (paragraph 3).

the Court, is also satisfied. [13] The Law on procedure before the administrative courts, [14] which makes observance of the *inter partes* principle mandatory, is in fact applicable in the present case by virtue of the reference to it in Article 59(2) of the Carinthian Verwaltungssenatsgesetz. Moreover, that conclusion is indirectly confirmed by the Law establishing the UVK, which, in Article 13(5), provides for an oral procedure, under the direction of the President, in which the parties have the right to be heard.

14. Doubts have been expressed, in the course of the written procedure, concerning the conformity of the rules governing the composition and operation of the UVK with the requirement of independence of the judicial body. However, in contrast to my observations in the *Köllensperger* case, [15] I consider that such doubts are not founded in this case. From an analysis of the applicable rules, it is clear that the UVK has fully independent status which enables it to exercise its judicial function without being subject to undue pressure and interference, especially on the part of the executive.

The UVK's independence and third-party status are guaranteed, first and foremost, by the relevant constitutional provisions. Article 129b(2) of the Bundes-Verfassungsgesetz (B-VG, Federal Constitutional Law) clearly confirms that, in the execution of the tasks entrusted to them by the Constitution itself and by the laws of the *Länder*, the members of the independent administrative senates may not receive any instructions. The same provision states that cases are to be distributed amongst the members of the Senate in advance for a period fixed by the laws of the *Länder*. Once a case has been thus assigned to a member of the Senate, it may not then be withdrawn from him except by decision of the President on grounds of serious impediment. Article 129b(3) further provides that, before the expiry of their term of office, the members of the Senate may be removed only in the circumstances expressly provided for by law and that a collective decision of the Senate itself is required for that purpose. Under the next paragraph, the members of the Senate may not engage in any activity which might give rise to doubts as to their independence in the exercise of their functions. It should be added that, by providing that the members of the UVK are to exercise their functions with complete independence and that they are not to be bound by any instructions, Article 5 of the Carinthian Verwaltungssenatsgesetz confirms the guarantees already provided for by the Constitution.

In the light of all those considerations, I am of the opinion that the rules applicable to the UVK fully satisfy the requirements of independence and third-party status which are necessary for proper exercise of the judicial function.

13 — Having first stated that 'the requirement that the procedure ... must be *inter partes* is not an absolute criterion', the Court held, in paragraph 31 of the *Dorsch Consult* judgment, that it is sufficient that the parties to the procedure before the procurement review body must be heard before any determination is made by the chamber concerned.

14 — See Part II, Paragraph 37 et seq., of the Verwaltungsverfahrensgesetz (Law on procedure before the administrative courts, BGBl. 1991, No 51).

15 — See points 22 to 31 of my Opinion.

15. Since there are no grounds for doubting the status of the UVK as a court or tribunal, the questions submitted to the Court by that body, which is responsible under the legislation of the *Land* of Carinthia for reviewing the legality of procedures for the award of public contracts, must be considered admissible.

16. That conclusion also has decisive significance with regard to the answer to be given to the first question. In fact, it supports the view that no useful purpose would be served by the assessment requested by the UVK of whether the rules governing the latter's own composition and operation satisfy the conditions referred to in Article 2(8) of the Review Directive. My reasons for taking that view are the same as those set out in my Opinion in the *Köllensperger* case: [16] Austrian law entrusts responsibility for review procedures at first and sole instance to a body which is a 'court or tribunal' within the meaning of Article 177, whereas Article 2(8) as a whole applies exclusively to cases where Member States prefer, as is their right, to adopt a two-tier system of review comprising determination at first instance by a review body which is not a 'court or tribunal' and at second instance by a 'judicial' body which is independent both of the contracting authority and of the first-instance review body. It is only when a Member State adopts such a 'two-tier' system that the second subparagraph of Article 2(8) of the Review Directive applies, and only in that case, therefore, must the conditions relating to the composition and operation of the independent body be observed. It follows that the rules governing the structure and activity of the UVK are not to be assessed in the light of the special conditions set out in Article 2(8) of the Review Directive. [17]

17. I therefore propose that the first question be answered as follows: Article 2(8) of the Review Directive is to be interpreted as meaning that the conditions set out therein concern only the composition and operation of independent bodies responsible for reviewing decisions taken by another body which is competent at first instance to hear review proceedings against the award of public contracts and is not a court or tribunal within the meaning of Article 177 of the Treaty. The provision in question is therefore not relevant as far as the composition and operation of the independent administrative senate of the *Land* of Carinthia are concerned since the latter is a judicial body which is competent to review, at first and sole instance, measures awarding public contracts.

