OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 28 June 2000 [1]

I — Introduction

1. By order of 17 February 2000, lodged at the Registry of the Court on 10 March 2000, the Vergabenkontrollsenat (Committee for the control of public service contracts) of the Land of Vienna (Austria) referred, under Article 234 EC, three questions for a preliminary ruling on the possible legal remedies applicable in respect of the procedures of a contracting authority which cancels an award procedure for a public contract. In particular, the national court asks this Court, first, whether Article 2(1)(b) of Directive 89/665 [2] requires the Member States to initiate review proceedings in respect of such procedures in order to have them set aside. If that question is answered affirmatively, then the Vergabenkontrollsenat asks whether Directives 89/665 and 92/50 [3] preclude the national court, before which review proceedings may be brought, from being necessarily limited to examining the arbitrary or sham nature of the contested cancellation of the award procedure (second question); and which is the relevant moment in time for assessing whether the decision to cancel the award procedure is lawful (third question).

II — Legal framework

A — *Community law*

2. Article 1(1) of Directive 89/665, as amended by Article 41 of Directive 92/50, provides:

'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 and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public

1 — Original language: Italian.

2 — Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33; hereinafter 'Directive 89/665' or the 'review directive').

3 — Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1; hereinafter 'Directive 92/50').

procurement or nation[al] rules implementing that law.'

Article 2(1)(b) of Directive 89/665 provides:

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

...

(a) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure'.

The second paragraph of Article 2(6) provides:

'Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

Article 12(2) of Directive 92/50, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC (OJ 1997 L 328, p. 1) concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, provides:

'Contracting authorities shall promptly inform candidates and tenderers of the decisions taken on contract awards, including the reasons why they have decided not to award a contract for which there has been an invitation to tender or to start the procedure again, and shall do so in writing if required. They shall also inform the Office for Official Publications of the European Communities of such decisions.'

B — *National law*

3. In Austria the relevant national law is the Wiener Landesvergabegesetz (Viennese

law on public procurement; hereinafter the 'WLVerG'). [4] Paragraph 32 (entitled 'Correction and withdrawal of an award procedure') (2) (3) and (4) of that law provides that: [5]

'(2) An invitation to tender may be withdrawn during the period for submission of tenders where events occur which, had they been previously known, would have excluded an invitation to tender being made or led to an invitation to tender with a substantially different content.

(3) At the expiry of the period for submitting tenders, the invitation to tender must be withdrawn where compelling grounds exist. Compelling grounds exist in particular where:

(1) events described in subparagraph 2 are not known until after the expiry of the period for submitting tenders,

or

(2) where all the tenders had to be excluded.

(4) An invitation to tender may be withdrawn, for example, when:

(1) no tender acceptable from an economic point of view has been submitted,

or

(2) only one tender remains after the exclusion of other tenders.'

4. As regards the jurisdiction of the Vergabekontrollsenat, that is to say the court which made the present reference, Paragraph 99 of the WLVerG provides that that court is to have jurisdiction to review decisions of the contracting authority taken in the context of procedures for the award of public contracts. In particular, until such time as a contract is awarded, the Vergabekontrollsenat may adopt interim measures or declare void decisions taken unlawfully by the contracting authority on the grounds laid down in Paragraph 101 of the WLVerG. In cases where the contract has already been awarded, the Vergabekontrollsenat may declare that the contract has

4 — LGBl. No 36/1995, in the version published in LGBl. No 30/1999.

5 — The translation of the national provisions is not an official version.

not been awarded to the best bidder owing to a breach of the WLVerG and may confirm, at the request of the contracting authority, whether, had that breach not occurred, the contract would have been awarded to a bidder who had been passed over.

a decision more favourable to the applicant if the infringed provisions had been complied with.'

III — Facts and questions for a preliminary ruling

5. Paragraph 101 of the WLVerG provides:

'The Vergabekontrollsenat must set aside decisions of the awarding authority adopted in the course of a contract awarding procedure:

(1) where discriminatory technical, economic or financial specifications appear in the tender notice inviting undertakings to participate in a closed procedure or a negotiated tender, or in the invitation to tender or tender specifications; or

(2) where a tenderer is passed over in breach of the criteria appearing in the tender notice in which undertakings are invited to participate in a closed procedure or a negotiated tender and the awarding authority might have come to

6. The City of Vienna, represented by the Magistrat der Stadt Wien — Wiener Krankenanstaltenverbund (hereinafter the 'City of Vienna' or the 'respondent'), in 1996 published an invitation to tender for the 'implementation of project management for realisation of the overall catering-supply concept in the premises of the Viennese associated hospitals'. [6]

