

JUDGMENT OF THE COURT

10 November 1998 [\(1\)](#)

(Public service contracts - Meaning of contracting authority - Body governed by public law)

In Case C-360/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Gerechtshof te Arnhem (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Gemeente Arnhem,

Gemeente Rheden

and

BFI Holding BV,

on the interpretation of Articles 1(b) and 6 of 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),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissochet and P. Jann (Rapporteur) (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, D.A.O. Edward, L. Sevón, M. Wathelet, R. Schintgen and K.M. Ioannou, Judges,

Advocate General: A. La Pergola,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Gemeente Arnhem and Gemeente Rheden, by L.H. van Lennep, of the Hague Bar,
- **BFI Holding BV**, by P. Glazener, of the Amsterdam Bar, and J.J.M. Essers, of the Utrecht Bar,
- the Netherlands Government, by A. Bos, Legal Adviser, Ministry of Foreign Affairs, acting as Agent,
- the Danish Government, by P. Biering, Head of Directorate, Ministry of Foreign Affairs, acting as Agent,
- the French Government, by Catherine de Salins, Head of Sub-directorate in the Legal Directorate, Ministry of Foreign Affairs, and P. Lalliot, Secretary for Foreign Affairs, in the same Directorate, acting as Agents,
- the Austrian Government, by Wolf Okresek, Ministerialrat in the Federal Chancellor's Office, acting as Agent,
- the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

having regard to the written answers given to the questions put by the Court:

- for Gemeente Arnhem and Gemeente Rheden, by L.H. van Lennep,
- for **BFI Holding BV**, by P. Glazener,
- for the Netherlands Government, by J.G. Lammers, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

- for the Danish Government, by J. Molde, Legal Adviser and Head of Directorate, Ministry of Foreign Affairs, acting as Agent,
- for the German Government, by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent,
- for the Spanish Government, by S. Ortiz Vaamonde, Abogado del Estado, acting as Agent,
- for the French Government, by K. Rispal-Bellanger, Head of Sub-directorate (International Economic Law and Community Law), in the Legal Directorate, Ministry of Foreign Affairs, acting as Agent, and P. Lalliot,
- for the Austrian Government, by W. Okresek,
- for the Finnish Government, by H. Rotkirch, Ambassador, Head of Legal Affairs in the Ministry of Foreign Affairs, acting as Agent,
- for the Swedish Government, by L. Nordling, Rättschef in the Ministry of Foreign Affairs, acting as Agent, and
- for the United Kingdom Government, by J.E. Collins, of the Treasury Solicitor's Department, acting as Agent, and K.P.E. Lasok QC and R. Williams, Barrister,
- for the Commission, by H. van Lier,

after hearing the oral observations of Gemeente Arnhem and Gemeente Rheden, represented by L.H. van Lennep; of **BFI Holding BV**, represented by P. Glazener and J.J.M. Essers; of the Netherlands Government, represented by J.S. van den Oosterkamp, Deputy Legal Adviser, Ministry of Foreign Affairs, acting as Agent; of the French Government, represented by P. Lalliot; of the Austrian Government, represented by M. Fruhmann, of the Federal Chancellor's Office, acting as Agent; of the United Kingdom Government, represented by J.E. Collins, K.P.E. Lasok QC and R. Williams; and of the Commission, represented by H. van Lier, at the hearing on 18 November 1997,

after hearing the Opinion of the Advocate General at the sitting on 19 February 1998,

gives the following

Judgment

1.

By judgment of 29 October 1996, received at the Court Registry on 5 November 1996, the *Gerechtshof* (Regional Court of Appeal), Arnhem, referred to the Court

for a preliminary ruling under Article 177 of the EC Treaty seven questions on the interpretation of Articles 1(b) and 6 of 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).

2.

Those questions were raised in proceedings brought by Gemeente Arnhem and Gemeente Rheden (Municipalities of Arnhem and Rheden, hereinafter 'the municipalities') against **BFI Holding BV** (hereinafter '**BFI**'), which claims that the award of a contract for refuse collection should be subject to the procedure laid down in the abovementioned directive.

The applicable Community legislation

3.

Article 1 of Directive 92/50 provides:

'For the purposes of this Directive:

...

(b) *contracting authorities* shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

Body governed by public law means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

The lists of bodies or of categories of such bodies governed by public law which fulfil the criteria referred to in the second subparagraph of this point are set out in Annex I to Directive 71/305/EEC. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 30b of that Directive;

...'

4.

Article 6 of Directive 92/50 provides:

'This Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.'

The Netherlands provisions

5.

