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OPINION OF ADVOCATE GENERAL

FENNELLY

delivered on 2 April 1998 (1)

Case C-76/97

Walter Tögel

v

Niederösterreichische Gebietskrankenkasse

I — Introduction

1. This case relates to the award of a public service contract for the transport of persons, with or without medical attendance, to and from hospitals and medical centres. It raises, in particular, questions regarding the bodies competent to review such contracts and the availability of remedies where the relevant Community directives have not been implemented in time, the categorisation of the services in question and the contract award procedures which should, accordingly, be followed, the direct effect of the legislative provisions concerning these procedures, and the effect of the implementation of the applicable directive on pre-existing contracts.

II — Legal and factual context

A — Community law

2. Article 1 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 (2) (hereinafter referred to as 'the Review Directive'), as amended, 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, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national (3) rules implementing that law. (4)

(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.'

Article 2 of the Review Directive provides, in relevant part, 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:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) 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;

(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.

...

(6) The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its

award shall be determined by national law.

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.

(7) The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

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

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

authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.`

3. Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (5) (hereinafter referred to as 'the Services Directive`) establishes procurement procedures for certain types of public service contracts. The seventh recital in the preamble to the Services Directive provides as follows:

'Whereas the field of services is best described, for the purpose of application of procedural rules and for monitoring purposes, by subdividing it into categories corresponding to particular positions of a common classification; whereas Annexes I A and I B of this Directive refer to the CPC nomenclature (common product classification) of the United Nations; whereas that nomenclature is likely to be replaced in the future by Community nomenclature; whereas provision should be made for adapting the CPC nomenclature in Annexes I A and I B in consequence.`

4. The twenty-first recital in the preamble to the Services Directive reads, in relevant part, as follows:

'Whereas full application of this Directive must be limited, for a transitional period, to contracts for those services where its provisions will enable the full potential for increased cross-frontier trade to be realised; whereas contracts for other services need to be monitored for a certain period before a decision is taken on the full application of this Directive.`

5. Article 1 of the Services Directive defines a number of terms employed in the Directive. Article 2 governs the scope of the Directive relative to that of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts. (6) Article 3 of the Services Directive provides for the application, without discrimination, of the provisions of the Directive to the award of public service contracts, to design contests and to service contracts publicly subsidised by more than 50% which are awarded in connection with works contracts within the meaning of Article 1a(2) of Council Directive 71/305/EEC of

26 July 1971 concerning the coordination of procedures for the award of public works contracts. (7) In particular, Article 3(1) provides as follows:

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

Articles 4 to 6 of the Services Directive provide for the non-application of that Directive in a variety of specified exceptional situations. Article 7 of the Services Directive provides for the application of the Directive to public service contracts with an estimated value, net of VAT, which is not less than ECU 200 000, and identifies the methods by which contracts are to be valued.

6. Article 8 of the Services Directive provides for the observance of the detailed award procedures in Titles III to VI in the case of contracts which have as their object services listed in Annex I A to the Services Directive. Article 9 states that contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16 of the Services Directive, which relate only to technical specifications and the notification of the results of award procedures. The procedure applicable to contracts whose subject-matter falls within both Annexes is dealt with as follows by Article 10 of the Services Directive:

'Contracts which have as their object services listed in both Annex I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the

services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

7. Title III of the Services Directive regulates the choice of award procedures and the rules governing design contests. Title IV relates to technical specifications for public service contracts. Title V establishes common advertising rules. Title VI is divided into three chapters, which set out, respectively, common rules on participation by service providers in the contract award process, criteria for qualitative selection and criteria for the award of contracts.

8. Annex I A to the Services Directive lists services within the meaning of Article 8. It includes, in Category No 2, the subject 'Land transport services, including armoured car services, and courier services, except transport of mail', with the CPC reference numbers 712 (except 71235), 7512, 87304. Annex I B lists services within the meaning of Article 9 of the Services Directive, and includes Category No 25, whose subject is 'Health and Social Services'. Its CPC reference number, 93, is provided in the third column of the Annex.

9. CPC reference number 712 is a subdivision of Division 71 ('Land transport services') and is entitled 'Other land transport services'. (8) Subdivision 712 includes 'Non-scheduled passenger transportation' (7122), which is further subdivided into 'Taxi services' (71221), 'Rental services of passenger cars with operator' (71222), 'Rental services of buses and coaches with operator' (71223), 'Passenger transportation by man- or animal-drawn vehicles' (71224) and 'Other non-scheduled passenger transportation n.e.c.' (71229). (9) In Division 93 of the CPC ('Health and Social Services'), subdivision 931 on 'Human health services' includes 'Other human health services' (9319), one of the elements of which is headed 'Ambulance services' (93192), followed by the fuller description: '[g]eneral and specialised medical services delivered in the ambulance'.

10. The fifth recital in the preamble to Council Regulation (EEC) No 3696/93 of 29 October 1993 on the statistical classification of products by activity (CPA) in the European Economic Community (10) (hereinafter 'the CPA Regulation') reads as follows:

'Whereas the international compatibility of economic statistics requires that the Member States and the Community institutions use product classifications by activity which are directly linked to the United Nations Central Product Classification (CPC).'

Article 1(1) of the CPA Regulation states that '[t]he purpose of this Regulation is to establish a classification of products by activity within the Community in order to ensure comparability between national and Community classifications and hence national and Community statistics'. (11) Article 1(3) states: 'This Regulation shall apply only to the use of this classification for statistical purposes'. Article 3(1) of the CPA Regulation states, in relevant part, that '[t]he CPA shall be used by the Commission and the Member States as a classification'.

11. The CPA comprises a Division 60, 'Land Transport ...' and a Division 85, 'Health and Social Work Services'. Although the component groups, classes and categories are not divided in precisely the same way as is done in the CPC, (12) their

order and content are essentially similar. The CPA subcategories 60.23.14, 'Other non-scheduled passenger transportation n.e.c.', and 85.14.14, 'Ambulance services', are stated to correspond, respectively, to CPC reference numbers 71229 and 93192.

12. The Commission adopted a Common Procurement Vocabulary (CPV) in 1996. (13) The preface states that the main CPV is 'a detailed adaptation, tailored to the needs of public procurement, of the CPA ... nomenclature ... . The CPV will ultimately become a harmonised nomenclature that will replace the different ones referred to in the public procurement directives'. In Division 60 of the CPV, reference number 60231400-0 relates to 'Other non-scheduled passenger transport n.e.c.', while in Division 85, reference number 85141400-3 relates to 'Ambulance services'.

13. The fifth and sixth recitals in the preamble to Commission Recommendation 96/527/EC of 30 July 1996 on the use of the Common Procurement Vocabulary (CPV) for describing the subject-matter of public contracts (14) (hereinafter 'the CPV Recommendation') state that the CPV is an adaptation of the CPA and that the CPA, in turn, 'offers a fixed correspondence with the CPC nomenclature of the United Nations'. It is recommended that the CPV be used by contracting authorities and contracting entities covered by the various public procurement directives (15) in notices of public contracts submitted to the Office for Official Publications of the European Communities, and by suppliers of goods, works and services and their agents to describe contracts of interest to them.