7. Following submission of tenders, including one from the German company Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) (hereinafter 'HI' or 'the tenderer') and one from the Austrian company Humanomed, the City of Vienna withdrew the invitation to tender within the period prescribed for awarding the contract 'for compelling reasons in accordance with the first subparagraph of Paragraph 32(3) of the WLVerG'. In reply to a request for information submitted to it by HI, the City of Vienna stated that, in the

6 — In the supplement to the OJ of 24 December 1996 and in the legal notices in the Wiener Zeitung of 30 December 1996.

light of the results of studies carried out by Humanomed in 1996, it had emerged that the project initially envisaged and put out to tender had to be developed in a decentralised manner and it had therefore been decided not to establish any central coordinating body; consequently, it was no longer necessary to allocate the contract covered by the invitation to tender. The same letter also stated that the withdrawal of the invitation to tender was clearly justified by supervening circumstances which, had they been known earlier, would have precluded the opening of the award procedure.

8. HI did not share that opinion, contending that the withdrawal was in fact due to the contracting authority's intention to favour the Austrian company Humanomed to the detriment of a company, like itself, from another Member State. Besides suspecting that the City of Vienna was, either directly or indirectly (through municipal undertakings), a shareholder in Humanomed, HI questioned the fact that Humanomed had been closely involved in the preparatory work for the invitation to tender, which had subsequently been withdrawn, and had thus influenced the drafting of the outline specifications of the project which was the subject of that invitation to tender. That being the case, Humanomed, according to HI, should have been excluded from the invitation to tender in compliance with the principle of equal treatment between different tenderers; thus, according to HI, the invitation to tender was withdrawn precisely in order to avoid the necessity of excluding Humanomed, whilst at the same time continuing to cooperate with that company. Accordingly, for all these reasons HI instituted proceedings before the Vergabekontrollsenat seeking, in particular, the commencement of review proceedings, an interim order, the annulment of certain tender documents and of the withdrawal of the invitation to tender on the ground that it was unlawful and discriminatory.

9. By decisions of 30 April and 10 June 1997, the Vergabekontrollsenat dismissed the action brought by HI. In particular, it declared the claim for the annulment of the withdrawal of the invitation to tender inadmissible on the grounds that, under Paragraph 101 of the WLVerG, such claims could be made only in respect of certain specific decisions, exhaustively listed, adopted in the course of an award procedure, and these did not include decisions to withdraw an invitation to tender.

10. However, on appeal brought by HI, the Verfassungsgerichtshof (Constitutional Court) set aside the decision of the Vergabekontrollsenat. In particular, it held that, for the purposes of such a ruling, it was first necessary to resolve whether a withdrawal of an invitation to tender came within the scope of application of Article 2(1)(b) of Directive 89/665 and, since the Court of Justice had not yet had an opportunity to give a ruling on the matter, the Vergabekontrollsenat should have referred to it the relevant question for a preliminary ruling. Since the Vergabekontrollsenat had not done so, it had infringed both Article 234 EC and HI's

constitutionally guaranteed right to a hearing before the proper court.

11. When the matter was referred back to it, the Vergabekontrollsenat then studied the action in light of the statements by the Verfassungsgerichtshof, and finally decided to refer the following questions to this Court for a preliminary ruling:

'(1) Does Article 2(1)(b) of Directive 89/665/EEC (review directive) require the decision of a contracting authority to cancel the procedure for the award of a contract for services to be reviewable in review proceedings leading, if appropriate, to its being set aside?

(2) If Question 1 is answered affirmatively, is there any provision of Directive 89/665 or of Directive 92/50/EEC which precludes a review limited to examination of the issue whether cancellation of the award procedure was arbitrary or sham?

(3) If Question 1 is answered affirmatively, which is the relevant moment in time for assessing whether the decision of the contracting authority to cancel the award procedure is lawful?'

IV — Legal analysis

A — *On the first question for a preliminary ruling*

1. Introduction

12. With the first question for a preliminary ruling, the national court is essentially asking this Court to clarify whether, within the meaning of Article 2(1)(b) of Directive 89/665, the obligation imposed on Member States to institute appropriate review procedures against the decisions taken by the competent authorities in the context of award procedures governed by Community directives relating to the award of public works contracts, public supply contracts and public service contracts (the so-called substantive directives) also extends to the procedures for cancelling a contract (in this case, a contract for services).

13. However, as the Commission pointed out, it would have perhaps been more appropriate to extend the question at least to Article 1(1) of Directive 89/665 according to which the Member States must ensure that 'decisions taken by the contracting authorities may be reviewed'. In any case, in the following pages, as occurred in the discussion between the parties, it is inevitable that reference will be made to both provisions.

2. Arguments of the parties

14. Of the parties submitting observations in the present proceedings, only the applicant in the main proceedings has proposed that this question be answered in the affirmative. The other parties, namely the Commission and the Austrian Government, as well as the national court, have proposed a negative response on the basis of reasoning that I am now going to examine.

