

Case C-103/97

Josef Köllensperger GmbH & Co. KG and Atzwanger AG

v

Gemeindeverband Bezirkskrankenhaus Schwaz

(Reference for a preliminary ruling
from the Tiroler Landesvergabeamt, Austria)

(National 'court or tribunal' within the meaning of Article 177 of the EC Treaty —
Procedures for the award of public supply contracts and public works contracts —
Body responsible for review procedures)

Opinion of Advocate General Saggio delivered on 24 September 1998	I - 553
Judgment of the Court (Sixth Chamber), 4 February 1999	I - 566

Summary of the Judgment

- 1. Preliminary rulings — Reference to the Court — National court or tribunal within the meaning of Article 177 of the Treaty — Definition — Body competent to hear appeals concerning the award of public contracts
(EC Treaty, Art. 177)*

2. *Approximation of laws — Review procedures concerning the award of public supply and public works contracts — Directive 89/665 — Bodies responsible for review procedures — Applicability of the guarantee provisions of the second subparagraph of Article 2(8) of the directive — Conditions — Bodies of a judicial character — Not applicable*
(Council Directive 89/665, Art. 2(8), second subpara.)

1. In order to determine whether a body making a reference for a preliminary ruling is a court or tribunal within the meaning of Article 177 of the Treaty, which is a question governed by Community law alone, account must be taken 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 is independent. Those criteria are satisfied by the Tiroler Landesvergabeamt (Public Procurement Office of the *Land* of Tyrol), established by the Law of the *Land* of Tyrol on the Award of Contracts to review procedures for the award of public contracts.

Landesvergabeamt in the performance of their duties is prohibited.

2. The conditions set out in Article 2(8) of Council Directive 89/665 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 do not apply to provisions such as those governing the composition and functioning of the Tiroler Landesvergabeamt, since the guarantee provisions in that article do not apply to a body responsible for review procedures which is of a judicial character.

It is apparent from the provisions on its composition and functioning that that body complies with the first five criteria, and that the independence of its members is guaranteed by the application of the General Law on Administrative Procedure, which contains very specific provisions on the circumstances in which members of the body in question must withdraw, failure to comply with that obligation constituting a procedural defect which may be challenged by the parties concerned. In addition, under the *Land* law, the giving of instructions to members of the Tiroler

It is only if Member States have chosen to give jurisdiction over such reviews to bodies which are not of a judicial character that their decisions must be capable of being the subject of judicial review or of review by another body which must satisfy the particular requirements of Article 2(8) of the directive, so as to guarantee an adequate review.