B — *Implementation in national law*

14. By virtue of Article 65 of and Annex XVI to the Agreement on the European Economic Area signed at Oporto on 2 May 1992, the Republic of Austria was obliged to transpose into national law, by 1 January 1994 at the latest, (16) a number of Community acts in the field of public procurement, including the Review Directive in its original version. The Review Directive was transposed at federal level by the Bundesgesetz über die Vergabe von Aufträgen or

Bundesvergabegesetz (Federal Procurement Law, hereinafter 'the BVergG'), (17) which entered into force on 1 January 1994. The BVergG established a conciliation procedure before the Bundesvergabekontrollkommission (Federal Procurement Review Commission) and a review procedure before the Bundesvergabeamt (Federal

Procurement Office). The review competence of the Bundesvergabeamt was established by the BVergG only in respect of awards of public supply and works contracts.

15. By virtue of Article 168 of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, of 24 June 1994, (18) the Services Directive, including Article 41 amending the Review Directive, was required to be transposed into Austrian law by the date of accession, viz. 1 January 1995. (19) Transposition at federal level took place by means of an amendment to the BVergG, (20) which extended the review competence of the Bundesvergabeamt to awards of public service contracts and which entered into force on 1 January 1997.

16. Austrian social security institutions are legally obliged to reimburse transport costs to insured persons in the event that those persons or members of their families need medical assistance. Such reimbursement covers the costs of transport within national territory, on the one hand, for hospitalisation, to the nearest suitable clinic or from there to the patient's residence and, on the other hand, for out-patient treatment, to the nearest suitable doctor or health centre, at contractually agreed rates. In practice, a broad distinction is drawn between transport of patients by emergency-doctor vehicle (accompanied by the doctor on emergency call and a paramedic), rescue and patient transport (accompanied by a paramedic) and ambulance journeys (without medical attendance). Relationships between the social security institutions and the transport operators are governed by private-law contracts. It appears that doctors are provided and paid separately in the case of transport by an emergency-doctor vehicle, so that their presence and activities in the ambulance do not form the subject-matter of such contracts.

C — *Facts and proceedings*

17. In 1984, the Gebietskrankenkasse Niederösterreich (Sickness Insurance Fund for Lower Austria, hereinafter 'the defendant') entered into framework agreements of unlimited duration with the Austrian Red Cross, regional section for Lower Austria, and the Austrian federation of Samaritan workers, for the provision of patient transport of all three types. The framework agreement provides for tariffs to be fixed by a related agreement and for annual tariff negotiations to be concluded within two months. The framework agreement can be terminated by either party, subject to three months' notice in writing, at the end of any calendar year.

18. On 1 December 1992, the Bezirkshauptmannschaft Wien Umgebung (Chief Local Government Office for Vienna and District) granted Walter Tögel (hereinafter 'the applicant') a licence to carry on a hire-car business, limited to rescue and patient transport. However, the defendant refused the applicant's repeated requests for a direct charging contract for rescue and patient transport, on the ground that care was adequately provided through the two existing agreements. The applicant applied to the Bundesvergabeamt to commence review proceedings under Paragraph 91 (2) of the BVergG on 22 August 1996, that is, before the amendment of that law which transposed the Services Directive. He sought the remedy set out in Article 2(1)(b) of the Review Directive, arguing that the dispute concerned a service within the meaning of Annex I A to the Services Directive and that a public tender procedure should, therefore, be carried out.

19. The Bundesvergabeamt stayed the proceedings and referred the following questions for a preliminary ruling in accordance with Article 177 of the Treaty establishing the European Community:

'1. May an individual derive, from Article 1(1) and (2), Article 2(1) or any other provisions of Council Directive 89/665/EEC 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, a specific right to have review proceedings conducted before authorities or courts which comply with the provisions of Article 2(8) of Directive 89/665/EEC, which right is so sufficiently precise and specific that, in the event of non-transposition of the Directive in question by the Member State, an individual may successfully assert that legal right against that Member State in legal proceedings?

2. In conducting a review procedure on the basis of an individual's right, founded on Article 41 of Directive 92/50/EEC in conjunction with Directive 89/665/EEC, to the conduct of a review procedure, must a national court having the attributes of the Bundesvergabeamt disregard provisions of national law such as Paragraph 91(2) and (3) of the Bundesvergabegesetz, which confer on the Bundesvergabeamt powers of review only in the case of infringements of the Bundesvergabegesetz and regulations adopted thereunder, on the ground that those provisions preclude a review procedure from being conducted under the Bundesvergabegesetz for awards of contracts for services, and must such a national court conduct a review procedure in accordance with the fourth part of the Bundesvergabegesetz?

3.(a) Are the services mentioned in the facts of the case (with reference to Article 10 of Directive 92/50/EEC) to be classified as services coming under Annex I A, Category No 2 (Land transport services) and contracts for such services thus to be awarded in accordance with the provisions of Titles III and IV of the Directive, or are they to be classified as services coming under Annex I B to Directive 92/50/EEC (Health services) with the result that contracts for such services are to be awarded in accordance with the provisions of Articles 13 and 14, or do those services fall entirely outside the sphere of application of Directive 92/50/EEC?

(b) Do the provisions of Articles 1 to 7 satisfy the preconditions laid down in paragraph 12 of the judgment in Case

41/74 *Van Duyn* v *Home Office* on the direct applicability of a Community Directive, with the result that services coming under Annex I B to the Directive are to be awarded under the procedure therein mentioned or are the relevant provisions of the Directive for the services mentioned in Annex I A capable of fulfilling the preconditions laid down in the abovementioned case?

4. Is there under Article 5 or other provisions of the EC Treaty, or under Directive 92/50/EEC, an obligation on the State to interfere in existing legal situations concluded for an indefinite period or for several years but which were not entered into in accordance with the abovementioned directive?�much

20. Written and oral observations were submitted by the defendant, the Republic of Austria and the Commission of the European Communities. Oral observations were also submitted by the applicant and the French Republic.

III — Analysis

A — *Jurisdiction*

21. I would first observe that the Bundesvergabeamt is, in my view, 'a court or tribunal of a Member State�much for the purposes of Article 177 of the Treaty. To this end, I adopt fully the reasoning of Advocate General Léger in *Mannesmann Anlagenbau Austria AG and Others* v *Strohal Rotationsdruck GesmbH*. (21) Furthermore, this reasoning appears to have been implicitly accepted by the Court,

whose judgment examined the questions referred by the Bundesvergabeamt in that case without a preliminary analysis of their admissibility. (22)

B — *The first and second questions*

22. The Services Directive contains the substantive provisions on the award of public contracts for services as well as providing for the extension to the field of services of the review procedures set out in the Review Directive. It is common ground that the Services Directive should have been, but had not been, implemented, in Austria on the date the applicant sought to initiate review proceedings in accordance with Article 2(1)(b) of the Review Directive, viz. 22 August 1996. In the first and second questions, the national court asks whether there is a directly effective right to have review proceedings conducted before authorities or courts which comply with the provisions of Article 2 (8) of the Review Directive, which an individual can assert in order to have such proceedings conducted before the Bundesvergabeamt in respect of an award of a contract for services, despite the attribution of competence by the BVergG to that body only in respect of contracts for works or for supplies.