15. Whilst Article 1(1) of Directive 89/665 requires the Member States to take the necessary measures to ensure that decisions taken by the contracting authority may be reviewed rapidly and effectively, it is clearly to pursue the objective, enshrined in the directive, of guaranteeing that Community law in relation to public contracts is implemented effectively. It follows that the requirement to establish review procedures to set aside or ensure the setting aside of 'decisions taken unlawfully' by the contracting authority, as laid down in Article 2(1)(b) of the review directive, can refer only to those measures of the contracting authority which come within the scope of application of the substantive directives, that is to say only to decisions which, being subject to specific rules under those directives, may entail an infringement thereof. As the Commission points out, the preparatory work on Directive 89/665 would also point to this conclusion. The first version of Article 1(1) provided, in the initial proposal, that the aforementioned obligation on Member States be extended to the setting aside of all decisions taken in breach of *Community and/or national* rules on public contracts. However, despite requests by the Commission and by certain Member States, the draft was subsequently amended to limit the requirement to the setting aside of decisions taken in breach of *Community law relating to public contracts and national rules transposing that law.*

16. Thus, to maintain that the withdrawal of the invitation to tender comes within the 'decisions taken unlawfully' referred to in Article 2(1)(b) of Directive 89/665, it would need to be the subject of specific rules in the relevant substantive directive; in the present case, Directive 92/50. However, according to those who support this argument, that directive lays down no rules governing the conditions and form relating to the withdrawal of an invitation to tender for services, and thus does not even impose an obligation on the contracting authority to complete an award procedure. Article 12(2) of Directive 92/50 merely provides that, if so requested by a tenderer, the contracting authority is to inform candidates of the grounds of the withdrawal. Thus, it is contended that, unlike decisions to terminate the tendering procedure by awarding the contract, decisions to withdraw the invitation to tender do not constitute a 'decision' within the meaning of Directive 89/665. Moreover, the Austrian Government asserts that that conclusion is confirmed by the fact that Article 2(1)(b) refers solely to decisions

the contracting authority is obliged to take, under Directive 92/50, *during* an award procedure, while a decision of withdrawal constitutes an act that *terminates* such a procedure. [7]

17. But that is not all. Community case-law also holds that the contracting authorities have wide discretion in how they choose to terminate an invitation to tender, either by deciding not to award the contract, or by withdrawing the invitation to tender; as already noted, the Community directives do not impose any particular limits or conditions in that respect and do not even require that there exist 'exceptional cases ... based on serious grounds'. [8] However, those supporting that argument contend that if the contracting authority is not required to award a contract, that confirms that the decision to terminate an award procedure by withdrawing the relevant invitation to tender is not covered by the directive and thus does not constitute a decision within the meaning of Article 2(1)(b) of Directive 89/665.

18. Finally, the Austrian Government contends that, under Article 2(6) of Directive 89/665, where a contract has already been concluded between the contracting authority and the successful tenderer, the Member States may limit damages to the protection of the rights of any parties harmed, thereby precluding the possibility of having the decision to award the contract set aside. It therefore does not see why, as far as decisions to withdraw an invitation to tender are concerned, the interested parties should be offered any greater protection. It contends that the only obligation the national legislature must meet in such a case is to guarantee the right of the tenderers to seek damages should the contracting authority withdraw the invitation to tender in an abusive manner. In any event, as the Commission points out, tenderers harmed by an unlawful withdrawal are not without means of redress to safeguard their interests. On the one hand, there are the remedies provided for by national law in the event of a breach of national provisions; on the other hand, they may avail themselves of the remedies guaranteed by Directive 89/665 where the contracting authority has published a new invitation to tender without complying with Community directives.

7 — It is claimed that that interpretation is also supported by the judgment in Case C-81/98 *Alcatel Austria* [1999] ECR I-7671 which held that all decisions taken during an award procedure up to the time when the contract is concluded between the contracting authority and the successful tenderer may be questioned.

8 — See Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697, particularly paragraphs 23 to 25. In his Opinion on that case, Advocate General Saggio stated that 'the power to withdraw the administrative notice announcing a tendering procedure is the manifestation of a power vested in the contracting authorities by the laws of the Member States and that, until such time as a final decision awarding a contract is adopted, the contracting authority is essentially free to decline to award a contract on supervening grounds of public interest or because of a reappraisal of the feasibility of the planned works (lack of adequate resources, changes in the state of the art in a particular technological sector, and so forth)' (paragraph 13). On the discretion of the contracting authorities, see also, in more general terms, *inter alia*, Case C-56/77 *Agence européene d'Interims* [1978] ECR 2215, paragraph 20; Case T-19/95 *Adia interim* v *Commission* [1996] ECR II-321, paragraph 49; Case T-203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II-4239, paragraph 54; Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 147; and Case T-139/99 *AICS* v *Parliament* [2000] ECR II-2849, paragraph 39.

