OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 13 March 2008 [1]

I — Introduction

1. In this case the Austrian Bundesvergabeamt (Federal Procurement Office) is referring to the Court of Justice a very comprehensive series of questions on the interpretation of various provisions of Community law in the field of public procurement law. The essential issue is the interpretation of the concept of 'award' in the context of public procurement law. In particular it is necessary to clarify in what circumstances an amendment to an existing contract is to be regarded as the award of a new public service contract, with the result that where appropriate a public procurement procedure must be carried out beforehand and undertakings left out of consideration are to be afforded legal protection.

2. The background to this reference for a preliminary ruling is a bitter dispute relating to the supply of news agency services to the Austrian federal authorities, in which pressetext Nachrichtenagentur, a relatively new supplier on the Austrian market, is taking legal action in relation to contractual relations which traditionally exist between the Republic of Austria and the long-established Austria Presse Agentur and which were the subject of amendments in the years 2000, 2001 and 2005.

II — Legal background

A — *Community law*

3. Community law in this case is governed by two directives in the area of public procurement law, namely:

— Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of pro-

1 — Original language: German.

cedures for the award of public service contracts [2] ('Directive 92/50'); 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 workscontracts, [3] as amended by Directive 92/50 ('Directive 89/665'). [4]

1. Relevant provisions of Directive 92/50

4. Article 1(f) in the general provisions in Title I of Directive 92/50 contains the following definition:

'[For the purposes of this Directive] negotiated procedures shall mean those national procedures whereby authorities consult service providers of their choice and negotiate the terms of the contract with one or more of them'.

5. Article 3 of Directive 92/50 also in Title I provides as follows:

'1. In awarding public service contracts or in organising design contests, contracting authorities shall apply procedures adapted to the provisions of this Directive.

2. Contracting authorities shall ensure that there is no discrimination between different service providers.

…'

6. Title II of Directive 92/50 contains Articles 8 to 10 under the heading 'Two-tier application' which are worded as follows:

2 — OJ 1992 L 209, p. 1. This directive was repealed and replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). The latter amendment was, however, to be transposed into national law by 31 January 2006 only. Since it was not transposed into Austrian law prior to that date, it is without relevance to the facts of the main proceedings which concern the years 2000, 2001 and 2005.

3 — OJ 1989 L 395, p. 33.

4 — Further amendments to this directive are to be found in Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31; 'Directive 2007/66'). The latter amendments only came into force on 9 January 2008 and will have to be transposed by 20 December 2009; they are therefore without relevance to the facts of the main proceedings.

'*Article 8*

Contracts which have as their object services listed in Annex IA shall be awarded in accordance with the provisions of Titles III to VI.

Article 9

Contracts which have as their object services listed in Annex IB shall be awarded in accordance with Articles 14 and 16.

Article 10

Contracts which have as their object services listed in both Annexes IA and IB shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex IA is greater than the value of the services listed in Annex IB. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

7. Title III of Directive 92/50 is headed 'Choice of award procedures and rules governing design contests'. It contains Article 11(3), which contains the following provision:

'Contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice in the following cases:

…

(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider;

…'

8. Article 31(3) of Directive 92/50, which is in Title VI, provides as follows:

'If, for any valid reason, the service provider is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

2. Relevant provisions of Directive 89/665

9. Article 1 of Directive 89/665 provides as follows:

‘1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles … on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming 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 public supply or public works 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 authority of the alleged infringement and of his intention to seek review.’

10. Article 2 of Directive 89/665 provides 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 to:

…

(b) either set aside or ensure the setting-aside of decisions taken unlawfully …;

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

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

…

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

…'

B — *National law*

11. The element of Austrian law to be highlighted is Paragraph 331 of the Bundesvergabegesetz (Law on federal procurement) in the version that entered into force on 1 February 2006 [5] (hereinafter referred to as the 'BVergG 2006'), which forms the legal basis for the proceedings for a declaration brought before the Federal Procurement Office, and provides in part as follows:

'(1) Where an undertaking had an interest in the conclusion of a contract within the scope of application of this Federal Law, it may, in so far as it has suffered harm in consequence of the alleged infringement, apply for a declaration that:

1. the decision to make a direct award or to conduct a procurement procedure without prior publication was unlawful on account of a breach of this Federal Law or regulations made under it or on account of an infringement of directly effective Community law, or

…

4. a contract award which has been made directly to an undertaking without any other undertakings having participated in the procedure was manifestly unlawful under this Federal Law.'

12. According to Paragraph 332(2) and (3) of the BVergG 2006, the right to a declaration provided for in Paragraph 331 of the BVergG 2006 lapses not later than six months after the contract has been awarded.

5 — BGBl. I, No 17/2006.

13. It follows from Paragraph 132(3) of the BVergG 2006 that a successful application under Paragraph 331(1)(4) of that law will result in the contractual relationship being void as from the time of a definitive declaration of illegality.

14. The action for damages is to be distinguished from proceedings for a declaration; in the case of the former it is the Austrian civil courts that have jurisdiction rather than the Federal Procurement Office. Under Paragraph 341(2) of the BVergG 2006, an action for damages is admissible only if proceedings for a declaration have been successfully conducted.

III — Facts and main proceedings

15. The factual background to this case as it appears from the information contained in the order for reference may be summarised as follows.

A — *The news agencies involved in the proceedings*

16. Austria Presse Agentur ('APA') was established in Austria after the Second World War [6] in the form of a cooperative society, [7] of which nearly all Austrian daily newspapers and also Austrian broadcaster, ORF, are members. Together with its group companies, APA is the market leader in the news agencies market in Austria and traditionally provides the Republic of Austria with various news agency services.

17. Pressetext Nachrichtenagentur GmbH ('PN') has been active on the Austrian news agencies market since 1999 but has hitherto issued press releases for federal departments to a limited extent only. PN also has fewer journalists working for it than APA and does not have available to it such a large archive as APA. In 2004 PN offered the Republic of Austria news agency services; this offer did not however result in the conclusion of a contract.

6 — A predecessor organisation of the APA, the Österreichische Correspondenz, had already been established in 1849 in Vienna.

7 — It is apparent from the file that it is a registered cooperative society with limited liability.

B — *The relevant contractual relations between APA and the Republic of Austria*

18. In 1994, prior to its accession to the European Union, the Republic of Austria entered into a basic agreement with APA, relating to the provision of certain services for remuneration.[8] This basic agreement essentially allowed Austrian federal departments to access and use current information (basic service), to use historical information and previous press releases from an APADok database maintained by APA and to use APA's original text service 'OTS', both for its own purposes and for issuing its own press releases. The APADok database contains data from the basic service from 1 January 1988 and OTS releases from 1 June 1989.

19. The basic agreement was entered into for an indefinite period, and provided that neither party would seek to terminate the agreement before 31 December 1999 at the earliest. The basic agreement likewise contained provisions concerning the date of the first price increases, the maximum amount of each increase and the indexation of prices on the basis of the 1986 consumer price index and as reference value the index figure calculated for 1994.

20. In September 2000 APA established a wholly-owned subsidiary APA-OTS Originaltext-Service GmbH ('APA-OTS'). The undertakings are bound by a contract excluding profit and loss, which, according to information from APA and APA-OTS, provides for APA-OTS to be integrated financially, organisationally and from an economic point of view within the APA undertaking and for APA-OTS to proceed in the conduct and management of its business on the basis of instructions from APA. APA-OTS is likewise required to pass its annual surpluses to APA, whilst in return APA has to make good any annual shortfalls incurred by APA-OTS.

21. APA transferred to APA-OTS the operation of its OTS original text service. This alteration was notified to the Republic of Austria in October 2000, and an authorised employee of APA gave an assurance in response to a query by the Federal Chancellery that following the hiving-off APA was operating on a basis of joint and several liability with APA-OTS, and that there would be no change in the 'overall performance experienced'. According to its own statements, the Federal Chancellery thereupon authorised the future provision of OTS services by APA-OTS, and the remuneration for these services was thenceforth paid direct to APA-OTS.

22. In 2001 the remuneration provisions in the 1994 basic agreement were amended by a first supplemental agreement. In addition to the conversion of remuneration from Austrian schillings into euro this supplemental agreement laid down maximum levels of remuneration for the years 2002, 2003 and

8 — According to information provided by the Federal Chancellery, which is participating in the proceedings, that involves the adjustment of a contractual relationship which has subsisted since 1946.

2004,[9] which could not be increased, for the inclusion in OTS of releases by federal departments. In addition the indexation clause was adjusted by reference to a new index, a successor index to the one used in the basic agreement.

23. In October 2005 a second supplemental agreement, with effect from 1 January 2006, amended the basic agreement in the version of the first supplemental agreement in two further respects: the reduction in fees for online access from the information services of the APA was increased from 15% to 25%, and the parties agreed a renewal of their waiver of the right to terminate, extending it to 31 December 2008.

C — *The proceedings before the Federal Procurement Office (proceedings for a declaration of illegality)*

24. Before the Federal Procurement Office PN is seeking a legal remedy against acts that in its view contravened procurement law in connection with the involvement of APA-OTS as the service provider for the Republic of Austria and in connection with the two supplemental agreements to the basic agreement between APA and the Republic of Austria.