16 — Points 34 to 43 of the Opinion cited, to which I refer for a more detailed analysis.

17 — In my Opinion in the *Köllensperger* case, at the points cited in the previous footnote, I indicated what I consider to be the rationale of a provision which is certainly not distinguished by its clarity of presentation.

The second and third questions

18. The second and third questions, which can be examined together, concern the competence of the UVK to hear review proceedings relating to procedures for the award of service contracts even in the absence of specific national provisions implementing Directive 92/50/EEC. I would point out that Article 41 of that directive amended the Review Directive to include within its scope procedures for the award of public service contracts.

19. The Austrian Law implementing the Services Directive entered into force on 1 July 1997, that is, more than two years after the end of the prescribed period. Because of that delay, the award of the contract at issue in the main proceedings took place in conformity with national provisions incompatible with those of the Services Directive. The applicant undertaking in the national proceedings therefore brought review proceedings before the UVK, a body on which, at the material time, domestic law conferred competence to hear only review proceedings concerning awards of supply and works contracts.

20. The national court therefore seeks to ascertain whether, notwithstanding the non-transposition of the directive, an individual is also entitled to use the procedures provided for by Article 2(8) of the Review Directive in relation to the award of a service contract. If the answer is in the affirmative, the court making the reference asks the Court whether such a right may be exercised before a body on which, at the material time, national legislation conferred exclusive competence to hear review proceedings against awards of works and supply contracts.

21. The circumstances of this case display obvious similarities to those of the *Dorsch Consult* case, cited above, and the *Tögel* case. [18] In particular, the second and third questions submitted to the Court by the UVK are completely identical to the first and second questions submitted by the Bundesvergabeamt in the *Tögel* case.

22. In those judgments, the Court reached conclusions to which I can subscribe. It held that 'it does not follow from Article 41 of Directive 92/50 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

18 — Judgment in Case C-76/97 [1998] ECR I-5357.

may also hear appeals relating to procedures for the award of public service contracts'; [19] that is so because, in principle, it is 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. [20]

Starting from those premisses, the Court held that, although Article 41 of the Services Directive requires the Member States to adopt the measures necessary 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 those 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. [21]

The Court added, however, that it is for the national court, in compliance with the requirement that domestic law must be interpreted in conformity with the Services Directive and the requirement that the fullest possible protection of the rights of individuals must be ensured, to determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring review proceedings in relation to awards of public service contracts. The substantive provisions of the Services Directive could then, in so far as they are capable of direct effect, [22] be relied on in proceedings against a State which had failed to transpose it. The national court must determine whether such a right of appeal may be exercised before the same bodies as those which are competent to hear appeals concerning the award of public supply contracts and public works contracts. [23] I would, however, add that in this case it is questionable whether a similar conclusion can be reached: as has been observed previously, the text of the Austrian law, which has been in force since 1 July 1997, expressly excludes application of the Services Directive to proceedings which are already pending.

The Court went on to state that, if the relevant domestic provisions cannot be interpreted in conformity with the Services Directive, the persons concerned, using the appropriate domestic law procedures, may claim compensation for the damage incurred owing to the failure to transpose the directive within the time prescribed. [24]

23. The conclusion reached by the Court in the cases cited is entirely appropriate to the circumstances of this case, in which the issue is precisely whether the body responsible under Austrian legislation for determining review proceedings concerning the award of

19 — Judgment in *Dorsch Consult*, at paragraph 46; judgment in *Tögel*, at paragraph 28.

20 — See the judgment in *Dorsch Consult*, at paragraph 40, and the Opinion of Advocate General Tesauro, at point 47. See also the judgment in *Tögel*, at paragraph 22.

21 — Judgment in *Dorsch Consult*, at paragraph 41; judgment in *Tögel*, at paragraph 23.

22 — For a more detailed discussion of this aspect, see below, at point 28 et seq.