Directive 92/50 was transposed into Netherlands law by a framework law of 31 March 1993 (Stbl. 12) relating to the Community rules for the award of public contracts for the supply of goods, the execution of works and the supply of services, combined with Article 13 of the order of 4 June 1993 (Stbl. 305), as amended by the order of 30 May 1994 (Stbl. 379).

6.

Articles 10.10 and 10.11 of the Wet Milieubeheer (Law on the Environment) require municipalities to ensure that, at least weekly, household refuse is collected from all properties in their districts where waste may regularly accumulate. The municipalities must designate an authority to undertake responsibility for such collection.

7.

Under Article 2 of the Afvalstoffenverordening (Regulation on Waste) of Gemeente Rheden, as amended on 21 December 1993, the collecting authority is the Dienst Openbare Werken en Woningzaken, Afdeling Wegen en Reiniging, or such independent service as may replace it. Article 2 of the Regulation on Waste of Gemeente Arnhem, as amended on 4 July 1994, designates as the collecting authority the Dienst Milieu en Openbare Werken. It also states that '[a]s from 1 July 1994, that service shall be provided by the company ARA, an independent municipal cleaning service'.

The dispute in the main proceedings

8.

In 1993 the municipalities planned merging the municipal refuse collection services and entrusting them to a new legal entity. By decisions of 6 and 28 June 1994 the Municipalities of Arnhem and Rheden decided to establish ARA, a public limited company, and to entrust to it a series of tasks defined by law in the field of waste collection and, in the case of Gemeente Arnhem, cleaning of the municipal road network.

9.

ARA was incorporated on 1 July 1994. Article 2 of its statutes provides:

'1. The objects of the company shall be:

(a) the performance of all economic operations aimed at collecting (or having collected and, so far as possible, recycling or having recycled), in an efficient, effective and environmentally responsible manner, waste such as household refuse, industrial waste and separable parts thereof to be specified, together with activities relating to the cleaning of highways, the elimination of vermin and disinfection;

(b) the (joint) setting up, cooperation with, participation in, the (joint) provision of management and supervision for, as well as the taking over and financing of, other undertakings whose activities have any connection with the objects set out under (a);

(c) the performance of all economic operations which are connected with the foregoing or may be conducive to the operations, activities and action defined above (provided that needs in the general interest are thereby met).

2. The company shall carry out such activities in a socially acceptable manner.'

10.

Under Article 6 of its statutes, the shareholders of ARA may only be legal persons governed by public law or companies at least 90% of whose shares are held by such entities and, in addition, the company itself. Under Article 13(2) of the statutes, the municipalities are to appoint at least five of the minimum seven and maximum nine of the members of the supervisory board.

11.

The framework agreements which the municipalities concluded with ARA specify, in particular in their preambles, that the municipalities wish to have the tasks in question carried out exclusively by ARA, and accordingly they grant it concessions for that purpose.

12.

As far as ARA's remuneration is concerned, Article 8 of the framework agreement between Gemeente Rheden and ARA provides, in particular:

'8.1 Rheden shall pay ARA remuneration for services rendered, at a rate to be specified.

8.2 The remuneration for services referred to in the preceding paragraph shall be defined in a financial clause to be added to the specifications and quality standards for each operation contained in the partial contracts.

8.3 The actual remuneration for services rendered will be fixed:

(a) either on the basis of the unit prices agreed beforehand for each operation, result or batch of work;

(b) or on the basis of a fixed price agreed beforehand for a particular task;

(c) or on the basis of an invoice for costs actually incurred.

...'

13.

Article 9 of the framework agreement contains the following provisions:

'9.1 Advances on the above remuneration shall be paid on dates to be specified or on the basis of groups of operations, results or batches of work. Such advances shall be deducted from the final payments.

9.2 If ARA invoices and/or carries out operations for which payment is collected on behalf of Gemeente Rheden or receives any other payment from third parties in the name of Gemeente Rheden, that income must be transferred to the municipality in accordance with procedures to be agreed upon. As regards risks associated with the payment of such amounts, more detailed rules shall also be adopted.'

14.

The service agreement for the collection of household refuse concluded between Gemeente Rheden and ARA provides, in Article 7, that the remuneration to be paid to ARA by the municipality for the collection and transport of waste and the method of calculation of such remuneration are to be set out in the implementation plan.

15.

The same procedures for remuneration were agreed between Gemeente Arnhem and ARA.

16.

Although initially ARA carried out all collection of household refuse, street cleaning and collection of industrial waste, those activities were subsequently split between it and Aracom, a public limited company. Whilst ARA continues to collect household refuse, Aracom was entrusted with the collection of industrial waste. Also, a holding company, ARA Holding NV, was incorporated and holds all the capital of those two companies.