25. By its applications lodged on 4 and 19 July 2006 PN seeks a declaration by the Federal Procurement Office under Paragraph 331 of the BVergG 2006 that the separation of the contract by the restructuring of APA in 2000, and the supplemental agreements of 2001 and 2005, described by it as 'de facto awards', were unlawful; in the alternative it seeks a declaration that the decision to opt for the procurement procedures at issue was unlawful.[10]

26. In regard to the time-limits for applications the Federal Procurement Office maintains that, whilst the actions complained of dated back to 2000, 2001 and 2005, the legal remedy available under domestic law in respect of unlawful awards of contracts, namely an application for a declaration of illegality having the effect of dissolving the contract, was created only subsequently, that is to say with effect from 1 February 2006. The period provided for this legal remedy is six months from the date of the unlawful award. However, the Federal Procurement Office considers it appropriate to apply Paragraph 1496 of the Allgemeines Bürgerliches Gesetzbuch (General Civil Code — ABGB) under which limitation periods do not run if the requisite legal remedy is not available, provided that such application is compatible with Community law.

9 — These maximum fees are applicable where broadcasts are transmitted online.

10 — According to the order for reference, PN's main application is based on Paragraph 331(1)(4) and the ancillary application on Paragraph 331(1)(1) of the BVergG 2006.

IV — Order for reference and proceedings before the Court of Justice

27. By order of 7 November 2006, drawn up on 10 November 2006 and registered at the Court on 13 November 2006, the Federal Procurement Office stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Are the terms "awarding" in Article 3(1) of Directive 92/50/EEC and "awarded" in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which a contracting authority intends to obtain services in the future from a service provider established as a limited liability company where those services were previously supplied by a different service provider who is the sole shareholder in the future service provider and has control of the future service provider? In such a case is it legally relevant that the contracting authority has no guarantee that throughout the entire period of the original contract the shares in the future service provider will not be disposed of in whole or in part to third parties and moreover has no guarantee that the membership of the original service provider, which is in the form of a cooperative society, will remain unchanged throughout the entire contract period?

(2) Are the terms "awarding" in Article 3(1) of Directive 92/50/EEC and "awarded" in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which, during the period of validity of a contract concluded for an indefinite period with certain service providers for the joint provision of services, a contracting authority agrees with those service providers amendments to the charges for specified services under the contract and reformulates an index-linking clause, where these amendments result in different charges and are made upon the changeover to the euro?

(3) Are the terms "awarding" in Article 3(1) of Directive 92/50/EEC and "awarded" in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which, during the period of validity of a contract concluded for an indefinite period with certain service providers for the joint provision of services, a contracting authority agrees with those service providers to amend the contract, first, renewing for a period of three years a waiver of the right to terminate the contract by notice, the waiver no longer being in force at the time of the amendment, and, second, also laying down a higher rebate than before for certain volume-related charges within a specified area of supply?

(4) If the answer to any of the first three questions is that there is an award:

Is Article 11(3)(b) of Directive 92/50/EEC or are any other provisions of Community law, such as, in particular, the principle of transparency, to be interpreted as permitting a contracting authority to obtain services by awarding a single contract in a negotiated

procedure without prior publication of a contract notice, where parts of the services are covered by exclusive rights as referred to in Article 11(3)(b) of Directive 92/50/EEC? Or do the principle of transparency or any other provisions of Community law require in the case of an award of mostly non-priority services that a contract notice is none the less published prior to the contract award, to enable undertakings in the sectors concerned to assess whether services are in fact being awarded that are subject to an exclusive right? Or do the provisions of Community law relating to the award of public contracts require that in such a case services can only be awarded in separate tender procedures, according to whether they are or are not subject to exclusive rights, in order to allow at least competitive tendering as to part?

(5) If the answer to the fourth question is to the effect that a contracting authority may award services which are not subject to exclusive rights in a single procurement procedure together with services which are subject to an exclusive right:

Can an undertaking which does not have any right to deal with data that is subject to an exclusive right possessed by an undertaking which has a dominant position in the market establish that in that respect it has the capacity, for the purposes of procurement law, to provide a comprehensive service to a contracting authority, by relying on Article 82 EC and an obligation derived from that provision on the market-dominant undertaking which has the power of disposal over the data and is established in a Member State to provide the data on reasonable conditions?

(6) If the answer to the first, second and third questions is to the effect that the partial contract transfer in 2000 and/or one or both of the contract amendments referred to constituted new awards; and furthermore should the fourth question be answered to the effect that either when awarding a contract for services not subject to exclusive rights by means of a separate award procedure, or when awarding a combined contract (in the present case for press releases, the basic service and rights to use APADok), a contracting authority should have first published a contract notice to ensure that the intended contract award was transparent and capable of being reviewed:

Is "harmed" in Article 1(3) of Directive 89/665/EEC and in Article 2(1)(c) of that directive to be interpreted as meaning that an undertaking in a case such as the present one is harmed, within the meaning of those provisions of Directive 89/665/EEC, simply where it has been deprived of the opportunity to participate in a procurement procedure because the contracting authority did not, prior to making the award, publish a contract notice, on the basis of which the undertaking could have tendered for the contract to be awarded, could have submitted an offer or could have had the claim that exclusive rights were involved reviewed by the competent procurement review body?

(7) Are the Community law principle of equivalence and the Community law requirement for effective legal protection, or the principle of effectiveness, to be interpreted, having regard to any other relevant provisions of Community law, as conferring an individual and unconditional right on an undertaking against a Member State such that it has at least six months from the time when it could have known that a contract award infringed procurement law to bring legal proceedings before the competent national authority to seek damages following the contract award on account of an infringement of Community procurement law, while it must be allowed additional time for periods when it could not make such a claim owing to the absence of a statutory basis in national law, in circumstances where under national law claims for damages based on infringements of national law are normally subject to a limitation period of three years from the date of knowledge of the wrongdoer and of the damage and, in the absence of legal protection in a particular area of law, the limitation period does not (continue to) run?'

28. In the proceedings before the Court of Justice, PN, APA and APA-OTS, the Republic of Austria and the Commission of the European Communities presented written and oral submissions. Written submissions were also submitted by the Austrian Federal Chancellery in its capacity as a public awarding authority and by the Lithuanian Government. The French Government made oral submissions.

V — Admissibility of the reference for a preliminary ruling

29. Before dealing substantively with the questions referred it is appropriate to make some brief preliminary observations on the admissibility of the reference for a preliminary ruling.

A — *Entitlement of the Federal Procurement Office to make a reference*

30. The Austrian Federal Procurement Office is a permanent body established by law whose competence in procurement cases is mandatory where the federal government is the contracting authority. [11] It reaches a determination in adversarial proceedings on the basis of provisions of Austrian federal law. In that connection it is both the first and last instance. [12] Its members are not bound by instructions in regard to the exercise of the tasks conferred on them and are appointed for at least five years and, in part, for an indefinite period. [13]

11 — Paragraph 291 of the BVergG 2006.

12 — Second sentence of Paragraph 291(2) of the BVergG 2006.

13 — Paragraphs 292 and 295 of the BVergG 2006.

31. Accordingly, the Federal Procurement Office is a court within the meaning of Article 234 EC [14] and is entitled to make references for a preliminary ruling to the Court of Justice. The Court of Justice has already on several occasions [15] responded to requests for a preliminary ruling from the Federal Procurement Office. [16]

B — *Admissibility of the reference for a preliminary ruling: general aspects*

32. The criticism expressed by APA and APA-OTS of the complex and not readily comprehensible formulation of the reference for a preliminary ruling does not alter the fact that the questions referred are intelligible overall. The factual and legal framework of the questions is apparent to a sufficient degree from the clarifications given by the Federal Procurement Office in the order for reference, which likewise indicates why those questions were deemed essential to a resolution of the dispute in this case.

33. In particular it may be inferred from the order for reference that the reference for a preliminary ruling is intended to clarify whether in the national proceedings the taking of detailed evidence of particular facts is necessary or whether the dispute in the main proceedings may be determined without such taking of evidence.

34. On that point it should be observed that it is for the national court to decide at what stage of the procedure it should send a reference for a preliminary ruling to the Court of Justice. [17] The determinant factor is that the referring court sufficiently sets out the factual and legal framework underpinning its request for an interpretation of Community law and otherwise gives all information to the Court of Justice which it needs in order to provide a useful answer to this request. [18] Contrary to the view of APA and APA-OTS, that is the case here. Thus there are no objections in general terms to the admissibility of the reference for a preliminary ruling.

14 — On the settled case-law of the Court, see Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; Case C-53/03 *Syfait and Others* [2005] ECR I-4609, paragraph 29; and Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-8817, paragraph 19.

15 — See Case C-411/00 *Felix Swoboda* [2002] ECR I-10567, in particular paragraphs 25 to 28; Case C-314/01 *Siemens and ARGE Telekom* [2004] ECR I-2549; and Case C-15/04 *Koppensteiner* [2005] ECR I-4855. The current organisation of the Federal Procurement Office on the basis of the BVergG 2006 is, according to the order for reference, essentially the same as at the time of the *Koppensteiner* case.

16 — Similarly the Court recognised a federal procurement supervisory committee, at that time in Germany, as entitled to make a reference (*Dorsch Consult*, cited in footnote 14, paragraph 38).

17 — Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraph 10; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 39; and Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749, paragraph 45.

18 — *Schmidberger* (cited in footnote 17), paragraphs 40 and 41.

C — *Admissibility of the sixth question in particular*

35. However, a specific problem of admissibility arises in respect of the sixth question referred, which concerns the interpretation of the concept of 'harm' in Article 1(3) and Article 2(1)(c) of Directive 89/665.

36. In the main proceedings that are brought under Paragraph 331 of the BVergG 2006, the Federal Procurement Office is competent only to make a *declaration of a violation* of the procurement law but not to award *damages*, which is a matter reserved to the Austrian civil courts. [19] Accordingly, it cannot submit to the Court of Justice any questions for a preliminary ruling relating to damages or the criteria for the award thereof. [20]

37. Against that background, the sixth question referred is only admissible to the extent to which it concerns the criteria for admissibility of an application for review under Article 1(3) of Directive 89/665. However, in so far as the sixth question refers to Article 2(1)(c) of Directive 89/665, it is inadmissible since the latter provision directly concerns the grant of damages.