23. In essentially similar circumstances, the German Vergabeüberwachungsausschuß des Bundes (Federal Public Procurement Awards Supervisory Board) referred a question in *Dorsch Consult Ingenieurgesellschaft mbH* v *Bundesbaugesellschaft Berlin mbH* (23) as to whether bodies set up by Member States under the Review Directive to review only the procedures for the award of public contracts for works and supplies were competent, by virtue of Article 41 of the Services Directive, to review also the procedures for the award of public service contracts. The Court answered that such a result did not follow from Article 41 of the Services Directive. (24) It observed that it was for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. Member States must ensure that those rights are effectively protected in each case. Otherwise, the Court does not involve itself in the resolution of questions of jurisdiction. (25) Although Article 41 of the Services Directive requires the Member States to ensure effective review in the field of public service contracts, 'it does not indicate which national bodies are to be the competent bodies for this purpose or whether these

bodies are to be the same as those which the Member States have designated in the field of public works contracts and public supply contracts�much. (26)

24. This conclusion excluded the possibility of Article 41 of the Services Directive giving rise to a directly effective right to have review proceedings conducted before the Vergabeüberwachungsausschuß des Bundes, because one of the essential elements was missing, that is, an identifiable person or body under a duty to conduct the review proceedings in question. (27) It implicitly rejects the argument initially submitted by Austria (but, in light of *Dorsch Consult*, not pursued at the oral hearing) that in the case of partial implementation of the Review Directive through the establishment in respect of works and supplies of a review body such as the Bundesvergabeamt, that body is sufficiently closely related to the omitted field of services for its competence, as a matter of Community law, to be extended to that field. In response to Austria's contention that the Bundesvergabeamt has jurisdiction 'proximate�much to that in the Directive, the defendant disputed the existence of such a notion in Austrian law and, in my view, correctly observed that the degree of clarity of a directive cannot be assessed, for the purposes of determining whether it is directly effective in the absence of adequate transposition, by reference to the existing content of national rules, which will vary between Member States.

25. The present case is quite different, in my view, from the situation in a case such as *Factortame and Others*, (28) which was mentioned by the Bundesvergabeamt in its order for reference. In that case, the Court required the national court to set aside a national rule precluding, in certain circumstances, the grant of interim relief, which was deemed essential for Community-law rights to have full force and effect. However, it was clear that the national

court, the House of Lords, had jurisdiction over the subject-matter of the dispute and was properly seised of it. (29) I do not accept the applicant's argument that, as a matter of Community law, all national courts and tribunals have jurisdiction to apply all directly effective provisions of Community law in the absence of a domestic-law provision expressly excluding such

jurisdiction. (30) As Advocate General Tesauro said in his Opinion in *Dorsch Consult*, 'this would encroach on the domain of the national legislator�.' (31)

26. The Court referred, however, in *Dorsch Consult* to the duty of 'all the authorities of Member States, including, *for matters within their jurisdiction*, the courts‛, to take all appropriate measures to achieve the result envisaged by a directive, which gives rise to the judicial obligation to interpret national law, as far as possible, in the light of the wording and purpose of the directive. (32) This requires the national court to 'determine whether the relevant provisions of its *domestic law* allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts ... [and] in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts‛. (33)

27. The Bundesvergabeamt refers in its order for reference to a decision of the Verfassungsgerichtshof (Austrian Constitutional Court) of 11 December 1995. (34) The Verfassungsgerichtshof doubted, on similar grounds to those outlined above, whether Article 1(1) of the Review Directive, as amended by Article 41 of the Services Directive, gave rise to a directly effective right for individuals to bring review proceedings before the Bundesvergabeamt in respect of public service contracts. This would, it said, prejudge a decision reserved for the national legislature on whether to frame review proceedings in the field of services in the same way as for works or supply contracts, or to make other arrangements for legal protection in this area consistently with the requirements of Community law. That, of course, is a matter to be resolved exclusively by the national legal system.

28. If the Bundesvergabeamt is ultimately found not to enjoy the claimed jurisdiction, two principal options remain open to individuals who seek a remedy for an alleged breach of the terms of the Services Directive.

29. The Court observed in *Dorsch Consult* that where a Member State has failed to take the implementing measures required, individuals might be able to rely, as against that Member State, on the substantive provisions of the Services Directive. (35) The possible direct effect of certain of those provisions is considered below, in response to the third question. Were any of those substantive provisions to have direct effect, it would be a clear violation of Community law if an individual had no actual possibility of relying upon it for want of a court, whether specialised or of general jurisdiction, to hear his case. (36) Austria stated at the oral hearing that disputes regarding public procurement awards which are outside the competence of the Bundesvergabeamt are deemed to be contractual disputes within the jurisdiction of the ordinary civil courts. (37) Only the national courts can resolve this issue.

30. Alternatively, the persons concerned may use the appropriate domestic-law procedures to claim compensation for damage incurred owing to the failure to transpose the Services Directive within the time prescribed. (38) The existence of these potential remedies does not, however, affect my conclusion regarding the issue raised by the first and second questions, which I would answer in the same terms as the operative part of the judgment in *Dorsch Consult*.

C — *The third question, part (a)*

31. By this question the Bundesvergabeamt is seeking guidance as to the classification as between Annexes I A and I B, respectively, for the purpose of applying Article 10 of the Services Directive to the services 'mentioned in the facts of the case‛. As I have already mentioned, a practical distinction is drawn in the

transport of patients between transport by emergency-doctor vehicle (accompanied by the doctor on emergency call, whose presence is not the responsibility of the service provider), rescue and patient transport (accompanied by a paramedic) and ambulance journeys (without medical attendance). It appears that the applicant is only licensed to provide services of the second type, and it was in respect of such rescue and patient transport that he applied to the defendant for a contract. The defendant relies on the prior existence of the framework agreements, which provide for patient transport of all three types. In the light of the defendant's existing practice, I will address this question as if it related to the content of those framework contracts, although the response I propose should also assist in determining the appropriate procedure for the award of a contract of more limited scope.

32. In responding to this question, I can state at once that I share France's view that the CPC provides the only binding guide to the interpretation of the service categories set out in Annexes I A and I B to the Services Directive. The seventh recital in the preamble to the Services Directive, quoted at paragraph 3 above, shows clearly that the references in the Annexes to the CPC are not merely indicative, but rather that the categories used 'correspond ... to particular positions of a common classification‛, the CPC. This intention appears unambiguously, not only from the terms of the recital but also from the material terms of the Annexes. Public authorities and affected undertakings and individuals are entitled to as much clarity as possible in dealing with technical rules which govern the action they are required to take.