17.

BFI is a private undertaking whose business includes the collection and treatment of household and industrial waste.

18.

On 2 November 1994 **BFI** brought proceedings before the Arrondissementsrechtbank (District Court), Arnhem, for a declaration that Directive 92/50 applied to the award of the contract granted to ARA, with the result that the municipalities should observe the tendering procedure laid down by that directive. By judgment of 18 May 1995 the Arrondissementsrechtbank, Arnhem, found in favour of **BFI**. It considered that the task in question had not

been entrusted to an authority on the basis of an exclusive right which it enjoyed pursuant to a published law, regulation or administrative provision, so that the exception provided for in Article 6 of the directive was inapplicable.

19.

The municipalities appealed against that decision to the Gerechtshof, Arnhem.

20.

In its interlocutory judgment of 25 June 1996 the Gerechtshof, Arnhem, rejected the Arrondissementsrechtbank's interpretation to the effect that the contract had not been awarded to an authority on the basis of an exclusive right which it enjoyed pursuant to a published law, regulation or administrative provision within the meaning of Article 6 of Directive 92/50.

21.

It took the view that, under the Wet Milieubeheer, the municipalities are under an obligation to ensure that household refuse is collected. In order to discharge that obligation, they appointed ARA, by orders of 6 and 28 June 1994, as sole operator responsible for waste collection. They also expressly amended their regulations on waste, which specifically grant ARA an exclusive right, since they prohibit any other body from collecting household refuse without the prior authority of the municipal council.

22.

The Gerechtshof, Arnhem, therefore considered that ARA fell within the exception provided for in Article 6 of Directive 92/50 in so far as it was to be regarded as a body governed by public law within the meaning of Article 1(b) of Directive 92/50.

23.

In those circumstances the national court stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'1. For the purposes of interpreting Article 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (the Directive), is the first indent of the second subparagraph of Article 1(b) of the Directive, which specifies that body governed by public law means any body ... established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, to be interpreted as distinguishing

(i) between needs in the general interest and needs having an industrial or commercial character, or

(ii) between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character?

2. If the answer to the first question is that the distinction to be drawn is that set out in (i),

(a) is the phrase "needs in the general interest" to be understood as meaning that there can be no question of meeting needs in the general interest where private undertakings meet such needs?

and

(b) if so, is the phrase "needs having an industrial or commercial character" to be understood as meaning that needs having an industrial or commercial character are met whenever private undertakings meet such needs?

3. If the answer to the first question is that the distinction to be drawn is that set out in (ii), is the difference between "needs in the general interest not having an industrial or commercial character" and "needs in the general interest having an industrial or commercial character" to be determined according to whether (competing) private undertakings meet such needs or not?

4. Is the requirement that the body must be established "for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character" to be interpreted as meaning that such a "specific purpose" can exist only where the body was established exclusively to meet such needs?

5. If not, must a body meet needs in the general interest, not having an industrial or commercial character, almost exclusively, substantially, preponderantly or to some other degree in order to be or remain able to meet the requirement that it must be established for the specific purpose of meeting such needs?

6. Does it make any difference to the answers to Questions 1 to 5 whether the needs in the general interest, not having an industrial or commercial character, which the body was set up to meet, derive from legislation in the formal sense, from administrative provisions, from acts of the administration or otherwise?

7. Does it make any difference to the answer to Question 4 if responsibility for the commercial activities is entrusted to a separate legal entity forming part of a single group or concern within which activities meeting needs in the general interest are also carried out?

24.

It must be noted at the outset that, in its written observations, the French Government submits that contracts between the municipalities and ARA may be regarded as public service concessions which, as such, fall outside the scope of Directive 92/50. It maintains that, for there to be a public service concession as

defined in Community law, the contracting authority must be remunerated either on the basis of its right to operate the service or on the basis of that right and a price linked to it.

25.

Without its being necessary to interpret the term public service concession, which is not at issue in the questions from the national court, it need merely be pointed out that it is clear from the information given by the municipalities in response to a question put to them by the Court, and in particular from Articles 8 and 9 of the framework agreement concluded between Gemeente Rheden and ARA and from Article 7 of the service agreement for the collection of household refuse concluded between the same parties, that the remuneration paid to ARA comprises only a price and not the right to operate the service.

26.

The French Government also maintains that ARA should be classified as an association formed by one or more authorities within the meaning of Article 1(b) of Directive 92/50. Such an association is, in its view, a contracting authority *ipso jure*, there being no need to consider whether it is a body governed by public law.

27.