D — *Interim conclusion*

38. Overall, therefore, this reference for a preliminary ruling is admissible save for that part of the sixth question that concerns Article 2(1)(c) of Directive 89/665.

VI — Substantive assessment of the questions referred

39. In substance this extremely extensive reference for a preliminary ruling seeks clarification as to the circumstances under which the amendment of an existing agreement may be deemed to constitute an award of a public service contract with the consequence that an award procedure must be conducted beforehand and legal remedies are available to undertakings not considered.

40. The highly interesting further question whether any limits are set by procurement

19 — The Republic of Austria has availed itself of the possibility set out in Article 2(2) of Directive 89/665 of transferring the powers in review proceedings to several bodies.

20 — Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 38.

law or other provisions of Community law to the conclusion of continuing legal obligations without limit as to time is not a matter raised by the present proceedings. Since the basic agreement of 1994 that was entered into for an indefinite period was concluded before the Republic of Austria's accession to the European Union, [21] this problem requires no further discussion, even as a preliminary question. [22]

A — *The first, second and third questions*

41. By its first three questions the Federal Procurement Office seeks to ascertain the circumstances under which amendments to existing contractual relations between a contracting authority and a service provider are to be deemed to constitute a new award of a public service contract within the meaning of Directive 92/50.

42. That problem has not hitherto been discussed in detail in the case-law of the Community Courts. [23]

1. Preliminary observation: the criterion of a material contractual amendment

43. It is above all in the case of contracts for continuing obligations and contracts of long duration that it may become necessary during the currency thereof to adjust their content if contractual provisions — for example, owing to unforeseen changes in external circumstances — prove no longer to be appropriate. Where a contract is brought into line with the altered circumstances, such adjustment may assist the attainment of the aim of the contract.

44. If, however, the original contract concerned a public contract subsequent amendments to its terms always give rise to the question whether an award procedure (a new one, as the case may be) is to be conducted. In that connection a potential area of conflict regularly opens up between the endeavour to ensure an efficient as possible continuation of the conduct of the contract, on the one

21 — See Case C-76/97 *Tögel* [1998] ECR I-5357, paragraphs 53 and 54. Unlike the actions which are at issue in these proceedings and date back to 2000, 2001 and 2005, that is to say, within the temporal application of Community law, the procurement directives were not applicable to the basic agreement because in 1994 the Republic of Austria was not a Member State of the European Union.

22 — On the specific problem of the coupling of a contract without limit as to time with a waiver of a right to terminate, see below, in particular point 74 of this Opinion.

23 — A preliminary reference by the German Oberlandesgericht (Higher Regional Court) Rostock did not lead to a judgment of the Court (Case C-50/03, removed from the register on 9 November 2004).

hand, and the requirement that equal opportunities be maintained for all current and potential awardees, on the other.

45. Fundamentally, it is not precluded from the outset that subsequent amendments to the terms of existing contracts may (once more, in some cases) satisfy the criterion of an award of a public contract with the consequence that an award procedure must be undertaken. For under settled case-law the legal concepts that define the scope of the procurement directives are to be interpreted broadly. [24]

46. However, the interpretation of the concept of an award must in the end be guided by the objectives of the relevant directive. The coordination of the procedures for the award of public contracts is intended to eliminate obstacles to freedom of movement for goods and services and protect the interests of economic operators from other Member States. [25] It is a matter of ensuring that contracting authorities do not give preference to domestic tenderers or applicants and in the award of the contract are not influenced by considerations other than economic ones. [26]

47. Accordingly, Directive 92/50 too has as its principal objective the free movement of services and the opening-up to competition that is undistorted and as comprehensive as possible. [27] That requires a transparent and non-discriminatory method of proceeding in the award of public service contracts, with the result that equal opportunities of all possible service providers are guaranteed.

48. Against the background of that objective, not every amendment, however slight, to contracts for public services requires a prior award procedure. Only *material contractual amendments*which are such as to distort competition on the relevant market and to favour the contracting authority's contractual partner as against other possible service providers justify conducting a new procurement procedure. [28]

24 — On the broad interpretation of various concepts defining the scope of the procurement directives, see Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 43; Case C-129/04 *Espace Trianon and Sofibail* [2005] ECR I-7805, paragraph 73; and judgment of 29 November 2007 in Case C-119/06 *Commission* v *Italy*, paragraph 43.

25 — Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraph 41, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16, Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 27, and Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173, paragraph 38; see also the second and sixth recitals in the preamble to Directive 92/50.

26 — *University of Cambridge* (cited in footnote 25), paragraph 17; *Felix Swoboda* (cited in footnote 15), paragraph 45; and *Bayerischer Rundfunk and Others*(cited in footnote 25), paragraph 36.

27 — Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraphs 44 and 47, and *Bayerischer Rundfunkand Others* (cited in footnote 25), paragraph 39.

28 — To that effect, see also Case C-337/98 *Commission* v *France* [2000] ECR I-8377, paragraphs 46, 50 and 51, and Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 117, where reference is made to *significant* contractual provisions or tender conditions.

49. In particular there must always be a presumption that there has been a material contractual amendment where other service providers might have been deterred from applying for the public contract by the original less favourable terms, or might now in the light of the new contractual terms be interested in applying for the public contract; or where an application by a tenderer who was unsuccessful at that time might be successful under the new contractual terms. [29]

50. These preliminary observations form the basis for my subsequent discussion of the first three questions referred.

2. First question

(a) First part of the first question: involvement of APA-OTS

51. In the first part of its first question the Federal Procurement Office essentially seeks to ascertain whether it is to be deemed a new award of an already existing public service contract within the meaning of Directive 92/50 where a contracting authority accepts that the carrying-out of a part of the contract is to be assigned to the awardee's subsidiary company, to which the awardee has a right to issue instructions and which is wholly owned by the awardee, even if its 100% shareholding is not guaranteed to subsist for the whole duration of the contract.

52. The background to this question is the hiving-off by APA in 2000 of the OTS services to its subsidiary company APA-OTS. Irrespective of whether this restructuring within the APA group stemmed from a contract-splitting, a takeover of a contract, novation or subrogation, [30] it is in any event clear that thenceforth the abovementioned services were directly provided, with the approval of the Federal Chancellery, by APA-OTS and that the remuneration therefor was paid directly to APA-OTS.

53. In any event, in regard to practical implementation of the contract in 2000 there was a partial change in service provider.

29 — Admittedly, it is not always easy in practice to distinguish between material and non-material contractual amendments because that has to be decided on a case-by-case basis. The use of uncertain legal concepts requiring interpretation is however unavoidable in any area of law and is far from unknown in procurement law.

30 — There does not seem to be any consensus between the parties to the main proceedings on this point. Nor does the order for reference use any uniform terminology. However, it is for the Federal Procurement Office to clarify how the translation is to be classified under civil law.

54. A change in service provider during the currency of a public contract prima facie indicates a material contractual amendment, as an undertaking which did not have to compete with other bidders and whose selection did not depend upon any comparison with any other bidders is, after all, entrusted wholly or in part with the carrying-out of the public contract. Inherent in such a manner of proceeding is the danger of circumvention of procurement law and the concomitant risk of distortion of competition on the relevant market and giving preference to the new service provider over other possible service providers.

55. However, the particular circumstances of the individual case may result in a situation where alterations on the part of the service provider exceptionally do not entail any material contractual amendment. In that respect the two following categories of cases in particular must be considered.

56. The first category of cases concerns the *involvement of subcontractors* by the contractual partner of the contracting authority. In order not to restrict unduly the possible group of service providers Directive 92/50 expressly confers on the contracting authority the possibility of permitting subcontracts to be awarded to third parties. [31] A characteristic feature of this category is that the main supplier retains full contractual liability for performance of the services contract or at any rate remains jointly responsible for it, even after the subcontract has been awarded.

57. The second category concerns *organisational changes of a purely internal nature* on the part of the contractual partner of the contracting authority. That may include the involvement of one of its subsidiary companies in carrying out the contract. How close the connection between the awardee and its subsidiary company has to be does not need to be definitively established in the present case. Such subsidiary companies are caught in any event where they are controlled by the awardee in a manner similar to its own in-house departments. The involvement of the subsidiary company in the carrying-out of the contract is therefore similar, on the part of the service provider, to an in-house transaction, [32] none of the conditions under which the public contract is performed being altered, at any rate from an economic point of view.

58. It is certain in both cases that the alteration in respect of the service provider does not lead to any distortion of competition or therefore to any material contractual amendment.

31 — See Articles 25 and 32(2)(c) and (h) of Directive 92/50 and Case C-176/98 *Holst Italia* [1999] ECR I-8607, paragraphs 26 and 27. However, the award of subcontracts for carrying out substantive parts of the contract may be restricted under national law (*Siemens and ARGE Telekom*, cited in footnote 15, paragraph 45).

32 — On the criteria for an in-house transaction, see in particular Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50, *Stadt Halle and RPL Lochau* (cited in footnote 27), paragraph 49, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 62, and Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 55; on the concept of the in-house transaction, see my Opinion in *Parking Brixen*, points 1 and 2.

59. An event such as the transfer in 2000 of the OTS services to APA-OTS is at first sight similar to the award of a subcontract by APA (first category). That view is supported by the fact that the services concerned are henceforth provided by a legal person other than APA, whereby APA itself remains jointly and severally liable for the carrying-out of the public services contract as a whole, including the tasks taken over by APA-OTS.