33. Although the CPA nomenclature has been established by a binding act, the CPA Regulation, it is clearly intended for purposes other than the interpretation of the Services Directive, that is, as its Article 1(3) states, 'for statistical

purposes'. The more general statement in Article 3(1) of the CPA Regulation that '[t]he CPA shall be used by the Commission and the Member States as a classification' cannot, in my view, in the absence of a further legislative act, override the earlier description of its objectives in Article 1(3). The fact that the CPA is employed for classification purposes under Directive 93/36/EEC coordinating the procedures for the award of public supply contracts (39) does not indicate that its normal scope of application should be extended to fields other than that governed by that Directive.

34. On the other hand, the CPV, although expressly intended for use in the field of procurement, is the subject only of a Commission recommendation which, by virtue of Article 189 of the Treaty, has no binding effect. It cannot, therefore, be deemed to be the eventual replacement of the CPC, for the purposes of Annexes I A and I B, that is envisaged in the seventh recital in the preamble to the Services Directive. Although the preface to the CPV suggests that it will ultimately serve that intended function, the CPV Recommendation confines itself to urging

the use of that nomenclature in preparing notices and other communications in the procurement field. Given that neither the CPV nor the CPV Recommendation refers to the use of the Annexes to the Services Directive to determine the appropriate contract-award procedure, it cannot be deemed, for present purposes, to have the interpretative value of a recommendation 'designed to supplement binding Community provisions'. (40)

35. I do not accept the Commission's argument that the CPC-based lists in Annexes I A and I B should be interpreted with the aid of the CPA or the CPV. The fifth recital in the preamble to the CPA Regulation indicates that the CPA is 'directly linked' to the CPC, for the purposes of 'the international compatibility of economic statistics', whereas the sixth recital in the preamble to the CPV Recommendation states that the CPA 'offers a fixed correspondence with the CPC nomenclature'. The fifth recital describes the CPV, for its part, as 'an adaptation of the CPA'. In the circumstances, it seems to me more logical to construe the CPA and CPV by reference to the temporally prior CPC than to do the opposite. (41) I should add, for the sake of completeness, that I can detect nothing in the CPA and CPV nomenclatures which would affect in any way my interpretation of the CPC-based lists in the Services Directive's Annexes, read on their own.

36. Although it might be initially tempting, given the simple title 'Ambulance services' of CPC reference number 93192, to allocate the contractual services at issue in this case in their entirety, or at least those which involve some level of medical attendance, to Category No 25 'Health and Social Services' (CPC reference number 93) in Annex I B, closer examination shows that this would not be justified. In the first place, the explanatory note to this category reads: 'General and specialised medical services delivered in the ambulance'. Secondly, this reference number must be read in its context. 'Human health services' (931) includes 'Hospital services' (9311), 'Medical and dental services' (9312), and 'Other human health services' (9319), which is further subdivided into 'Deliveries and related services, nursing services, physiotherapeutic and paramedical services' (93191), 'Ambulance services' (93192), 'Residential health facilities services other than hospital services' (93193) and 'Other human health services n.e.c.' (93199).

These simple service titles, amplified by the more detailed descriptions which accompany them, show that this Division of the CPC focuses only on the medical aspects of health services, to the exclusion of non-medical aspects. (42)

37. 'General and specialised medical services delivered in the ambulance' (93192) would cover the attendance of a nurse or paramedic. This category should not, however, cover the simple transport costs of fuel, driver and acquisition of a vehicle of the requisite size and power, just as general hospital catering services, for example, should not be included, in my view, under CPC reference number 93110 'Hospital services'. The excluded transport elements should, instead, be classified in Category No 2 of Annex I A to the Services Directive, 'Land transport services ...', corresponding to CPC reference number 71229 'Other non-scheduled passenger transportation n.e.c.'.

38. I do not accept the applicant's argument that the fact that the Services Directive divides the services within its material scope into two classes, which are subject to different award procedures, affects this conclusion. The twenty-first recital in the preamble to the Services Directive indicates that the application of the full award procedure set out in Titles III to VI is limited, for a transitional period, 'to contracts for those services where its provisions will enable the full potential for increased cross-frontier trade to be realised'. The defendant argued that the contractual services at issue should, thus, be classified in Annex I B, as no non-Austrian service provider had sought a contract and it would be impossible to provide the services in question from outside Austria. The nationality or place of establishment of the actual or potential tenderers in any given case does not appear to me to be relevant. Furthermore, the term 'services' in the Services Directive should not be understood as relating only to economic activities within Chapter 3, 'Services', of Title III of the Treaty. The Services Directive was adopted on the basis not only of Article 66 but also of Article 57(2) of the Treaty, which relates to establishment. Thus, service providers established in Austria from other Member States would also satisfy the criterion in the twenty-first recital.

39. The disputed public service contract, therefore, concerns three types of contractual service the common element of which — non-scheduled transport of passengers — would, taken on its own, come under Annex I A to the Services Directive, and the variable element of which — general and specialised medical services delivered in the ambulance — would, in the same circumstances, come under Annex I B. The Bundesvergabeamt and some of the parties who have submitted observations have suggested that the appropriate contract award procedure must, thus, be determined in accordance with Article 10 of the Services Directive. Articles 8, 9 and 10 provide for the application of the provisions of

Titles III to VI or of Articles 14 and 16, respectively, by reference to the content of the 'contracts' to be awarded. Where a contract has as its object exclusively 'services listed' in either Annex I A or I B, either Article 8 or 9 applies. When it covers 'services listed in both Annexes I A and I B', the applicable award procedure depends, pursuant to Article 10, on the relative values of the services covered by the contract.

40. I would first state that, in my view, the specific terms of Article 10 of the Services Directive prevail, in cases of conflict, over the interpretative rules of the CPC itself, as the CPC is simply used as a point of reference rather than to dictate the rules by which the appropriate award procedure is chosen. I have in mind, in particular, CPC interpretative rule B, which states, in relevant part:

'1. When services are, prima facie, classifiable under two or more categories, classification shall be effected as follows, on the understanding that only categories at the same level (sections, divisions, groups, classes or subclasses) are comparable:

(a) The category which provides the most specific description shall be preferred to categories providing a more general description.

(b) Composite services consisting of a combination of different services which cannot be classified by reference to 1 (a) shall be classified as if they consisted of the service which gives them their essential character, in so far as this criterion is applicable.'

In the light of the foregoing analysis, 'ambulance services' does not describe the services at issue more specifically than does 'non-scheduled passenger transportation'. Furthermore, Article 10 clearly sets out a rule regarding contracts for multiple or composite services which is at variance with that in rule B 1(b) of the CPC. However, different means of applying Article 10 have been proposed.

41. France argued that a service could not come, simultaneously, under Annexes I A and I B to the Services Directive, and that the three distinct types of contractual service should be assessed in the light of the general nature of each service, according to the presence or absence of medical personnel, rather than by trying to assess the relative cost of the transport and medical elements of the three contractual services taken together. It concluded that ambulance journeys without medical attendance in ordinary vehicles came under Annex I A to the Services Directive, whereas patient transport accompanied by either a doctor or a paramedic in a specially-equipped vehicle should be deemed to come under Annex I B. It would then be necessary to assess whether the transport services involving medical attention or the simple ambulance transport service were greater in value, in order to determine, in accordance with Article 10, which of the award procedures referred to in Articles 8 and 9 of the Services Directive was applicable to the contract as a whole. This approach favours a priori the medical as opposed

to the transport element of the contractual services in question when determining the applicable contract-award procedure.