3. Assessment

19. In assessing these arguments, I should initially like to reiterate, albeit very summarily, the aims of the Community directives on public contracts, which seem to me to have been somewhat obscured in the foregoing arguments. As is well known, these directives have established a body of rules designed to give effect, in this sector too, to the freedom of establishment and freedom to provide services by guaranteeing all Community traders the right to participate in public calls to tender under conditions of absolute equality and total transparency. As in other sectors, the necessity to achieve that goal also in relation to public contracts required legislation that went beyond a mere ban on discrimination on grounds of nationality to embrace every eventuality that might lead, in any way whatever, to differences in the conditions governing access to and participation in an activity. Thus, there has also been a gradual movement away from a more limited set of rules, such as those laid down by the first directives on public supply and public works contracts, towards a more specific, incisive and, above all, tendentially global set of rules, such as those which have come about by degrees and which, in their main outlines, may now be considered almost complete.

20. In particular, for our present purposes, I note that the directives in question have a specific aim which is expressly stated in the directives themselves and repeatedly stressed in Community case-law. That aim is to guarantee equal treatment between tenderers and transparency at every stage of the award procedure, [9] whilst imposing an obligation on Member States, as in the case of the directive here in question, to provide appropriate remedies at national level in order to ensure effective compliance with those principles. [10] Accordingly, I must point out that those principles apply in the present case in so far as they go beyond the wording of the directives, which neither refer to those principles nor provide the basis for them, but which are intended solely to facilitate and ensure their effective application. In that respect, the Court has held that 'although the directive [71/305/EEC [11]] makes no express mention

9 — See, in particular, Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043 in which the Court held 'the procedure for comparing tenderers therefore had to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency' (paragraph 54); *Embassy Limousines & Services*, cited above, paragraph 85; Joined Cases T-191/96 and T-106/97 *CAS Succhi di Frutta* v *Commission* [1999] ECR II-3181, paragraph 72, and *ADT Projekt*, cited above, paragraph 164.

10 — I note that the first three recitals of Directive 89/665 expressly provide, first, that the scope of the directive is precisely to obviate the lack, in the directives on public contracts, of specific provisions that guarantee their effective application; second, the need to reinforce the national and Community control mechanisms which did not always allow the Community provisions to be respected; third, the need to provide for a 'substantial increase' in the guarantees of transparency and non-discrimination, requiring the Member States to introduce effective and rapid remedies to review infringements of Community and national legislation.

11 — Council Directive of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ 1971 L 185, p.5).

of the principle of equal treatment of tenderers, the duty to observe that principle lies at very heart of the directive'. [12]

21. Accordingly, it follows not only that the contract directives must be interpreted in accordance with the traditional principles of Community case-law, and in particular with the principle requiring the provisions which implement the fundamental principles of freedom of movement to be interpreted in a way that does not restrict their scope or impair their effectiveness, [13] but, above all, to be read in the light of their stated function of guaranteeing full and effective observance of the superior principles of equality of treatment and transparency. In particular, the review directive must be interpreted, in strict compliance with the aims of this directive and of the entire system, as meaning that its aim is to ensure at all levels effective observance of the substantive directives and of the principles underlying them so that, over and above the cases expressly provided for, it cannot be implicitly assumed or inferred, in relation to the procedures covered by those directives, that there are limits to the judicial safeguards which leave stages or phases of those procedures uncovered. It must also be interpreted in compliance with the principle of the 'justiciability' of acts producing definite legal effects that 'reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms'. [14] In other words, it is necessary to follow a reasoning exactly opposite to that adopted by those who support the argument explained above.

22. Coming now to consider the specific question before us in the light of the

12 — See Case C-243/89 *Commission* v *Denmark*, *'Storebaelt'* [1993] ECR I-3353, paragraph 33. In the same vein, see Case C-87/94 *Commission* v *Belgium*, *'Bus Wallons'* [1996] ECR I-2043, paragraph 51. The Commission has also recently noted that 'the Court's case-law holds that, even if Member States remain free under the Treaty to lay down the substantive and procedural rules, they must respect all the relevant provisions of Community law, and particularly the prohibitions deriving from the principles enshrined in the Treaty by specifying in particular that the public procurement directives were intended to "facilitate the attainment within the Community of freedom of establishment and freedom to provide services" and "to ensure the effectiveness of the rights conferred by the Treaty in the field of public works and public supply contracts"' (see the Commission interpretative communication on concessions (for public contracts) under Community law (OJ 2000 C 121, paragraph 3, which refers to Case 198/85 *Commission* v *Italy* [1987] ECR 1039 and Case C-71/92 *Commission* v *Spain* [1993] ECR I-5923). Accordingly, on that basis, it has confirmed, particularly with reference to concessions, that although they are not defined by the Treaty and are practically ignored by the public contract directives, this does not mean that 'concessions are not subject to the rules and principles of the Treaty. Indeed, in so far as these result from acts of State, the purpose of which is to provide economic activities or the supply of goods, they are subject to the relevant provisions of the Treaty and to the principles which derive from Court case-law' (*ibidem*, paragraph 2).