60. However, on closer inspection an entity such as APA-OTS resembles not so much an autonomous subcontractor of APA as rather a company department of APA. An event such as the involvement of APA-OTS in the carrying-out of the public services contract in 2000 constitutes no more than a purely internal reorganisation by the service provider APA (second category).

61. It is true that part of the services to be supplied by APA is being supplied by another legal person, APA-OTS. However, from an economic point of view, APA-OTS is not a third party, as it is wholly controlled by its parent company APA. Not only the 100% ownership of it by APA, but also APA's right to issue instructions, and an agreement excluding profit and loss ensure that APA-OTS is governed by its parent company like one of the parent company's own departments. Therefore, from an economic point of view, there has been no material change in regard to the conditions for implementing the public contract.

62. The transaction in 2000 thus did not lead to any material contractual amendment; therefore, it did not need to be treated as a (new) award of a public services contract.

63. That is not precluded by the fact that APA's 100% ownership of APA-OTS is not guaranteed for the entire duration of the public contract. [33] It is true that APA could theoretically at any time transfer shares in APA-OTS to third parties. However, only the actually foreseeable events at that time are relevant to the issue of whether there was a material change to the contract and with it a new award of a public services contract in 2000.

64. The principle of legal certainty requires that the obligation to conduct an award procedure must always be evaluated ex ante, that is to say at the time of entry into the transaction. [34] For both from the perspective of the contracting authority and its business partner and from the perspective of competitors not considered, it must be possible to ascertain already at the time of the transaction whether or not an award procedure was to be conducted. Subsequent circumstances

33 — The same is true of the dissolubility of the profit and loss exclusion agreement.

34 — See my Opinion in *Parking Brixen* (cited in footnote 32), paragraph 56. The question of the actual foreseeability of an assignment of shares to third parties also plays a significant role in Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705, paragraphs 38 to 41; Case C-410/04 *ANAV* [2006] ECR I-3303, paragraphs 30 to 32; and *Parking Brixen* (cited in footnote 32), paragraph 67(c).

may at most be taken into consideration where at the time of the transaction it could have been foreseen that they would occur.

65. It is apparent from the file that at the time of the involvement of APA-OTS in the implementation of the public contract there were no specific indications of any imminent disposal of shares by APA. In these circumstances I maintain my view that a transaction such as that in 2000 gave rise to no material contractual amendment and thus did not require an award procedure to be conducted.

(b) Second part of the first question: membership composition of the APA

66. The Federal Procurement Office would also like to know whether in regard to the transaction in 2000 it makes any difference that the members comprising the APA grouping might change during the currency of the contract.

67. Such an alteration will only be significant in terms of procurement law if it results in at least a partial change of service provider and thus constitutes a material contractual amendment.

68. If, for example, the supplier of the service contract is a mere consortium without legal personality, each of its members will normally have rights and obligations through the contract with the contracting authority. Any change in the composition of the consortium can then lead to a situation in which an undertaking that did not have to compete with other bidders and whose selection was not based on a comparison with other possible suppliers is wholly or partly entrusted with implementing the public contract. That — subject to the exceptions described above [35] — would amount to a material contractual amendment. [36]

69. On the other hand, if the service provider is a legal person, it alone will be the contracting authority's contractual partner; any subsequent changes in the composition of its shareholders will not result in any material contractual amendment. [37]

35 — See above, points 55 to 58 of this Opinion.

36 — The judgment in Case C-57/01 *Makedoniko Metro and Mikhaniki* [2003] ECR I-1091, paragraph 61, merely clarifies that making provision for the composition of consortia of bidders is within the competence of the Member States. Accordingly, it is for the Member States to determine whether changes in the composition of such consortia are indeed permissible. However that is to be distinguished from the question which is relevant for present purposes, namely whether such changes occurring *after* the contract has been awarded are to be deemed to constitute material amendments to the contract and accordingly satisfy the criteria of an award of a public contract. The latter question is a matter of Community law.

37 — If one wished to treat any change in the ownership of a legal person as giving cause to carry out a new award procedure, the award of public contracts would in the case of listed companies whose shareholders sometimes change on a day-to-day basis be rendered practically impossible.

70. In the present case it is apparent from the file that APA is a 'registered society with limited liability'. It may therefore be assumed that APA has legal personality. Subject to the findings of the Federal Procurement Office on this point, it is only APA itself which is to be regarded as the contractual partner of the Republic of Austria and not the members of the society. In a case such as this, any changes within the membership of the society give rise to no material contractual amendment.

3. Third question

71. By its third question the Federal Procurement Office essentially seeks to ascertain whether it is to be regarded as a new award of a public service contract within the meaning of Directive 92/50 where the contracting authority and the service provider amend a contract for the provision of services during the currency thereof in the following manner:

— a previously agreed waiver of entitlement to give notice which has expired is renewed for a three-year period; and

— certain amounts of remuneration differ from those hitherto agreed because a price rebate increased by 10 percentage points is granted.

72. The background to this question is the second supplemental agreement to the basic agreement agreed in 2005 between APA and the Republic of Austria.

(a) First part of the third question: renewal of waiver of entitlement to give notice

73. The first part of the third question relates to the renewal agreed in 2005 by the contractual partners of a waiver of entitlement to give notice which had expired.

74. It would be problematical from the point of view of public procurement law to agree, in addition to a relationship creating continuing obligations, also to a long-term waiver of entitlement to give notice or even to agree that termination by the contracting authority should be altogether excluded. For such an agreement would permanently exclude any competition between the possible service providers and therefore run counter to the aims of the public procurement directives.

75. However, it is otherwise in the case of a waiver of entitlement to give notice, such as the one agreed in 2005, which is limited to three years. Such waiver of entitlement to give notice cannot from the outset be regarded as impermissible in terms of public procurement law. However, it must be examined whether such a waiver ought to have been subject to a public procurement procedure. That depends on whether the waiver of entitlement to give notice is regarded as a material contractual amendment to the existing basic agreement. [38]

76. In order to be categorised as a material contractual amendment, a waiver of entitlement to give notice that is limited to a few years must be liable to distort competition on the relevant market and favour the contracting authority's contractual partner as against other possible service providers. [39]

77. This can only exceptionally be the case when there are concrete reasons for supposing, at the time when the waiver was agreed, that the contracting authority would otherwise have resiled from the existing contract during the currency of the waiver. It is only then that other possible service providers would at all have been able to entertain serious hopes of displacing the current service provider during this period, either wholly or in part.

78. The first observation to be made in this connection is that the contracting authority was under no legal obligation prematurely to terminate an existing contractual relationship that came into existence without infringing applicable law; the accession of the Republic of Austria to the European Union did not create any obligation on the contracting authority to terminate the existing basic agreement or to make a new award in respect thereof. [40] Therefore, whilst it might have been legally possible for the Republic of Austria to terminate the services contract with APA as from the expiry of the originally agreed waiver of entitlement to give notice (1994), it was in no way mandatory for it to do so.

79. Secondly, in 2005 — subject to findings to be made by the Federal Procurement Office — there was no economic incentive for the Republic of Austria during the comparatively foreseeable period of the waiver of the right to terminate, that is to say until the end of 2008, to change to another service provider. As far as can be ascertained, the contracting authority was able reasonably to assume that in the period until 2008 there would be no equivalent offers under more favourable conditions such as to justify the expenditure entailed by making a change.

80. According to the information available, the renewed waiver of the right to terminate agreed in 2005 for a three-year period

38 — See above, point 48 of this Opinion.

39 — See above, points 48 and 49 of this Opinion.

40 — In this connection see *Tögel* (cited in footnote 21), paragraphs 53 and 54.

therefore entailed no risk of a distortion of competition and is therefore not to be regarded as a material amendment to the basic agreement.

(b) Second part of the third question: agreement as to higher price reductions

81. The second part of the third question relates to the price reductions agreed in 2005 for online requests to APA's information services. Whilst the basic agreement provided for a price reduction of 15% for this service provided to the Austrian federal departments, a 25% price reduction has applied since the second supplemental agreement.

82. As already mentioned,[41] there can be a new award of an existing public services contract only if a material contractual amendment is carried out. That also applies to amendments to the contractually agreed remuneration. Even if the detailed rules governing payments as such constitute a material part of the contract,[42] not every amendment, however slight, to the originally agreed provisions concerning payment may be automatically regarded as a material contractual amendment.

83. First of all it must be examined whether the increase by 10 percentage points in the originally agreed price reduction constituted an *amendment to the payment terms* applicable to the public services contract.

84. APA and APA-OTS argue that the 25% price reduction now granted was merely the logical development of existing provisions of the basic agreement. The basic agreement already referred to an APA graduated tariff. The new higher price reduction is to be equated with the introduction of a new lower graduated tariff in the APA price list.

85. In that regard it must be noted that the actual assessment of the relevant facts in the main proceedings is a matter for the Federal Procurement Office. In the order for reference, which for the purposes of these preliminary ruling proceedings sets out the relevant factual framework,[43] the alteration in percentage figures from 15% to 25% is presented as a 'higher discount than before'. This points to an amendment of the payment terms.

41 — See above, points 48 and 49 of this Opinion.

42 — In this connection see *Commission* v *CAS Succhi di Frutta* (cited in footnote 28), paragraph 117.

43 — Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42, and Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I-589, paragraph 21.