42. On the other hand, the Commission, supported by the applicant, examined the transport of patients in the broadest sense, that is, without distinguishing between the three different contractual types of service. It argued that the transport of patients comprised certain services governed by Article 8 of the Services Directive and others governed by Article 9. Article 10 could, therefore, be applied in the light of the relative value of these two elements of the overall contract. The applicant contended that the transport element of the services provided was the greater.

43. Despite the ambiguous reference in Article 10 of the Services Directive to 'services listed in both Annexes I A and I B', which could be read as establishing that certain service activities can be placed, simultaneously, in categories from both lists, France is correct, in my view, to suggest that this is not possible. It is necessary, in the light of the two-tier scheme of award procedures established by Articles 8 and 9, which is applied by reference to the ascription of a given service to one or other of the annexed lists, that the Annexes be deemed to be mutually exclusive.

44. However, I also take the view that the Commission's approach represents the better interpretation of Article 10 of the Services Directive. France's argument for a global approach, allocating each service in its entirety to either Annex I A or I B depending on the presence or absence of medical assistance, does not reflect the clear distinction in the Annexes between transport and 'medical servicesdelivered in the ambulance'. The notion in Article 10 of 'services listed' in either Annex I A or I B is a Community-law notion. Accordingly, Community-law criteria — those used to subdivide the annexed lists into a number of categories by reference, in particular, to the CPC — should be used to identify and distinguish the various services which are the object of a single public service contract. This process would be distorted if it were forced to conform to a prior contractual subdivision of the relevant services into classes different from the categories set out in the Annexes to the Services Directive. The three types of contractual service provided for in the disputed contract cut across the categories of service employed in the Annexes, so that it would be impossible accurately to reflect the relative value of the services listed in Annexes I A and I B which are the object of the contract if the contract rather than the Annexes were used as the framework for analysis.

45. Article 10 requires, instead, that the value of each of the services which are the object of the contract, categorised in accordance with the scheme laid down in the Services Directive, be estimated separately, and then compared. In the present case, this would involve assessing the total value of the passenger-transport element of the three contractual service types, and comparing it with that of the medical

services element which, of course, varies markedly between those three contractual service types.

46. I recognise, none the less, the validity of the submissions by France and Austria regarding the difficulty of conducting a valuation in accordance with service categories other than those employed by the contracting authority or parties themselves. The calculation of the relative value of a number of categories of service which are the object of a single public service contract also gives rise to difficulties of a more general kind. The tendering process is founded on the premiss that different service providers will have different cost structures, some more competitive than others. This may result in differing relative values, as between service providers, for the service categories which are taken into account in the total prices they quote for the services tendered or contracted for. Furthermore, it cannot be expected that a contracting authority will know in advance the exact relative cost for each potential service provider of the different service categories which constitute the object of an envisaged contract.

47. I do not wish to exaggerate the significance of these problems. In many, perhaps most cases, the obvious preponderance in relative value of one of the listed service categories will place the matter beyond dispute. Furthermore, although paragraphs (2) to (7) of Article 7 of the Services Directive appear to be chiefly concerned with the calculation of the total estimated value of a contract, for the purposes of satisfying the threshold for application of the Directive set out in Article 7(1), they furnish some guidance on how contracting authorities should estimate the value of the individual service categories which comprise a contract.

48. In cases where the contracting authority's estimate of the relative value of the service categories which are the object of a public service contract is disputed, recognition of the problems involved in preparing such an estimate in advance dictates that the burden of proving the contrary should be borne by the complaining party and that the authority be permitted a certain margin of appreciation. The complainant should have to demonstrate, on the basis of the information which was or should have been considered by the contracting authority, from previous contracts, commercial and accounting practice, past levels of demand and so on, and taking into account its margin of appreciation, that the values placed on the services were clearly incorrect. In the present case, it is for the competent national court to find the facts necessary for such a determination.

D — *The third question, part (b)*

49. In part (b) of the third question, the Bundesvergabeamt asks whether Articles 1 to 7 of the Services Directive, in the event that the limited award procedure for Annex I B services is applicable, and the provisions of its Titles III to VI, in the event of the full award procedure prescribed for Annex I A services

being applicable, are capable of direct effect where that Directive has not been transposed in time in national law. Titles IV and V include, respectively, Articles 14 and 16 of the Services Directive, which are also applicable to the award of contracts for Annex I B services.

50. In paragraph 12 of its judgment in *Van Duyn* v *Home Office*, (43) the Court established the principle of the possible direct effect of unimplemented directives. The Court has consistently held that 'wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions of the directive define rights which individuals are able to assert against the State‛. (44)

51. In *Francovich and Others*, the Court stated that it was 'necessary to see whether the provisions of [the directive in question] which determine the rights of employees are unconditional and sufficiently precise. There are three points to be considered: the identity of the persons entitled to the guarantee provided, the content of that guarantee and the identity of the persons liable to provide the guarantee‛. (45) Similarly, in the present case, it is necessary to determine which, if any, of the relevant provisions of the Services Directive are unconditional and sufficiently precise regarding the creation of rights for individuals, the identity of the individuals who are to benefit from those rights, and the identity of the public bodies under a duty to respect those rights.

52. For the purpose of such an inquiry, I would first observe that the application of the Review Directive to services strongly indicates that the Services Directive was intended to involve specific justiciable rights for individuals. I would add, secondly, that, although provisions of a directive which define its personal and material scope may not as such create rights for individuals, they are essential to the identification of the bearers of rights and duties and of the extent of rights and duties under the directive and may, read with substantive rights-creating provisions, be capable of direct effect. Thirdly, provisions of a directive whose application entails the exercise by Member State authorities of administrative discretion in accordance with prescribed criteria, as distinct from substantive discretion regarding the means of their transposition into national law, may be directly effective in the case of non-implementation. This is borne out by the decision in *Van Duyn* v *Home Office* regarding the criteria in accordance with which Member States were to take measures on grounds of public policy or public security, which were set out in Article 3(1) of Council Directive 64/221/EEC of 25 February 1964 on the

coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. (46)

53. On the other hand, in the light of the broadly similar content of the other public procurement directives, (47) the following statement by the Court regarding Directive 71/305 in *CEI* v *Association Intercommunale pour les*

Autoroutes des Ardennes (48) should be borne in mind:

'The directive ... does not lay down a uniform and exhaustive body of Community rules. Within the framework of the common rules which it contains, the Member States remain free to maintain or adopt substantive and procedural rules in regard to public works contracts on condition that they comply with all the relevant provisions of Community law ... .'

54. Areas not exhaustively regulated by the procurement directives include the determination of a contractor's financial standing, the fixing of a maximum value for works (49) and the imposition of conditions regarding the employment of unemployed persons. (50) By way of contrast, the Court found in *Transporoute* v *Minister of Public Works* (51) that Articles 23 to 26 of Directive 71/305, the equivalents of Articles 29, 30(2) and (3), 31 and 32(2) and (3) of the Services Directive, set out exhaustively the possible means of proof of a tenderer's good standing and qualifications (as distinct from his financial and economic standing).