13 — Among the numerous recent cases, see Case C-434/97 *Commission* v *France* [2000] ECR I-1129, paragraph 21, where further references are made and Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraph 41, where further references are made. In the same vein, see the opinion of Advocate General Mischo in *Alcatel Austria* (paragraph 40, with specific reference to Article 1 of Directive 89/665).

14 — Case C-97/91 *Borelli* v *Commission* [1992] ECR I-6313, paragraph 14, where further claims are made; Case C-1/99 *Kofisa Italia* [2001] ECR I-207, paragraph 46, and Case C-226/99 *Siples* [2001] ECR I-277, paragraph 17.

preceding discussion, the negative reply proposed by the above argument seems highly debatable and, as far as the Commission is concerned, I would even say surprising when account is taken of its traditional approach in this matter. [15] In any event, I do not think the argument in question stands up to critical analysis.

23. First, I note that the text of Directive 89/665 makes no mention of any restriction with regard to the nature and content of the decisions which Member States must ensure are open to review. On the contrary, Article 1(1) of the directive provides, without further specification, that it refers to 'award procedures' governed by the relevant substantive directives and that in the context of those procedures the Member States must take the measures necessary to ensure that 'decisions taken by the contracting authorities' may be reviewed effectively and rapidly: thus, that covers all decisions taken within the framework of those procedures, from start to finish, whether they result in the award of a contract, or in its termination on the basis of a decision to withdraw or cancel it. In any case, as the Court held in *Alcatel Austria*, the article does not provide for any 'restriction with regard to the nature and content' of the decisions that have infringed Community law on public contracts or the relevant national implementing provisions (paragraph 35).

24. On the other hand, the wording of the subsequent Article 2(1)(b) of the directive in question ('setting aside of decisions taken unlawfully, including' etc.) leads to the same conclusion, given that it gives no indication of limits or any other sign that provides any authorisation whatsoever to restrict the scope of the decisions taken in terms of their content, the stage in the award procedure at which they are taken or on any other grounds. [16] Finally, that is also confirmed by the wording of Article 2(1)(a) which requires Member States to make provision for interlocutory procedures to deal with 'any decision taken by the contracting authorities'; it is not clear why procedures for the setting aside of decisions referred to in the subsequent Article 2(1)(b) should be more limited.

25. Thus, on the basis of a textual analysis alone, the directive not only fails to provide

15 — I merely note, for example, that in the Green Paper on Public Contracts in the European Union of 27 November 1996 (COM(96) 583 fin.), the Commission maintained that, even in regard to situations that do fall within the scope of the directives (contracts below the thresholds, concessions or similar contracts), the principles of non-discrimination, equality of treatment and transparency apply (see point 3.24). Thus 'contracting authorities or contracting entities have, when awarding public contracts ..., engaged in behaviour or taken decisions incompatible with Community law, even if the rule or prohibition to be complied with is not expressly laid down in the Directives' (point 3.29). Also see, in the same vein, the Communication on public contracts in the European Union of 11 March 1998 (COM(1998) 143 fin.) and, in particular, the abovementioned interpretative Communication on concessions under the Community law on public contracts.

16 — See, in the same vein, paragraphs 32 and 33 of *Alcatel Austria*.

support for the argument under consideration, but, if anything, does the opposite. However, what is important for me to point out is the fact that the interpretation proposed here is also more consistent with the stated aims of the substantive directives on contracts, particularly of Directive 89/665 which, as the Court held in *Alcatel Austria*, is specifically intended to strengthen the existing mechanisms. Yet even from the perspective of the logic of the system it is not clear why, as HI observes, of the two main methods of concluding a tendering procedure, namely awarding a contract and withdrawing it, only the first method should be subject to control, whilst the second is not. And that is so even if by chance the decision to award the contract were to be taken in a totally arbitrary fashion or for the sole purpose of favouring a certain tenderer, and even if the tendering procedure were repeated several times until the tenderer who was hypothetically favoured was successful. That would imply, on the one hand, creating manifest and unjustifiable differences with respect to decisions to award contracts; on the other hand, it would imply leaving the contracting authority free to allow considerations, other than economic considerations, to be given preference thereby opening the way to the very risks of discrimination and lack of transparency which the directives have sought to remove: in other words, it would imply depriving those directives of their effectiveness and thus negating their purpose.