86. This assessment is also borne out by the fact that even the initial 15% price reduction referred to the 'lowest graduated tariff'. Even when the basic agreement was entered into in 1994, the contracting authority was therefore granted the most favourable tariff level that was conceivable. Under those circumstances, it is unlikely that the contractual partners at that time were planning to go over to an even more favourable price category or even regarded that as possible. If, in the year 2005, a price reduction enhanced by 10 percentage points is granted which is then applied to the lowest graduated tariff, that points to a genuine price alteration and not just to a logical progression of the calculation of remuneration as laid down in the basic agreement.

87. Such a price amendment may however only be regarded as a *material contractual amendment* if it is actually such as to distort competition on the relevant market and to favour the contractual partner of the contracting authority over and above other service providers.

88. In order to assess this aspect, the extent of the price alteration in respect of the relevant service has to be examined and this price amendment has to be placed in the context of the significance of the public contract as a whole.

89. As regards first of all the price amendment itself, the risk of distortion of competition in the event of price reductions is less than in the event of price increases. For the reduction in remuneration works in favour of the contracting authority and normally improves the economic efficacy of the implementation of the contract.

90. None the less, it cannot be ruled out from the outset that an agreement concerning lower remuneration may also have a distorting effect on competition. That has been rightly pointed out by the Lithuanian Government.

91. The determinant factor is always the conditions the contracting authority could have achieved on the market *at the time of the contractual amendment*. If, for example, the prices for the service provided for under the agreement have generally fallen on the market since the original award of the public contract, the mere agreement for a lower remuneration than before affords no guarantee of the observance of the principle of competition and of the principle of economic efficacy. The test is rather whether, at the time of the contractual amendment, other possible service providers could have offered the contracting authority the service required at a yet more favourable price.

92. From the information available there is however no specific indication that, in the present case, on implementation of an award procedure the contracting authority could have achieved a price for an equivalent

service even more favourable than the price it secured under the second supplemental agreement to the basic agreement with APA as the current service provider.

93. As regards, finally, the significance of the price amendment occurring in relation to the public contract as a whole, it must be borne in mind that the increased rebate was agreed only for one of the services agreed to be provided (the online request service from the information services of APA) and not, for example, for all the services to be provided by APA. Even if a price reduction increased by 10 percentage points is not insignificant in relation to the part-service concerned, in relation to the overall contract it carries significantly less weight.

94. Ultimately, it is for the Federal Procurement Office to make the necessary findings in regard to the significance of the price amendment as regards both the relevant part-service and the public contract in its entirety.

95. On the basis of the information available to the Court, I am not of the view that a price amendment of the kind contained in the second supplemental agreement of 2005 and effected by the increase in discount should be deemed to be a material contractual amendment.

4. Second question

96. By its second question the Federal Procurement Office essentially seeks to ascertain whether it is to be regarded as a new award of a public contract within the meaning of Directive 92/50, where the contracting authority and the service provider amend a services contract existing between them during its currency in such a way that:

— the contractually agreed remuneration on the conversion of the currency is no longer paid in the national currency but in euro,

— the index-linking clause in the contract is updated by the addition of a reference to a successor index of the index previously used, and

— certain remuneration now differs from remuneration previously agreed.

97. The background to this question is the first supplemental agreement of 2001, which provided for those changes to the provisions concerning remuneration.

98. Purely technical adjustments to the contract which have no significant influence on the relationship between the contracting authority and its contractual partner do not even constitute an amendment to the substance of the contract. They cannot, be regarded, a fortiori, as a material contractual amendment which requires the implementation of an award procedure.

99. Where an existing agreement was amended on the occasion of a currency conversion to the euro in such a way that the previously agreed remuneration is to be expressed in the new currency, but without any material increase or reduction, this does not constitute a material contractual amendment but merely a technical adjustment of an existing contract to bring it in line with altered external circumstances. [44] The rounding up or down of the newly calculated amounts in euro that may be necessary under the applicable legal provisions is also subsumed within this technical adjustment.

100. Similarly a reference to an index other than that originally agreed may also be a purely technical contractual adjustment, in so far as both indices are equivalent. The order for reference points to such equivalence by stating that the new index is the successor index to the previous index. The Federal Procurement Office will however also have to satisfy itself that the mode of operation of the new index is equivalent to that of the previous index. That means in particular that the baskets of goods, or other reference quantities, to which the relevant indices relate, must essentially be equivalent.

101. However, if a currency recalculation or an index adjustment is used by the contractual partners as a reason for substantively altering the originally agreed payments, that goes beyond a purely technical amendment in its effects. Then it can no longer be precluded from the outset that there is a material contractual amendment affecting competition between service providers.

102. In the present case the order for reference states that the adjustments to the framework contract made by the first supplemental agreement led to maximum fees being applicable to the inclusion of certain broadcasts by the federal services in the OTS for 2002, 2003 and 2004; those fees could not be increased.

103. The Federal Procurement Office will have to examine whether that represented a material change in comparison with the

44 — It is true that an adjustment to the contract on the occasion of the currency conversion would not have been absolutely necessary because the legal framework conditions already existing ensured that all amounts previously expressed in the national currency would in future be understood as euro amounts, without that implying any change in the existing contractual obligations (see also Articles 3 and 5 of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1). However, as APA and APA-OTS correctly point out, an express adjustment to the contract may, in a contract for continuing obligations, such as the contract at issue, be appropriate none the less in order to avoid the increased administrative burden of repeatedly performing a currency conversion.

remuneration agreed in the basic agreement. The relevant factor in that connection is the way in which the indexed remuneration agreed in the basic agreement might, on an objective view, have been expected to progress on the basis of indications available in 2001.

104. If the maximum remuneration laid down for 2002, 2003 and 2004 substantially accords with the prices which in all likelihood would have resulted from application of the index-linking clause in the basic agreement, there is no material contractual amendment. [45] If, conversely, they clearly depart from the price trends to be expected under the basic agreement, it will be necessary to examine the effects of this alteration on competition, in which connection the yardsticks set out above on the second part of the third question [46] apply.

105. On the basis of the information available to the Court, I am in any event of the view that price amendments such as those agreed in the first supplemental agreement were within the parameters of annual price increases foreseeable for 2001; for this reason alone, they did not constitute a material contractual amendment.

45 — The maximum line charges agreed in the first supplemental agreement for 2002, 2003 and 2004 are only slightly different. Subject to a closer examination by the Federal Procurement Office, such slight price differences appear to move from year to year within the framework of the general price trends to be anticipated in subsequent years based on projections from 2001.

46 — See above, points 81 to 94 of this Opinion.

B — *Fourth and fifth questions*

106. The fourth and fifth questions, in which the Federal Procurement Office devotes its attention to the applicable award procedure and proof of standing of a service provider, are based on the supposition that the 2000, 2001 and 2005 transactions are in any event to be regarded as awards of a public services contract.

107. On the basis of the information available to the Court, I am of the view that none of these events constituted such an award. [47] Accordingly, I shall examine the fourth and fifth questions merely in the alternative.

1. Fourth question

108. By its fourth question the Federal Procurement Office essentially seeks to ascertain whether a public services contract may be awarded as a single contract in a negotiated procedure without prior publication of

47 — See my comments on the first, second and third questions above, points 41 to 105 of this Opinion.

a contract notice, if the contract predominantly concerns non-priority services and a right of exclusivity within the meaning of Article 11(3)(b) of Directive 92/50 does not exist for all but only for some of the services to be provided.

(a) Priority and non-priority services

109. Directive 92/50 distinguishes in Articles 8 to 10 between priority and non-priority services. The former are defined in Annex IA to the directive and the latter in Annex IB. The background to these provisions is that, owing to their specific nature, contracts for non-priority services a priori are accorded no cross-border significance such as to warrant the conduct of an award procedure. [48]

110. Following the submissions of APA and APA-OTS, the Federal Procurement Office assumes that news agency services such as those agreed to be provided in the present case constitute a mix of priority and non-priority services, [49] and that the non-priority services clearly predominate in value.

111. If that view is regarded as correct, [50] the public services contract awarded to APA comes overall under the regime for non-priority services (Article 10 of Directive 92/50). That means it is a public contract not subject to any specific public procurement procedure for the purposes of Title III of Directive 92/50. [51]

(b) Applicability of the transparency rule

112. Even in procurement procedures for which the public procurement directives provide no specific public procurement procedures, it is none the less settled case-law that the public authorities are bound to comply with the fundamental rules of the EC Treaty, in general, and the principle of non-discrimination on grounds of nationality in

48 — Case C-507/03 *Commission* v *Ireland* (cited in footnote 25), paragraph 25.

49 — APA and APA-OTS are of the opinion that their documentation services are to be assigned to the 'Library services' sector, CPC Reference No 96311 and their OTS services to the 'Electronic message and information services' sector, CPC Reference No 75232.

50 — The order for reference defines the factual framework in which the questions referred are to be answered; see on that point the case-law cited in footnote 43.

51 — Under Article 9 in conjunction with Article 10 of Directive 92/50, only Articles 14 and 16 of the directive are applicable to such contracts, which are of no relevance to the matters at issue here. The other procedural provisions laid down in Directive 92/50, in particular those concerning tenders with prior notification of the award procedure, do not apply to those contracts (Case C-507/03 *Commission* v *Ireland*, cited in footnote 25, paragraphs 23 and 24). However, the prohibition on discrimination in Article 3(2) of Directive 92/50 applies (Case C-234/03 *Contse and Others* [2005] ECR I-9315, paragraph 47).

particular.[52] The Court has clarified only recently that this also applies to the award of contracts concerning non-priority services.[53]

113. Thus, if there is a certain cross-border interest in a contract for non-priority services, the *transparency rule* derived from the fundamental freedoms applies to it and the contract may not be awarded in disregard of all transparency.[54]

114. It will be for the Federal Procurement Office to examine whether there is a clear cross-border interest in the provision of news agency services that form the subject-matter of the contract in the present case.[55] In that connection regard must be had inter alia to the following considerations:

— The fact that a number of news agencies are internationally active suggests that there may be a cross-border interest. The entry onto the market of PN in 1999 shows that the Austrian market is not without interest for new service providers.