55. The non-exhaustive character of the common rules established by the public procurement directives regarding certain aspects of the contract award procedure does not preclude the direct effect of those rules, in so far as they satisfy the test outlined above. Even if the non-exhaustive character of the procurement directives means that full compliance with them will not guarantee a remedy to an aggrieved service provider if he has not also complied with any applicable and compatible national requirements, those directives still afford, as Austria put it, certain

minimum guarantees. In *Beentjes* v *Netherlands State*, (52) the Court found that no specific implementing measure was necessary for compliance with the requirements set out in Articles 20, 26 and 29 of Directive 71/305, the broad equivalents of Articles 23, 32 and 37 of the Services Directive, and that these could, therefore, be relied upon by an individual before the national courts. (53)

56. Turning now to the general provisions of the Services Directive, I am of the view that the bearers of rights and the public bodies bound by obligations under that Directive are sufficiently clearly identified by Article 1, as are the types of public service contracts to which the Directive applies by Articles 2 to 7. (54) Of particular importance is Article 3(1) of the Services Directive, which establishes an unconditional and precise right to the award of public service contracts in accordance with procedures adapted to the provisions of that Directive. I would add that the same is true of Articles 8 to 10 of the Services Directive, whereby the applicable contract award procedure is determined. These provisions, taken together, establish, in my view, the directly enforceable right of service providers to participate in the award of public service contracts in accordance with the provisions of the Services Directive, in so far as those detailed provisions themselves create rights for individuals, are unconditional and are sufficiently clear and precise to be enforceable in the absence of national implementing measures.

57. I am also of the view that the detailed provisions of Titles III to VI on the choice of award procedures, common technical and advertising rules, participation, and selection and award criteria are, subject to exceptions and qualifications which are apparent from their terms, unconditional, sufficiently precise and designed to create rights for individuals. These provisions specify in detail the obligations imposed on contracting authorities in order to secure access for service providers to the award procedures for public service contracts and are, for the most part, analogous to Articles 20, 26 and 29 of Directive 71/305, in that no specific implementing measure is necessary for compliance with them. (55) However, a comprehensive analysis of those provisions of Titles III to VI of the Services Directive which are or are not capable of direct effect is not warranted by the facts of the case as it now stands. Consideration of the quality of a particular provision should, in my view, await a concrete factual situation. It is, therefore, appropriate to limit the answer to Question 3(b) to Titles I and II of the Services Directive.

E — *The fourth question*

58. The fourth question referred by the Bundesvergabeamt seeks to establish whether a contracting authority is obliged to terminate or otherwise interfere with the operation of an existing contract which was concluded for an indefinite period but which was awarded prior to the date for transposition of, and otherwise than in accordance with, the provisions of the Services Directive. (56) In the absence of transposition of the Services Directive at the material time, this question is hypothetical. The Court stated in *Faccini Dori* v *Recreb* (57) that, in the absence of transposition of Council Directive 85/577/EEC of 20 December 1985 concerning protection of the consumer in respect of contracts negotiated away from business premises, (58) consumers could not derive from the directive itself an enforceable right of cancellation as against traders with whom they had concluded a contract. Despite the public or public-law character of contracting authorities, the same principle precludes, in my view, the existence of a Community-law right for a service provider, under the Services Directive, to require the cancellation of an existing contract between a contracting authority and another private party. The related principle that the State cannot rely upon an unimplemented directive so as to affect detrimentally the rights of individuals would also prevent a contracting authority from justifying its otherwise unlawful cancellation of such a contract by reference to the Services Directive. (59)

59. The question referred by the Bundesvergabeamt raises, none the less, the real possibility that, if the Services Directive were deemed to be capable, upon implementation, of affecting existing contracts, the aggrieved service provider could seek a remedy in respect of the contracting authority's non-observance, or the State's non-implementation, of the provisions of Titles III to VI of that Directive, in particular regarding services listed in Annex I A. The grant of a remedy in such

circumstances is contingent on a determination of the requirements of the Services Directive upon full transposition.

60. In the context of the present case, this question raises three related issues, which I will address in the following order: first, whether the Services Directive applies retroactively to existing contracts; secondly, whether that Directive affects in any way national rules regarding the continued existence of a contract; and, thirdly, whether public authorities are obliged to use any power of termination granted by an existing contract. (60)

61. The principle of legal certainty normally precludes a Community measure from taking effect from a point in time before its publication, although it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. (61) Furthermore, Community law presumes that, in the absence of a clear provision, legislation is not to be interpreted as having retroactive effect. (62) The Services Directive does not expressly state that it has retroactive effect. Article 44 merely requires the Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before a specified date after its adoption. In addition, there is nothing either in the terms or the general scheme and objectives of the Services Directive which would suggest that it should have a general retroactive effect. Its title, the third recital in the preamble, Articles 3(1), 8 to 10 and 23, and Chapter 3 of Title VI all speak of procedures or criteria for the *award* of public service contracts, which implies that existing contracts, already awarded and concluded, are not, in principle, to be disturbed.

62. The Court has already observed that the procurement directives do not establish exhaustive sets of common rules regarding the award of public contracts. The directives lay down rules intended to ensure the openness and non-discriminatory nature of public procurement procedures but do not affect substantive national rules about the means of conclusion, validity, terms and duration of contracts which result from these procedures. (63) Indeed, the proper functioning of the Services Directive presupposes the continuing application of

national rules to the conclusion of contracts subsequent to an award in accordance with its terms. This is borne out by the emphasis placed in the Services Directive on procedures which bind contracting authorities regarding the *award* of contracts, rather than binding both parties regarding the *conclusion* of contracts. Article 2(6) of the Review Directive illustrates the effects of this distinction, which preserves the role of national contract rules in the field of public procurement. It stipulates that the effects of the remedies provided for in that Directive, which are all directed against contracting authorities, on a contract concluded subsequent to its award by such an authority shall be determined by national law. The prospect that such a concluded contract would continue to be binding in national law appears to underlie the licence granted to the Member States by the Community legislator to limit the remedies available to an award of damages to any person harmed by an infringement by the contracting authority. It is ultimately for national law to determine whether the full effects of a contract are to be preserved in such circumstances.

63. In principle, therefore, national rules regarding the duration of contracts apply to contracts concluded before the date for transposition of the Services Directive. If the relationship between contracting parties is firm and binding in national law, so that even variations in price and other terms occur against the background of a continuing single binding contract, then it is not affected by the Services Directive. If, on the other hand, it amounts, in national law, merely to a long-standing relationship providing a framework for periodic renegotiation of terms, then, in my view, the procedures envisaged in the Services Directive must be followed at the first opportunity. Into which category a relationship falls is, in any event, a matter to be determined by national courts in accordance with their own law. Thus, where a framework contract concluded before the date for transposition of the Services Directive provides for the periodic renegotiation of certain of its terms, it is national contract law and the national courts which will determine whether the parties' relationship remains, at all times and in all circumstances (even if, for example, the renegotiation fails), subject to an existing binding contract. If, by virtue of national contract law, the renegotiation is deemed to give rise to a new contract, or the failure of the renegotiation is deemed to put an end to the contract, the new public service contract must be awarded in accordance with the terms of the Services Directive.