26. However, as noted above, those who support the argument in question insist above all on the correspondence between the review directive and the substantive directives, stressing that the latter make no provision in respect of the withdrawal of a tendering procedure and therefore they contend that, by definition, the relevant procedures fall outside the scope of application of the former directive, irrespective of the scope of the phrase 'decisions taken unlawfully' employed by that directive. I would observe, however, first of all, that the assumption on which that argument is based, according to which only procedures and decisions for which specific rules are laid down in the substantive directives should be subject to the review directive, remains to be substantiated. It is equally legitimate, and even more consistent with the principles and logic of the system, as I have pointed out several times, to argue that the first directive covers all the stages and phases of the award procedures which are covered by the substantive directives, including those which, on account of their particular nature, do not require specific rules or require only limited regulation, as in the specific case of the withdrawal of a tendering procedure.

27. However, apart from the foregoing considerations, I must point out that the substantive directive which is relevant here, namely Directive 92/50, does not ignore the measures withdrawing an invitation to tender, even if it is limited in that respect, as already noted, to providing that the contracting authority, if so requested, is to communicate in writing 'the grounds on which it decided not to award a contract' (Article 12(2) of Directive 92/50). It seems obvious to me that such an obligation to provide reasons is not of little consequence for our present purposes because stating the

reason for a measure and judicial review of that measure are two aspects that are closely linked. As the Court's case-law also demonstrates, the former serves as a direct basis for the latter because the logic adopted by the author of the measure must be clearly and unequivocally discernible so that those affected can comprehend the reasons for the measure and the competent court can exercise its own power of review. [17] Accordingly, if the directives require that reasons must be given, that is all the more reason for assuming that there is an obligation to establish judicial protection.

28. Nor, for the purposes of the present argument, can the aforementioned objection be raised that, since the contracting authority has wide discretion to withdraw a tendering procedure, tenderers have no right to claim that the procedure be concluded with the award of a contract. If, apart from the aforementioned obligation to provide reasons, procedural and substantive conditions governing withdrawal are not laid down, that does not mean that the relevant measures fall outside the review directive or that the power vested in national authorities may be exercised without control or limitation. The undoubted discretion which such authorities enjoy in that respect may affect, as we shall see in examining the second question, the scope of judicial review, but it certainly does not imply absolute freedom and removal from all control. Those authorities must continue to act in compliance with the relevant Community and national provisions and, above all, respect the principles of equality of treatment and transparency which, as the Court has held, 'lie at the very heart' of the rules governing the matter and therefore are to be applied absolutely and unconditionally. [18]

29. Before concluding with this point, I must still give my opinion on certain arguments put forward respectively by the Austrian Government and the Commission in favour of a negative reply to the question under consideration.

17 — See Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35, where other references are given. I also fully endorse the comments of Advocate General Saggio, in his Opinion in *Fracasso and Leitschutz*, where he stated that 'the obligation to state the reasons for which the contracting authority decided not to award the contract or to recommence the procedure, referred to in Article 8(2) of the Directive [Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), a provision analogous to Article 12(2) of Directive 92/50] must be seen for what it is. It allows the legality of the administrative decision to be reviewed, at least in cases where the decision cancelling the procedure appears inappropriate or contrary to other provisions of Community law' (point 17).

18 — As Advocate General Saggio observed in the abovementioned Opinion in *Fracacsso and Leitschutz* 'the power to withdraw the administrative notice announcing a tendering procedure ... [does] not imply that that power to adopt self-protective measures of that kind is absolute and not amenable to any judicial review'. It cannot therefore engender 'an arbitrary or unfair' act or invoke 'any infringement of the Directive or of other provisions or principles of Community law'. Article 8(2) of Directive 93/37 (corresponding to Article 12 of Directive 92/50) is 'without doubt intended to prevent the contracting authority from freeing itself of a potential contracting party in an entirely arbitrary manner or in disregard of fundamental principles of Community law' (points 13 to 18).