— Cooperation agreements currently existing between various news agencies active on their home markets, as mentioned in the oral proceedings, do not from the outset preclude certain of those agencies from seeking to strengthen their future involvement on a market such as the Austrian one by having a local presence of their own.

— Militating against a cross-border interest could be the fact that a large part of the services required by the Austrian federal authorities display specific references to Austria and also to regional events in that country.

(c) Substance of the transparency rule

115. Substantively, it follows from the transparency rule that *a sufficient degree of*

52 — *Parking Brixen* (cited in footnote 32), paragraph 46; see also Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60, Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 16, Case C-264/03 *Commission* v *France* [2005] ECR I-8831, paragraph 33, *ANAV* (cited in footnote 34), paragraph 18, and Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, paragraph 33; see also the order of 3 December 2001 in Case C-59/00 *Vestergaard* [2001] ECR I-9505, paragraph 20.

53 — Case C-507/03 *Commission* v *Ireland* (cited in footnote 25), paragraph 29.

54 — Case C-507/03 *Commission* v *Ireland* (cited in footnote 25), paragraph 30; see on the transparency rule also *Telaustria and Telefonadress* (cited in footnote 52), paragraph 62, *Coname* (cited in footnote 52), paragraphs 16 and 17, *Parking Brixen* (cited in footnote 32), paragraphs 46 to 49, and *ANAV* (cited in footnote 34), paragraphs 18 to 21.

55 — Case C-507/03 *Commission* v *Ireland* (cited in footnote 25), paragraphs 29 and 30; to the same effect, see Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 67.

advertising has to be secured. [56] What precise requirements flow from that rule for awards of contracts for which the directives on procurement lay down no specific award procedures is currently unclear. It is certain only that the transparency rule does not necessarily entail a duty to call for tenders. [57]

116. Ultimately, it is incumbent on the contracting authority to assess in each individual case the requisite degree of advertising in order for the relevant award procedure to be opened up to competition and the impartiality of the public procurement procedure to be reviewed. [58]

117. In general terms the transparency rule should not be interpreted in such a way that an award procedure ought always to be applied which accords with the procurement directives in all particulars. [59] For otherwise the distinction between contract awards within the scope of those directives and those not caught by them would be lost; the financial thresholds laid down by the Community legislature would also largely be deprived of their meaning in such a case.

118. A fortiori, under the transparency rule the requirements for award procedures in respect of which the procurement directives do not require specific award procedures may not be more far reaching than those applicable to the conduct of award procedures for which such procedures are laid down in the directives. [60] For the procurement directives are no more than an illustration of the transparency rule as it applies to certain particularly significant award procedures. [61]

119. In relation to public contracts which wholly or predominantly concern non-priority services the transparency rule can require no greater degree of advertising than for contracts wholly or predominantly concerning priority services.

56 — *Telaustria and Telefonadress* (cited in footnote 52), paragraph 62; *Coname* (cited in footnote 52), paragraphs 16 and 17; *Parking Brixen* (cited in footnote 32), paragraph 49; and *ANAV* (cited in footnote 34), paragraph 21.

57 — *Coname* (cited in footnote 52), paragraph 21; there is a misunderstanding in *Parking Brixen* (cited in footnote 32), paragraph 50, which in the German version mentions 'Ausschreibung' (tender) which presumably is a mistranslation of the French term 'mise en concurrence' (call for competition).

58 — *Telaustria and Telefonadress* (cited in footnote 52), paragraph 62; *Parking Brixen* (cited in footnote 32), paragraphs 49 and 50; and *ANAV* (cited in footnote 34), paragraph 21. Useful indications are provided in this connection by the Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives (OJ 2006 C 179, p. 2).

59 — See my Opinion in *Parking Brixen* (cited in footnote 32), point 37.

60 — In this connection see the Opinions of Advocate General Jacobs in Case C-525/03 *Commission* v *Italy* [2005] ECR I-9405, point 47, of Advocate General Stix-Hackl in Case C-532/03 *Commission* v *Ireland* [2007] ECR I-11353, point 111, and of Advocate General Sharpston in Case C-195/04 *Commission* v *Finland* [2007] ECR I-3351, points 76 and 77; see also my Opinion in *Parking Brixen* (cited in footnote 32), point 46.

61 — In this connection see Case C-507/03 *Commission* v *Ireland* (cited in footnote 25), paragraphs 27 to 29; see also my Opinion in *Parking Brixen* (cited in footnote 32), point 47.

120. Contracts for services which, owing to protection of exclusive rights, [62] can be performed only by a specific service provider may always be awarded in a negotiated procedure without any prior notification of the award, irrespective of whether the services concerned are priority or non-priority services. For if Article 11(3)(b) of Directive 92/50 allows such a procedure for priority services, a fortiori, it must be permissible to award non-priority services under this procedure. To that extent the values expressed in Article 11(3) of Directive 92/50 may be transposed to the area of non-priority services. Where Article 11(3) of Directive 92/50 requires no prior notification of the award, no further inference may be drawn from the transparency rule. [63]

121. Reasonable transparency ensuring that the award is opened to competition and a review of the impartiality of the procurement procedure may, in the case of services, as defined in Article 11(3) of Directive 92/50, also be secured by a subsequent publication.

(d) Award of a mixed service contract as a single contract

122. It remains to be examined whether a public contract may be awarded in a negotiated procedure as a single contract without any prior publication of the contract notice where an exclusive right within the meaning of Article 11(3)(b) of Directive 92/50 subsists not for all but only for certain of the services to be provided.

123. Article 11(3) of Directive 92/50 derogates from the rules ensuring the effectiveness of the rights conferred by the EC Treaty in relation to public service contracts; as such, it must, as a matter of principle, be interpreted strictly. [64] In relation to awards concerning services taken as a whole, this tends to indicate that recourse may be had to a negotiated procedure without prior publication of a contract notice only in the case of the services specifically covered by Article 11(3).

124. However, a separate award of services under Article 11(3)(b) of Directive 92/50 may be considered only if the public contract is divisible. In that connection it is not merely the theoretical divisibility of the contract

62 — Whether there is such an exclusive right in this case is a matter for the Federal Procurement Office.

63 — In this connection see also the Commission's communication (cited in footnote 58), point 2.1.4.

64 — Case C-126/03 *Commission* v *Germany* [2004] ECR I-11197, paragraph 23, and Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 58. See also Article 11(4) of Directive 92/50, according to which an open or restricted procedure must be used 'in all other cases'.

which is relevant; attention must also be paid to the intended use and practical efficacy of the services, depending on whether they are supplied separately or by one supplier.

125. In the present case APA and APA-OTS, the Republic of Austria and the Federal Chancellery have persuasively demonstrated the close interconnectedness of the various news agency services agreed under the basic agreement. Thus it is not objectively appropriate for editorial contributions to be provided by one service provider and to transmit reactions to them through the intermediary of another service provider, because it cannot be established with certainty that both service providers serve the same end-users. A report in newspaper A cannot be responded to by a statement in newspaper B. It is also of considerable significance in ensuring that the service is user-friendly to have access to networked databases via a uniform user surface.

126. It cannot be argued that the contractual elements are separable, for example, on the basis of the fact that the OTS services are in the meantime provided by APA-OTS and no longer by APA. As already stated, that amounts to no more than an internal reorganisation on the part of the service provider; from an economic point of view there was no change of service provider, rather APA-OTS is controlled by APA as its own corporate department. [65] The various services also continue to be networked and accessible via a uniform user surface.

127. Subject to an actual assessment by the Federal Procurement Office, all these matters militate against a finding that the contract for services between the Republic of Austria and APA is separable and thus against any obligation for there to be separate awards of items under the contract.

128. That is not altered by the fact that the services contract in this case concerns both priority and non-priority services. As a glance at Article 10 of Directive 92/50 shows, it is by no means necessary for priority and non-priority services to be awarded separately in each case. [66]

129. It would be otherwise only if the contracting authority had assembled the individual services into a single services contract arbitrarily or only for the purpose of circumventing the provisions on award procedures. [67] There are however no indications of this in the present case. On the contrary, from the information available to the Court, there were objective reasons in favour of an award of all the services at issue in a single contract. [68]

65 — See on this above, points 20, 61 and 62 of this Opinion.

66 — See also *Felix Swoboda* (cited in footnote 15), paragraphs 56 and 60.

67 — *Felix Swoboda* (cited in footnote 15), paragraphs 57 and 60.

68 — See also above, point 125 of this Opinion.

(e) Interim conclusion

130. In summary the answer to the fourth question may be stated thus:

A public contract for services may be awarded as a single contract under a negotiated procedure without prior publication of a contract notice, if the contract is predominantly for non-priority services and an exclusive right as referred to in Article 11(3)(b) of Directive 92/50 subsists not for all but only for certain of the services to be provided, unless the individual services were assembled into a single contract for services arbitrarily or in order to circumvent procurement provisions.

2. Fifth question

131. By its fifth question the Federal Procurement Office would essentially like to know whether an undertaking may demonstrate its standing to perform a public contract by the mere assertion that another undertaking is obliged under Article 82 EC to make certain data available to it on reasonable conditions.