23 — Judgment in *Dorsch Consult*, at paragraph 46; judgment in *Tögel*, at paragraph 28.

24 — Judgment in *Dorsch Consult*, at paragraph 45; judgment in *Tögel*, at paragraph 27.

public supply and public works contracts is also competent to hear review proceedings in relation to services. I therefore propose that the second and third questions referred by the UVK be answered as follows: neither Article 2(8) nor other provisions of Directive 89/665/EEC are to be interpreted as meaning that, in the absence of national measures to implement the directive within the period laid down for that purpose, the review bodies of the Member States which are competent in relation to procedures for the award of public works contracts and public supply contracts are also entitled to review procedures for the award of public service contracts. However, the requirement that domestic law must be interpreted in conformity with Directive 92/50/EEC and the requirement that the rights of individuals must be protected effectively mean that the national court must determine whether the relevant provisions of domestic law allow recognition of a right for individuals to bring review proceedings in relation to the award of public service contracts.

The fourth and fifth questions

24. The fourth and fifth questions concern the interpretation of certain provisions of the Review Directive. By its fourth question, the referring court seeks to ascertain whether the service which was the subject of the contract notice published by the Landeskrankenanstalten-Betriebsgesellschaft falls within Category No 12 of Annex I A to the Services Directive. If so, the implication of such a classification would be that the contract should have been awarded in conformity with the procedures referred to in Titles III, IV, V and VI of the Services Directive.

It will be recalled that Category No 12 covers the following: architectural services; engineering services and integrated engineering; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services. That category corresponds to Reference No 867 of the common product classification (CPC) nomenclature of the United Nations.

25. I share the view expressed by all the parties to the proceedings that the services at issue in the main proceedings are to be regarded as 'engineering services' of the kind referred to in Category No 12. In fact, the notice of the contract with which the main proceedings are concerned referred to planning and processing works, to be entrusted to firms of consulting engineers, in connection with the construction of a children's hospital at the Landeskrankenhaus Klagenfurt, with the corresponding outpatient facilities, operating theatre and X-ray laboratory as well as five children's wards and a children's surgical ward; it also included planning services for the sanitary, heating and ventilation installations with air conditioning and high-and low-voltage installations, 'structural and constructional engineering' services and planning services for the medical installations. All those

services can clearly be regarded as 'engineering services' and 'related scientific and technical consulting services' as referred to in Category No 12. They therefore come fully within the scope of the Services Directive, so that the contracts for those services must be awarded in conformity with the provisions of Titles III to VI of the Services Directive.

26. Finally, by its fifth question, the UVK asks the Court to rule on the direct applicability of the provisions of the Services Directive. Although in the text of the question the UVK refers to the directive generally, in the grounds of the order for reference it expressly refers only to Articles 1 to 7.

27. As the Court has consistently held, [25] for individuals to be able to rely, in proceedings against the State, on provisions of a directive which has not been transposed, or correctly transposed, into national law, those provisions must as far as their subject-matter is concerned be unconditional and sufficiently clear and precise.

28. The fifth question corresponds to the second part of the third question referred to the Court in the *Tögel* case. In the judgment in that case, the Court held that the provisions of the Services Directive may be relied on directly by individuals before national courts. [26] I see no reason to dispute that conclusion, which is based on an analysis of the wording of the directive. Although the provisions of Title I, relating to the persons and matters covered by the directive (Articles 1 to 7), are not inherently capable of creating rights for individuals, they are nevertheless essential for the purpose of identifying the persons enjoying rights and having obligations under the directive, so that, in combination with the substantive provisions, they may be relied on directly before a court.

As regards the provisions of Title II (Articles 8 to 10), concerning the procedures applicable to the services listed in Annexes I A and I B, they require contracting authorities to comply with the procedures referred to in Titles III to VI so far as the services listed in Annexe I A are concerned, and with those referred to in Articles 14 to 16 so far as the services listed in Annex I B are concerned. Those rules are not made subject to any conditions and are sufficiently clear and precise to create rights for individuals which may be relied on before a court.

25 — See, among others, the judgments in Case 41/74 *Van Duyn* [1974] ECR 1337, at paragraph 12; Case 8/81 *Becker* [1982] ECR 53, at paragraph 25; and Case 31/87 *Beentjes* [1988] ECR 4635, at paragraph 50.