64. It may be argued that, irrespective of the outcome of the application of national rules, the objectives of the Services Directive dictate certain minimum criteria, applicable throughout the Community, for the determination of the continued existence of a contract. Such an argument could be based on the anticipated prejudice to the achievement of the objectives of the Services Directive if a considerable part of the public market for services, and, in particular, that for Annex I A services, were removed from its effective scope of application through contracts which were awarded before the date for transposition and which national

law deemed to exist without interruption despite the renegotiation of certain key terms, such as those relating to price, (64) within the framework of the contract.

65. Although this argument correctly identifies the broad objectives of the Community's action in the field of public services procurement, it is not, in my view, consistent with the terms and scheme of the Services Directive. That Directive does not determine the conditions for the validity of contracts concluded subsequent to an award, nor, *a fortiori*, is there anything in its terms which would suggest that, for the purpose of determining the need for an award procedure, national rules on the validity or continued existence of contracts concluded before its date for transposition should be overridden. Furthermore, the principle of legal certainty requires that the rights of service providers under an otherwise valid subsisting contract be taken into account in the interpretation of the Services Directive. Article 2(6) of the Review Directive permits the preservation, by national law, of the effects of unlawfully awarded contracts, with the contracting authority being liable in damages to persons harmed by the infringement. If

the argument outlined above were accepted, it would entail the grant of the remedies provided for in the Review Directive to interested service providers in the event of non-compliance with the terms of Titles III to VI of the Services Directive. This could leave a contracting authority in the invidious position of being bound, in national law, to continue to observe the terms, including those regarding price reviews, of what is regarded as a validly subsisting contract, while at the same time being bound in Community law, without having acted in any way unlawfully in awarding and concluding the contract, to compensate persons harmed by its failure, upon such a price review, to initiate a new contract award procedure. Such an arbitrary outcome is not warranted by the terms and scheme of the Services Directive.

66. Finally, it appears that at least one of the framework agreements at issue in the present case is terminable at the end of any calendar year upon three months' notice by either side. If that amounts, in national law, to a mere option to give notice of termination, without which a binding contractual relationship continues, then, in the light of my conclusion that the Services Directive does not have retroactive effect on such relationships, Community law does not require that a pre-existing option be transformed into an obligation. Therefore, on its own, such a right of termination does not, as a matter of Community law, attract the application of the award procedures laid down in that Directive.

IV — Conclusion

67. In the light of the foregoing, I recommend that the Court respond as follows to the questions referred by the Bundesvergabeamt:

(1) It does not follow from Article 41 of the Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts that, where that directive has not been transposed by the end of the period laid down for that purpose, the appeal bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear appeals relating to procedures for the award of public service contracts. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In circumstances such as those arising in the present case, the national court must determine in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.

(2) The contractual services at issue comprise services some of which are to be classified as services coming under Annex I B, Category No 25 to Directive 92/50 ('Health and Social Services�does') and the remainder of which are to be classified under Annex I A, Category No 2 ('Land transport services, including armoured car services, and courier services, except transport of mail‘). The award procedure is, therefore, to be determined in accordance with Article 10 of Directive 92/50, on the basis of the relative values of those two service categories under the contract as a whole. Where it is alleged, in a case governed by Article 10 of Directive 92/50, that a contract should have been awarded in accordance with the provisions of Titles III to VI of that Directive, it must be demonstrated to the national court, on the basis of the information which was or should have been considered by the contracting authority, and taking into account that authority's margin of appreciation, that the value of the service listed in Annex I A to that Directive which constitutes part of the services contracted for in the disputed contract should have been estimated by the contracting authority to be greater than that of the constituent service listed in Annex I B.

(3) Subject to an assessment, in an appropriate concrete case, of whether the relevant provisions of Titles III to VI of Directive 92/50 create rights for individuals which are unconditional and sufficiently precise to be enforceable in the absence of national implementing measures, the right of

service providers under Articles 1 to 10 of Directive 92/50, taken together, to participate in the award of public service contracts in accordance with the provisions of that Directive is capable of direct effect.

(4) Directive 92/50 does not apply retroactively to existing public service contracts concluded before the date for transposition of that Directive. It is a question of national law whether the renegotiation of terms agreed under an existing public service contract results in a break in the continuity of that contract, leading to the application of the relevant provisions of Directive 92/50 to the award of the subsequent contract. Community law does not require a contracting authority to use a right of termination provided for in a pre-existing public service contract after the date for transposition of Directive 92/50.

1: Original language: English.

2: — OJ 1989 L 395, p. 33.

3: — The word 'nation‘ appears in the Official Journal but is clearly a typographical error.

4: — This amended version was introduced by Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, cited below. The original version referred only to contract award procedures within the scope of Council Directives 71/305/EEC and 77/62/EEC, cited below.

5: — OJ 1992 L 209, p. 1.

6: — OJ 1977 L 13, p. 1.

7: — OJ, English Special Edition, First Series 1971 (II), p. 682.

8: — CPC reference numbers 7512 and 87304 relate to armoured car services and courier services.

9: — It appears from the explanatory notes to the CPC issued by the Statistical Office of the United Nations that the acronym 'n.e.c.' means 'not elsewhere classified'.

10: — OJ 1993 L 342, p. 1.

11: — Article 1(1) of the CPA Regulation.

12: — For example, CPA classes 85.12 'Medical practice services' and 85.13 'Dental practice services' appear to correspond to the single CPC reference number 9312 'Medical and dental services', which is then subdivided into 'General medical services' (93121), 'Specialised medical services' (93122) and 'Dental services' (93123).

13: — OJ 1996 S 169, p. 2.

14: — OJ 1996 L 222, p. 10. Both the CPV Recommendation and the CPV itself were published on 3 September 1996.

15: — The Services Directive, Council Directive 93/36/EEC of 14 June 1993 concerning the coordinating procedures for the award of public supply contracts, OJ 1993 L 199, p. 1; Council Directive 93/37/EEC of 14 June 1993 coordinating procedures for the award of public works contracts, OJ 1993 L 199, p. 54; Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors, OJ 1993 L 199, p. 84.

16: — The date when the Agreement on the European Economic Area came into force. This was one year later than the date initially foreseen by Article 129(3) of that Agreement.

17: — *Bundesgesetzblatt für die Republik Österreich* No 462/1993.

18: — OJ 1994 C 241, p. 21.

19: — Austria was already under an obligation to transpose the Services Directive into its law by 1 July 1994, by virtue of Articles 1 and 3 of and Annex 14(b)(5b) to Decision of the EEA Joint Committee No 7/94 of 21 March 1994 amending Protocol 47 and certain annexes to the EEA Agreement, OJ 1994 L 160, p. 1. It has not been suggested that the present caserelates to the period between 1 July 1994 and 1 January 1995.