132. The background to this question is the fact that the provision of news agency services, as sought in this case by the Austrian federal authorities, presupposes access to a comprehensive archive from which inter alia historical information and texts may be obtained. According to the information in the order for reference, PN does not have anything like a historical data archive which would be comparable to that held by APA. Moreover, APA does not grant its competitors access to its archives, in any event not for the purpose of selling on the data obtainable there. It must now be clarified whether PN may contend as proof of its standing within the meaning of Article 31 of Directive 92/50 that it has legal entitlement to access the APA archives, in particular the APADok database.

133. This is an allusion to the doctrine of competition law known as the 'essential facilities doctrine'. Under the relevant case-law, it may be regarded as an abuse under Article 82 EC — albeit only under exceptional circumstances — for a market-dominant undertaking to refuse another undertaking access to essential goods, services or data ('essential facilities').[69] In such cases Article 82 EC may found a mandatory requirement on the part of the market-dominant undertaking to enter into a contract.

69 — Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission, ('Magill')* [1995] ECR I-743, paragraphs 49 to 57; Case C-7/97 *Bronner* [1998] ECR I-7791, paragraphs 38 to 47; and Case C-418/01 *IMS Health* [2004] ECR I-5039.

134. However, in the present case it may remain open whether a database such as the APADok archive operated by APA contains data essential to its competitors, that is to say is an 'essential facility', and whether there are exceptional circumstances which would require APA to grant its competitors access on reasonable conditions to its archives.

135. For a service provider which, in regard to its admission to an award procedure, wishes to refer to the resources of other establishments or undertakings has to prove that it can *actually* avail itself of those resources.[70] Otherwise the contracting authority will have before it no persuasive comparison of that service provider's standing with that of other possible service providers. If the contracting authority merely were to trust in the *potential* ability of the service provider to avail itself of those resources, the authority would be running the risk of awarding the contract to an undertaking whose standing would prove, in retrospect, to be deficient, that is in the event of difficulties arising in regard to accessing the requisite resources. At the same time it might be withholding the contract from another undertaking with actual standing. Such conduct would be in keeping neither with the notion of equality as between all possible service providers nor with the principle of efficacy in the award procedure.

70 — *Holst Italia* (cited in footnote 31), paragraph 29; *Siemens and ARGE Telekom* (cited in footnote 15), paragraph 44; and Case C-126/03 *Commission* v *Germany* (cited in footnote 64), paragraph 22. See for future cases also Article 48(3) of Directive 2004/18 where this case-law has now been codified.

136. A news agency such as PN cannot therefore merely assert that it is entitled to access the archives of APA but must specifically prove that such access will actually be granted to it, for instance in the form of an express assurance to that effect or in the form of a licence agreement already entered into. Otherwise it cannot successfully demonstrate its standing in an award procedure by a reference to APA's archives.

137. The often brief time-limits within which a decision must be reached in the award procedure are inimical to clarification, which is frequently time-consuming, of complex legal questions in connection with Article 82 EC and the 'essential facilities doctrine'. The undertaking concerned must bring any dispute on these matters to a conclusion before applying for a public contract.

138. Accordingly, as to the fifth question, I conclude that an undertaking cannot demonstrate its standing to perform a public contract for services by the mere assertion that another undertaking is obliged under Article 82 EC to make certain data available to it on reasonable conditions.

C — *Sixth and seventh questions*

139. In its sixth and seventh questions the Federal Procurement Office seeks information about the extent of legal protection to be afforded to an undertaking not taken into consideration by a contracting authority. The logical assumption underlying these questions too is that transactions such as those in 2000, 2001 and 2005 are to be regarded as awards of public contracts for services. This is also conceded by the Federal Procurement Office in its order for reference.

140. On the basis of the information available to the Court, I am, as already mentioned, of the opinion that none of these transactions constituted such an award. [71] Accordingly, I am examining the sixth and seventh questions only in the alternative.

1. Sixth question

141. The sixth question referred by the Federal Procurement Office concerns the interpretation of the concept of 'harm' in Article 1(3) and Article 2(1)(c) of Directive 89/665. As already mentioned, [72] this question is admissible only in relation to Article 1(3) of the directive.

142. By its question the Federal Procurement Office is essentially seeking to ascertain whether a review procedure is to be carried out where the applicant claims that it missed the opportunity of participating in an award procedure owing to the fact that there was an unlawful failure to publish a contract notice or whether the applicant must in addition prove its own standing to perform the relevant public contract. Accordingly, it is necessary to elucidate further the *question as to who is entitled to apply for a review.*

143. Article 1(3) of Directive 89/665 permits the Member States to restrict the right to bring an application in relation to a review procedure for the award of public contracts in two respects: [73] on the one hand, through the requirement that the applicant should have an interest in the relevant public contract and, on the other, through the requirement of existing or imminent harm to the applicant. In this way public interest actions and actions brought by applicants with no prospect of success may be excluded.

71 — See my comments on the first, second and third questions above, points 41 to 105 of this Opinion.

72 — See above, points 35 to 37 of this Opinion.

73 — The reference to public supply and public works contracts must, since the extension of the scope of Directive 89/665 by Directive 92/50, be interpreted as relating to all public contracts including contracts for services. The fact that only Article 1(1) but not Article 1(3) of Directive 89/665 was amended accordingly seems to be attributable to a drafting oversight on the part of the Community legislature which was corrected for future cases by Directive 2007/66.

144. However, that must not affect the practical effectiveness of the directive.[74] The restrictions on the entitlement to bring an action must therefore be construed in the light of the twofold aim of the directive: on the one hand, the individual must be afforded an *effective legal remedy* in connection with the award of public contracts and, on the other, the requisite *review of the lawfulness* of the decisions by contracting authorities must be facilitated.

145. For, as is apparent from the first and second recitals in its preamble, Directive 89/665 seeks to strengthen the means available at national and Community levels in order to secure the actual application of the Community directives in the sphere of public procurement. To that end the Member States are obliged under Article 1(1) of the directive to ensure that unlawful decisions by contracting authorities can be reviewed effectively and as swiftly as possible.[75]

146. Against that background, entitlement to bring an action in procurement review proceedings may not be restricted disproportionately. In particular the *admissibility* of an application for review must not be subject to the same requirements as apply in regard to whether it is *well founded*.[76]

147. It cannot therefore be the case that already at the stage of lodgement of the application the person concerned is required to produce specific evidence of actual harm or that such harm is imminent. In order for there to be entitlement to make an application for review, it must be sufficient that, in addition to the infringement of the law by the contracting authority, the person concerned *persuasively asserts* an interest in the contract at issue and the *possibility* of the occurrence of damage.

148. The possibility of harm to the person concerned must be presumed where it is not manifestly excluded that the applicant would have received the award if the legal infringement alleged had not occurred. Where, as in the present case, the public contract is awarded directly[77] without prior contract notice, it follows from the fact that the person concerned is — allegedly unlawfully — precluded from participating in the award procedure that he may have lost a contract and thus suffered loss.[78]

74 — Case C-410/01 *Fritsch, Chiari & Partner and Others* [2003] ECR I-6413, paragraphs 31 and 34; Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 72; and Case C-230/02 *Grossmann Air Service* [2004] ECR I-1829, paragraph 42.

75 — Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraphs 33 and 34; *Fritsch, Chiari & Partner and Others*(cited in footnote 74), paragraph 30; *Universale-Bau and Others*(cited in footnote 74), paragraph 74; and *Grossmann Air Service* (cited in footnote 74), paragraph 36.

76 — The mere fact that *at the end of the review proceedings* there may be no evidence of actual or potential damage does not in itself militate against the admissibility of the application for review; see in this connection Case C-249/01 *Hackermüller* [2003] ECR I-6319, paragraph 27.

77 — Also known as a 'negotiated contract'.

78 — See also the Bundesverfassungsgericht (German Federal Constitutional Court) Order of 29 July 2004 (2 BvR 2248/03, end of paragraph 36).

149. Nor may actual proof of standing be required of the person concerned at the stage of an application for review; in the same way, he cannot be required to provide evidence that he would have received the award if the alleged infringement had not taken place.[79] Otherwise access to the review procedure would be rendered impossible in practice or at any rate excessively difficult.[80] In particular in cases of direct awards such as the present case, it would be barely possible for the person concerned to provide actual proof of standing, since he would have no accurate information about the requirements laid down by the contracting authority because of the lack of a prior contract notice.

150. Only by way of exception may an application for review be rejected as inadmissible *ab initio* by reference to a lack of standing on the part of the person concerned, namely where that lack of standing is so plainly obvious at the time of the application as to require no further examination. Everything else is a question of the merits of the application.

151. On the sixth question I therefore conclude that an application for review under Article 1(3) of Directive 89/665 is admissible if the applicant persuasively asserts an interest in the public contract, the existence of a legal error and the possible harm suffered or about to be suffered. If the contract was awarded without prior publication of a contract notice, it follows from the fact that the person concerned was precluded from participating in the award procedure that he may have suffered harm unless there is a manifest lack of standing on its part.

79 — Similarly, see the German Constitutional Court (cited in footnote 78), paragraphs 26 and 29.

80 — Similarly — albeit in relation to the award of compensation for damages — see the Opinion of Advocate General Geelhoed in *GAT* (cited in footnote 20), point 66.

2. Seventh question

152. By its seventh question the Federal Procurement Office essentially seeks to ascertain whether it is consistent with the principles of equivalence and effectiveness for national law to provide, in the case of an application, in a matter of procurement law, for a declaration of illegality which is a mandatory requirement of a subsequent claim for damages, a limitation period of no more than six months from the date of the award that is alleged to be contrary to procurement law. The Federal Procurement Office also questions whether the principle of effectiveness requires any additional periods in which there was no effective remedy under national law to be added to the abovementioned period of six months.