26 — Judgment cited above, at paragraphs 41 to 47. See also the Opinion of Advocate General Fennelly, at points 49 to 57.

The same conclusion applies, in principle, to the provisions contained in the subsequent titles. Those provisions relate to the 'choice of award procedures and rules governing design contests' (Title III), the 'common rules in the technical field' (Title IV), the 'common advertising rules' (Title V) and the 'common rules on participation' (Title VI). They specify in detail the obligations imposed on contracting authorities in the preparation and conduct of invitations to tender. Observance of the rules set out therein may therefore be called for directly by an individual before the competent courts. [27]

It should, however, be added that, in its judgment in the *Tögel* case, the Court, in adopting the view taken by the Advocate General, held that the part of the directive under consideration here contains provisions — not specified — which are not clear, precise and unconditional and may therefore not be relied on directly before a court. [28] The conclusion that the provisions of the abovementioned titles, which by their wording are not clear, precise and unconditional, are not capable of direct effect was supported by the circumstance that a comprehensive analysis of all the provisions of the titles in question was not warranted by the specific facts of the case. Consideration of whether particular provisions of those titles are capable of direct effect must await a reference for a preliminary ruling in which such an examination is specifically required. [29]

Such a conclusion is all the more justifiable in the present case. Firstly, the facts of the case do not require specific interpretations of all the provisions contained in the abovementioned titles of the directive (twenty-seven articles in all). Secondly, it can be deduced from the grounds of the order for reference, although it gives very little information, that the interest of the court appears limited to the articles contained in the first part of the directive. For those reasons, even though I have doubts as to whether it is actually necessary to give an answer to the fifth question in view of its lack of precision with regard to Titles III to VI of the Services Directive, I propose that the Court give the same answer as it gave in the *Tögel* judgment.

27 — See paragraph 46 of the judgment in *Tögel* and the Opinion of Advocate General Fennelly, at point 57.

28 — Judgment in *Tögel*, at paragraph 46, and Opinion of Advocate General Fennelly, at point 57. Article 21 of the directive can be cited as an example. It confers on contracting authorities the right to arrange for the publication in the *Official Journal of the European Communities* of notices announcing public service contracts which are not subject to the publication requirement referred to in Article 15 et seq. of the Services Directive. Such a provision is clearly not capable of having direct effect since it cannot, by its very nature, be relied on directly before a court by an individual.

29 — Opinion of Advocate General Fennelly, at point 57.

Conclusion

29. In the light of the foregoing, I propose that the Court answer the questions submitted by the Unabhängiger Verwaltungssenat für Kärnten for a preliminary ruling as follows:

(1) Article 2(8) of the Review Directive is to be interpreted as meaning that the conditions contained therein concern exclusively the composition and operation of independent bodies responsible for reviewing decisions taken by another body which is competent, at first instance, to hear review proceedings against the award of public contracts and which is not a court or tribunal as referred to in Article 177 of the Treaty. The provision in question is therefore not relevant for the purpose of assessing the composition and operation of the independent administrative senate of the *Land* of Carinthia, since the latter is a judicial body which is competent, at first and sole instance, to review measures awarding public contracts.

(2) Neither Article 2(8) nor any other provision of Directive 89/665/EEC is to be interpreted as meaning that, in the absence of national implementing measures adopted within the period laid down for that purpose, the review 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 review proceedings relating to the award of public service contracts. However, in order to fulfil the requirement that domestic law must be interpreted in conformity with Directive 92/50/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 review proceedings in relation to the award of public service contracts.

(3) The services covered by the contract notice published by the Landeskrankenanstalten-Betriebsgesellschaft for the construction project relating to the Klagenfurt hospital are engineering services falling within Category No 12 of Annex I A to the Services Directive. Consequently, a contract concerned with such services must be awarded in conformity with the procedures referred to in Titles III, IV, V and VI of that directive.

(4) The provisions of Titles I and II of the Services Directive are unconditional and sufficiently clear and precise to be relied on directly before national courts. As regards the provisions of Titles III, IV, V and VI, they may be relied on by an individual before a national court to the extent to which it is clear from an individual examination of them that they are unconditional and sufficiently clear and precise.