30. The first argument, as noted above (point 18), relies on Article 2(6) of Directive 89/665, concluding from it that if, in the event of a contract already having been awarded, Member States may limit the protection afforded to individuals to a claim for damages, there is no reason to offer them greater judicial protection in the case of a measure of withdrawal. It must be objected, however, that there is no similarity between the two situations referred to, that is to say between the phase preceding the award of the contract (to which Article 2(1) refers and which is of interest here) and the phase following the award (to which Article 2(6) refers). As the Court held in *Alcatel Austria*, Directive 89/665 itself clearly distinguishes between those two stages by laying down different rules (paragraph 37). On the other hand, any analogous extension of the rules laid down in Article 2(6) not only would not be justified under any aspect of the structure of the system in question, but would be completely at odds with the aims of that system. [19]

31. Nor can it be maintained, as the Austrian Government still appears to claim, that a claim for damages caused by an unlawful withdrawal is sufficient to meet the claims of tenderers harmed by that withdrawal. I merely note that the review directive authorises the Member States to make actions for damages conditional on the contested decision first being set aside (see Article 2(5) of Directive 89/665) so that, at least in the case of such an eventuality, this latter type of remedy could not be precluded. Moreover, that seems to me to provide a further reason for giving a positive reply to the first question submitted by the Vergabekontrollsenat, given that, otherwise, any individuals affected would not even be able to bring an action for damages where the Member State in question had taken advantage of the opportunity offered it by the aforementioned Article 2(5).

19 — As Advocate General Mischo pointed out in his Opinion in that case 'the effectiveness of the review directive, and in particular its objective, set out in Article 1(1), of establishing rapid and effective review procedures, would be compromised if it were open to a Member State to widen the limitation provided for in Article 2(6) to such an extent that the most important decision of the contracting authority, namely the award of the contract, would systematically be covered by the limitation, and would thus be removed from the full protection established by Article 2(1). The objective of reinforcing remedies which is laid down by the review directive requires that the possibility left open to the Member States to limit them should be regarded as an exception and so be interpreted restrictively' (points 39 to 40). It obviously goes without saying that such observations, although directed at decisions to award contracts, also apply in full to procedures to withdraw an invitation to tender.

32. For its part, the Commission initially contends that any tenderer harmed by an unlawful decision to withdraw an invitation to tender would in any event have available the remedies provided for by the laws of the Member States where national provisions are infringed. I do not know if such a prospect is likely to console those affected. However, it certainly does not meet the stated requirements and frankly it sounds rather odd coming from an institu-

tion which for years has been insisting that the directives on contracts be effectively implemented and has proposed more than one directive (such as, for instance, Directive 89/665) aimed precisely at reinforcing that guarantee at Community level, removing it from the disparities and deficiencies of the national legislation.

33. Equally consoling, but just as inconclusive for our present purposes, it seems to me, is the Commission's other observation to the effect that participation in an invitation to tender which is subsequently withdrawn is in some way protected by the fact that, if the contracting authority decided to award the contract in question by recommencing the tendering procedure, it would in any event have to comply with the relevant Community directives and this could in an appropriate case be subject to judicial review in accordance with the provisions of Directive 89/665. On the other hand, I would observe that a contracting authority does not always decide to launch a new invitation to tender for a contract previously withdrawn. However, even if that were the case, that would not make the action to set aside a decision of withdrawal any less effective because, if such action were successful, apart from the consequences noted above (point 31), the contracting authority's discretion would inevitably be limited should a new invitation to tender be launched as it would have to comply with the principles laid down by the judgment setting aside the decision. [20]

34. Accordingly, in light of the foregoing observations, I consider that the reply to the first question for a preliminary ruling should be that Article 2(1)(b) of Directive 89/655 requires that the decision by the contracting authority to withdraw the invitation to tender for a contract for services may be examined and possibly set aside under a review procedure.

B — *On the second question for a preliminary ruling*

35. By the second question for a preliminary ruling, the Vergabekontrollsenat asks, if the first question is answered affirmatively, whether there is any provision of Directive 89/665 or Directive 92/50 which precludes judicial review of the legality of a withdrawal of an invitation to tender from having to be limited to examination of the issue whether that measure was arbitrary or sham.

20 — In that respect, I note that in *Simmenthal* the Court acknowledged that an applicant retains an interest in the annulment of an award decision (adopted in that case by the Commission) even if it has already been fully implemented for the benefit of other tenderers, 'either in its being restored sufficiently by the Commission to its original position or inducing the Commission to make suitable amendments in the future to the system of invitations to tender if the latter is found to be incompatible with certain legal requirements' (Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraph 32). In the same vein, see *CAS Succhi di Frutta* v *Commission* (paragraph 63).

36. In effect, this is a somewhat convoluted question which not even the grounds of the order for reference help to clarify, probably also because this reflects problems and concerns specific to the Austrian legal system. However, as far as I understand it, the Vergabekontrollsenat is disposed to give a negative reply, in other words seeking to limit judicial review to the decision to withdraw an invitation to tender, whilst HI takes the opposite view, arguing that it cannot be inferred from Directive 89/665 that an action to set aside a decision of withdrawal must be limited solely to examination of whether the contested measure was arbitrary or sham. On the contrary, in its opinion, a decision of withdrawal should be subject to full judicial review. Finally, for its part, the Commission, after repeating that withdrawal measures are excluded from Directive 89/665, merely notes that, if an action is brought before a national court challenging the lawfulness of a withdrawal of a tender, that court can verify whether the grounds for such a withdrawal are compatible with the national and, possibly, the Community provisions.