153. The background to this question is that PN made its applications for review to the Federal Procurement Office only in July 2006, that is to say within six months of the entry into force of the new procedural provisions in Paragraph 331 of the BVergG 2006 on 1 February 2006, yet more than six months after the matters at dispute in this case that date back to 2000, 2001 and 2005. According to the Federal Procurement Office, direct awards ('de facto awards') can be 'proceeded against effectively' in Austria only since the date of entry into force of Paragraph 331 of the BVergG 2006.

154. Directive 89/665 makes no express provision concerning the periods applicable to review proceedings under Article 1 thereof.

155. The starting point for the reply to the question submitted to the Court is therefore the *principle ofprocedural autonomy* enjoyed by the Member States. [81] It is settled case-law that, in the absence of Community rules in the field, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (*principle of equivalence*) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (*principle of effectiveness*). [82] Both principles are also reflected in Article 1 of Directive 89/665; the principle of equivalence in Article 1(2) and the principle of effectiveness in Article 1(1).

156. The *principle of equivalence* is a manifestation of the general principle of equal treatment and non-discrimination, [83] which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. [84]

157. The Commission and APA and APA-OTS rightly pointed to a specific peculiarity in that connection which differentiates review proceedings in procurement matters. Thus, Article 1(1) of Directive 89/665 requires Member States to facilitate *as rapid a review as possible* of infringements of procurement law. In this way, first, effective legal protection is to be ensured and, secondly, legal certainty is to be created as swiftly as possible. In light of this objective, it is justified in the case of applications for review under Directive 89/665, in appropriate cases, to provide for shorter periods than the limitation periods governing claims for damages under the general domestic legal provisions.

158. The principle of equivalence does not therefore preclude a six-month limitation period for applications for review such as, for example, the one provided for in Paragraph 332(2) and (3) of the BVergG 2006, even if under national law the general limitation period for claims for damages is longer.

81 — *Universale-Bau and Others* (cited in footnote 74), paragraph 71; on the concept of procedural autonomy, see Case C-201/02 *Wells* [2004] ECR I-723, paragraph 67, Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 95, and Case C-1/06 *Bonn Fleisch* [2007] ECR I-5609, paragraph 41.

82 — Case 13/68 *Salgoil* [1968] ECR 453; Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraphs 39 and 43; and Joined Cases C-222/05 to C-225/05 *Van der Weerd and Others* [2007] ECR I-4233, paragraph 28.

83 — See my Opinion in Case C-268/06 *Impact*, point paragraph 67; on the principle of equal treatment, see the settled case-law, not least Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 57, Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56, and Case C-227/04 P *Lindorfer* v *Council* [2007] ECR I-6767, paragraph 63.

84 — In this connection see also — albeit in relation to the refund of duties — Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 37.

159. However, it remains to be examined in the light of the *principle of effectiveness*-whether a limitation period, such as that provided for under Austrian law for applications for a declaration, does not render it virtually impossible or excessively difficult for the persons concerned subsequently to assert their rights to claim damages under Article 2(1)(c) of Directive 89/665.

160. In principle it is not contrary to the principle of effectiveness to lay down reasonable limitation periods for bringing legal proceedings, since to do so is an application of the basic principle of legal certainty. [85]

161. The reasonableness of a limitation period is therefore to be adjudged in the light of the nature and legal consequences of the relevant remedy and of the relevant rights and interests of all the persons concerned.

162. Accordingly, in applications for review that seek to have contracts which have already been concluded declared invalid — whether retroactively or for the future — an absolute limitation period of six months is in principle entirely reasonable. [86] For the particularly onerous legal consequences of invalidating a contract already concluded justify laying down a period that runs regardless of whether the applicant was aware, or at least ought to have been aware, that the award of the contract was contrary to procurement law. There is a clear need, both for the contracting authority and for its contract partner, for legal certainty as to the validity of the concluded contract and this should be protected.

163. In relation to a case such as this one, it must however be borne in mind that an absolute limitation period of six months, such as that provided for in Paragraph 332(2) and (3) of the BVergG 2006 for applications for a declaration under Paragraph 331(1) of that law, affects not only those who actually seek the invalidation of a contract that has already been concluded but also those who merely wish to take an essential procedural step in preparation for a subsequent action for damages before the Austrian civil courts.

164. So, if the person concerned only becomes aware more than six months later of the damage he has suffered as a result of an award of a public contract contrary to procurement law without prior publication of a contract notice (direct award or de facto award), he cannot apply to the civil courts even for damages since in order to do so it is mandatory under Paragraph 341(2) of

85 — Settled case-law; see *Rewe-Zentralfinanz and Rewe-Zentral* (cited in footnote 82), paragraph 5, *Edis* (cited in footnote 84), paragraphs 20 and 35, and Case C-30/02 *Recheio — Cash & Carry* [2004] ECR I-6051, paragraph 18; specifically on Directive 89/665, see further *Universale-Bau and Others*(cited in footnote 74), paragraph 76, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 50, and Case C-241/06 *Lämmerzahl* [2007] ECR I-8415, paragraph 50.

86 — See also Article 2(f)(1)(b) in conjunction with Article 2(d)(1) of Directive 89/665 in the version in Directive 2007/66.

the BVergG 2006 that he should first have applied for a declaration, which, however, by this stage would be time-barred.

165. Therefore, the limitation period in Paragraph 332(2) and (3) of the BVergG 2006 goes beyond its actual scope in also affecting subsequent proceedings for which it is unreasonably stringent. The contracting authority does not have the same need for legal certainty with regard to mere applications for damages as it does with regard to the validity of a contract already concluded.

166. In so far as a Member State avails itself of the possibility provided for in Article 2(2) and (5) of Directive 89/665, and makes the bringing of actions for damages dependent on an earlier successful application for a declaration of invalidity, the relevant limitation periods must be structured and applied in such a way that the actual implementation of the claim for damages is not rendered virtually impossible or excessively difficult. [87]

167. To summarise, the principle of effectiveness requires that the time-limit for an application for a declaration which the applicant is merely making in preparation for bringing an action for damages should not start to run before the applicant was aware or ought to have been aware of the occurrence of the damage. Conversely, in so far as the applicant intends, by such an application for a declaration, also to obtain a ruling that the contract concluded by the public contracting authority is invalid, more stringent time-limits may be laid down which start to run, irrespective of actual or possible awareness of any damage.

168. The national courts must, where possible, interpret national law in such a way that observance of the principle of effectiveness deriving from Directive 89/665 is assured, and if necessary must disapply any provision in so far as its application would, in the circumstances of the case, lead to a result contrary to Community law. [88]

169. In a case such as this one, in which there was a direct award without prior publication of a contract notice, this means that the time-limit for the application for a declaration may not start to run until the person concerned was aware or ought to have been aware of the alleged infringement of procurement law, in a case where the application is a necessary precondition of a subsequent action for damages.

87 — The significance of the specific structure and practical application of a rule on limitation periods is also emphasised in *Lämmerzahl* (cited in footnote 85), paragraphs 52, 56 and 61.

88 — *Santex* (cited in footnote 85), paragraphs 62 and 64, and *Lämmerzahl* (cited in footnote 85), paragraphs 62 and 63.

170. In its order for reference, the Federal Procurement Office indicates that, in its opinion, a result that complies with Community law can in fact be achieved, first, by applying the newly created remedy in Paragraph 331(1)(4) of the BVergG 2006 to events which occurred before this provision entered into force and, secondly, by calculating the applicable time-limits by reference to specific provisions of general civil law, with the result that they do not start to run until the applicant becomes aware of the damage and are extended by periods when there was no effective remedy.

171. To summarise in regard to the seventh question:

The principle of effectiveness requires that Article 1(1) of Directive 89/665 be interpreted as meaning that a reasonable period must be allowed in the case of an application for review which under national law is a mandatory prerequisite of a subsequent action for damages; that period may not begin to run until the person concerned was aware or should have been aware of the alleged infringement of procurement law, and it must be extended by periods when there was no effective legal remedy. The national court must interpret national procedural law as far as possible so that this result is achieved and, if necessary, must disapply any provision in so far as its application would, in the circumstances of the case, lead to a result contrary to Community law.

VII — Conclusion

172. Against the background of the foregoing, I propose that the Court should answer only the first three questions submitted to it by the Austrian Federal Procurement Office as follows:

‘(1) Generally on the first, second and third questions:

A contract within the scope of Directive 92/50 whose terms are amended during its currency does not require an award procedure to be carried out unless that amendment is material.

(2) Specifically on the first question:

(a) No material contractual amendment can be presumed to have occurred where the contracting authority accepts that performance of a part of a public contract be transferred to the contractor's subsidiary company which is a wholly-owned subsidiary governed by it in the same way as its own in-house departments. That is not altered by the fact that in theory the contractor might at a subsequent time transfer shares in the subsidiary company to third parties.

(b) If the contractor is a legal person, any changes occurring in the composition of its shareholders during the currency of the contract does not constitute a material contractual amendment.

(3) Specifically on the second and third questions:

(a) No material contractual amendment may be presumed where purely technical adjustments of the contract are carried out in light of altered external circumstances; that includes the conversion into euro of remuneration originally expressed in national currency and the reference to a new index which is an equivalent successor index to a previously used index.

(b) Nor is there a material contractual amendment where in the case of a public services contract without limit as to time the parties have agreed not to give notice for three years, unless there is firm evidence that during the above-mentioned period the contracting authority would otherwise have terminated the existing contract for legal or economic reasons.

(c) Whether the alteration of a price for a part of the services to be provided constitutes a material contractual amendment depends on the significance of the price amendment in question, both in relation to the part-service concerned and in relation to the public contract in its entirety.'