20: — *Bundesgesetzblatt für die Republik Österreich* No 776/1996.

21: — Case C-44/96 [1998] ECR I-0000, Opinion of 16 September 1997, paragraphs 34 to 45.

22: — Judgment of 15 January 1998.

23: — Case C-54/96 [1997] ECR I-4961, judgment of 17 September 1997, hereinafter '*Dorsch Consult*'.

24: — Paragraph 46. Article 41, as appears from footnote 2, extends the scope of Member States' obligation to establish review mechanisms to the field of services.

25: — Paragraph 40. The Court cited Case C-446/93 *SEIM* v *Subdirector-Geral das Alfândegas* [1996] ECR I-73, paragraph 32. See also Case 13/68 *Salgoil* v *Italy* [1968] ECR 453, p. 463, and Case 179/84 *Bozzetti* v *Invernizzi* [1985] ECR 2301, paragraph 17.

26: — Paragraph 41.

27: — See Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraphs 12 and 23 to 27.

28: — Case C-213/89 [1990] ECR I-2433.

29: — See paragraph 21.

30: — It appears that Paragraph 7(2) of the BVergG expressly excludes the jurisdiction of the Bundesvergabeamt over disputes in the water, energy, transport and telecommunications sectors, which are governed by the review provisions of Council Directive 92/13 of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1992 L 76, p. 14, whereas it is merely silent regarding disputes arising under the Services Directive. See further my Opinion of even date in Case C-111/97 *EvoBus Austria GmbH* v *Niederösterreichische Verkehrsorganisations Gesellschaft mbH (NÖVOG)*.

31: — Opinion of 15 May 1997, paragraph 48.

32: — Paragraph 43, emphasis added. The Court cited Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20; and Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325, paragraph 26.

33: — Paragraph 46, emphasis added.

34: — Decision B 3067/95-9.

35: — Paragraph 44. The Court's reference to Case C-253/95 *Commission* v *Germany* [1996] ECR I-2423, paragraph 13, indicates that it had in mind the principle of direct effect, rather than that of compensation for damage, which it raised in the immediately following paragraph of its judgment in *Dorsch Consult*.

36: — See paragraph 48 of the Opinion of Advocate General Tesauro in *Dorsch Consult*.

37: — It appears to me that the remedies prescribed in Article 2(1) of the Review Directive — interim measures, the setting aside of unlawful awards, and damages for loss — would, as a matter of Community law, have to be made available in the competent ordinary courts if the substantive provisions of the Services Directive were directly effective; see J.M. Fernández Martín, *The EC Public Procurement Rules: A Critical Analysis* (Clarendon, Oxford, 1996), pp. 200-202, 227.

38: — Paragraph 45. The Court cited Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* v *Germany* [1996] ECR I-4845.

39: — Cited above.

40: — See Case C-322/88 *Grimaldi* v *Fonds des Maladies Professionnelles* [1989] ECR 4407, paragraph 18.

41: — In addition, it seems likely that the CPV was adopted after the contested refusal to award a contract to the applicant. He applied to the Bundesvergabeamt on 22 August 1996, whereas the CPV Recommendation had been adopted only on 30 July 1996. The CPV itself is undated, but the fact that the CPV Recommendation makes reference to it suggests simultaneous adoption. Furthermore, the CPV and the CPV Recommendation were published on the same date, 3 September 1996. The fact that this publication postdated the commencement of review proceedings before the Bundesvergabeamt weakens further the case for its application in this case.

42: — The sole possible exception is 'Residential health facilities services other than hospital services�much (93193), which is described as concerning '[c]ombined lodging and medical services�much. It may have been felt to be necessary to refer expressly to the combination of lodging and medical services in order to prevent the exclusion of the former.

43: — Case 41/74 [1974] ECR 1337.

44: — Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, paragraph 25; Joined Cases C-6/90 and C-9/90 *Francovich and Others*, cited above, paragraph 11.

45: — Cited immediately above, paragraph 12.

46: — OJ, English Special Edition 1963-64 Series (I), p. 117.

47: — The twenty-second recital in the preamble to the Services Directive states that 'the rules for the award of public service contracts should be as close as possible to those concerning public supply contracts and public works contracts‘; the twenty-third recital states that 'the procurement rules contained in Directives 71/305/EEC and 77/62/EEC can be appropriate, with necessary adaptations ...‘.

48: — Joined Cases 27/86 to 29/86 [1987] ECR 3347, paragraph 15; see also Case 31/87 *Beentjes* v *Netherlands State* [1988] ECR 4635, paragraph 20.

49: — Ibid., paragraphs 10 and 18.

50: — *Beentjes* v *Netherlands State*, cited above, paragraphs 30 and 31.

51: — Case 76/81 [1982] ECR 417, paragraph 15.

52: — Ibid., paragraphs 42 to 44.

53: — Regarding the direct effect of Article 29(5) of Directive 71/305, corresponding approximately to the second sentence of the first indent of Article 37 of the Services Directive, see also Case 103/88 *Fratelli Costanzo* v *Comune di Milano* [1989] ECR 1839, paragraph 32.

54: — Article 7(2)(8) of the Services Directive is not material to the direct effect of the Directive, as it does not concern the rights of individuals or the duties of the Member States.

55: — See the finding of direct effect, discussed in the immediately foregoing paragraph, in *Beentjes* v *Netherlands State*, cited above.

56: — It may be argued, on the basis of the judgment of the Court in Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-0000, that Member States were under an obligation not to obstruct the future operation of the Services Directive in the period between its adoption and its date for transposition. Such an argument is not material in the present case, however, as the framework contracts in question were concluded before the adoption of the Services Directive. It is, therefore, more useful, for the purposes of the present discussion, to refer to the date for transposition of the Services Directive, when full effect was required to be given to its provisions.

57: — Cited above, paragraph 25.

58: — OJ 1985 L 372, p. 31.

59: — See Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 9. In paragraph 8 of his Opinion in *Marleasing*, cited above, Advocate General Van Gerven referred to the Court's judgment in *Kolpinghuis Nijmegen* and added that legal certainty precluded an unimplemented directive from introducing a civil penalty, such as nullity.

60: — Such an obligation, being based on the terms of the contract itself, would, if found to exist, bind the contracting authority even in the absence of transposition of the Services Directive.

61: — Case 98/78 *Racke* v *Hauptzollamt Mainz* [1979] ECR 69, paragraph 20; Case C-368/89 *Crispoltoni* [1991] ECR I-3695, paragraph 17.

62: — Case 100/63 *Kalsbeek* v *Sociale Verzekeringsbank* [1964] ECR 565, at p. 575; Case 88/76 *Société pour l'Exportation des Sucres* v *Commission* [1977] ECR 709; see also *Crispoltoni*, cited immediately above, paragraph 20.

63: — Furthermore, Article 7(2)(5) clearly envisages the possibility of public service contracts which are concluded, in accordance with its terms, for an indefinite duration.

64: — See the contract-award criteria in Article 36(a) and (b) of the Services Directive. </HTML