37. In coming to a general assessment of the question and thus leaving aside any situations specific to Austrian law, I must say that I have great difficulty identifying in the Community directives in question any provisions that are relevant from the point of view of the question submitted to us: in other words, provisions which make it possible to infer or, on the contrary, exclude limits to the scope of judicial control over a measure withdrawing an invitation to tender. It will certainly be necessary to keep firmly in mind what I have said above concerning the discretion enjoyed by the contracting authority in the matter, and the limits resulting from it, in this and all like cases, on the level of judicial review. Community case-law has repeatedly stressed that, given the nature of the power enjoyed by those authorities, review by the courts must be limited to checking that the rules governing the procedure and statement of reasons are complied with, that the facts are correct and that there is no manifest error of assessment or misuse of powers. [21] However, beyond that limitation, directly connected, I repeat, to the nature of the power exercised in the present case, remains the fact that the national authorities will still always be obliged to respect the relevant Community and national provisions and, above all, the principles of equality of treatment and transparency repeatedly referred to; therefore, judicial review must also be extended to those aspects.

38. Accordingly, I consider that the answer to the question concerned should be that no provision of Directives 89/665 and 92/50 allows judicial review of the legality of the decision to withdraw an invitation to tender to be solely limited to an examination of the arbitrary or sham nature of that decision.

21 — As stated by the Court of First Instance in *ADT Projekt*, paragraph 147. But see *Embassy Limousines & Services* where it notes that the discretion in assessing the factors to be taken into account for the purpose of deciding to annul a contract following an invitation to tender should be limited to checking that there has been no serious and manifest error (paragraph 56). See also, in the same vein, *Agence européene d'Interims*, cited above, paragraph 20; *Adia interim*, paragraph 49, and *AICS*, paragraph 39.

C — *On the third question for a preliminary ruling*

39. By this question also, submitted in the alternative in the event of an affirmative reply to the first question, the Austrian court asks finally what is the relevant moment for assessing whether the decision of the contracting authority to withdraw the invitation to tender is lawful.

40. In stating its reasons for that question, the Vergabekontrollsenat notes that Directive 89/665 contains no indication on the matter and that in its opinion there are two possible solutions: the moment at which the decision is taken by the contracting authority or the moment at which the decision is taken by the review body. In favour of the first solution is the fact that the decision of withdrawal is the subject of the application for review, whilst in favour of the second interpretation is the principle of the directive's effectiveness, which is intended to guarantee the existence of 'effective and rapid remedies'. However, HI contends that reference should be made to the moment when the decision is given on the contested act whilst the Commission contends that, since the withdrawal of an invitation to tender is governed not by Community law but by the applicable national law, it is on the basis of the latter that the solution to the third question for a preliminary ruling will depend.

41. For my part, I would observe that Directive 89/665 makes no provision concerning the determining moment for the purpose of considering the lawful nature of a decision of withdrawal. I believe that is due to the nature of the directive itself which is not intended to harmonise legislation, but merely to coordinate existing procedures. Thus, its aim is not to create a comprehensive legal framework on the subject, but merely to lay down the necessary rules to ensure that the substantive directives are fully and effectively applied. It is to the individual national legal systems that one must look for specification of the detailed rules and procedures, in compliance, of course, with the rules and principles laid down in the directive, for the exercise of the protection provided for in it. As the Court has recently held, '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'. [22]

42. Accordingly, in reply to the third question for a preliminary ruling, I consider that the Court should inform the national court that, without prejudice to the effectiveness and timeliness of the safeguards guaranteed by the principles and provisions of Community law, the relevant moment in time for the purpose of assessing the lawfulness of a decision taken by a contracting authority to withdraw an invitation to tender is to be determined on the basis of the applicable national law.

22 — Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 19, where further references are given.

V — Conclusion

43. In light of the preceding considerations, I therefore propose that the Court rule as follows:

(1) Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts requires that the decision by the contracting authority to withdraw the invitation to tender for the award of a contract for services be examined and, possibly, set aside under a review procedure.

(2) No provision of Directive 89/665 or of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts allows for judicial review of the legality of the act withdrawing an invitation to tender to be limited solely to examination of whether that procedure was arbitrary or sham.

(3) Without prejudice to the effectiveness and timeliness of the safeguards guaranteed by the principles and provisions of Community law, the relevant moment in time for the purpose of assessing the lawfulness of a decision taken by a contracting authority to withdraw an invitation to tender is to be determined on the basis of the applicable national law.