It must be observed, as stressed by the Advocate General in points 40 and 41 of his Opinion, that an entity cannot fall simultaneously within both the categories described in Article 1(b) of Directive 92/50 and that the term association has only a residual function, a fact confirmed by its position in the wording of that provision. It is therefore necessary to consider whether a company such as ARA, although set up on the initiative of two municipalities, can be characterised as a body governed by public law.

28.

In that connection, it is clear from the second subparagraph of Article 1(b) of Directive 92/50 that a body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law (see Case C-44/96 *Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck* [1998] ECR I-73, paragraph 20).

29.

As the Court held in paragraph 21 of *Mannesmann Anlagenbau Austria*, cited above, the three conditions set out in that provision are cumulative.

30.

The national court considers that the second and third conditions are fulfilled. Its questions thus relate only to the first condition.

The first question

31.

By its first question, the national court seeks clarification as to the relationship between the terms 'needs in the general interest' and 'not having an industrial or commercial character'. It asks in particular whether the latter expression is

intended to limit the term 'needs in the general interest' to those which are not of an industrial or commercial character or, on the contrary, whether it means that all needs in the general interest are not industrial or commercial in character.

32.

In that regard, it is clear from the second subparagraph of Article 1(b) of Directive 92/50, in its different language versions, that the absence of an industrial or commercial character is a criterion intended to clarify the meaning of the term 'needs in the general interest' as used in that provision.

33.

In paragraphs 22 to 24 of *Mannesmann Anlagenbau Austria*, cited above, the Court adopted the same interpretation in relation to the second subparagraph of Article 1(b) of 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 which is, essentially, the same as the second subparagraph of Article 1(b) of Directive 92/50.

34.

Moreover, the only interpretation capable of guaranteeing the effectiveness of the second subparagraph of Article 1(b) of Directive 92/50 is that it creates, within the category of needs in the general interest, a sub-category of needs which are not of an industrial or commercial character.

35.

If the Community legislature had considered that all needs in the general interest were not of an industrial or commercial character it would not have said so because, in that context, the second component of the definition would serve no purpose.

36.

The answer to the first question must therefore be that the second subparagraph of Article 1(b) of Directive 92/50 must be interpreted as meaning that the legislature drew a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character.

The second question

37.

The answer given to the first question makes it unnecessary to answer the second.

The third question

38.

By its third question, the national court asks essentially whether the term 'needs in the general interest, not having an industrial or commercial character' excludes needs which are also met by private undertakings.

39.

According to **BFI**, the possibility of a body governed by public law must be ruled out where private undertakings may carry out the same activities, such activities therefore being capable of being performed on a competitive basis. In this case, more than half the municipalities in the Netherlands entrust the collection of waste to private economic operators. There is thus a commercial market and the entities active in it do not constitute bodies governed by public law within the meaning of Article 1(b) of Directive 92/50.

40.

It must first be emphasised here that the first indent of the second subparagraph of Article 1(b) of Directive 92/50 refers only to the needs which the entity must meet and does not say whether or not those needs may also be met by private undertakings.

41.

Next, it must be borne in mind that the purpose of coordinating at Community level the procedures for the award of public service contracts is to eliminate barriers to the freedom to provide services and therefore to protect the interests of economic operators established in a Member State who wish to offer goods or services to contracting authorities in another Member State.

42.

Consequently, the objective of Directive 92/50 is to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities (see, to that effect, *Mannesmann Anlagenbau Austria*, cited above, paragraph 33).

43.

The fact that there is competition is not sufficient to exclude the possibility that a body financed or controlled by the State, territorial authorities or other bodies governed by public law may choose to be guided by other than economic considerations. Thus, for example, such a body might consider it appropriate to incur financial losses in order to follow a particular purchasing policy of the body upon which it is closely dependent.

44.

Moreover, since it is hard to imagine any activities that could not in any circumstances be carried on by private undertakings, the requirement that there should be no private undertakings capable of meeting the needs for which the body in question was set up would be liable to render meaningless the term 'body governed by public law' used in Article 1(b) of Directive 92/50.

45.

It is of no avail to object that, by recourse to Article 6 of Directive 92/50, the contracting authorities could evade competition from private undertakings which considered themselves capable of meeting the same needs in the general interest as the entity concerned. The protection of competitors of bodies governed by public law is already assured by Article 85 et seq. of the EC Treaty since the application of Article 6 of Directive 92/50 is subject to the condition that the laws, regulations or administrative provisions on which the body's exclusive right is based must be compatible with the Treaty.

46.

It was for that reason that, in *Mannesmann Anlagenbau Austria*, cited above, paragraph 24, the Court held, without considering whether private undertakings might meet the same needs, that a State printer met needs in the general interest not having an industrial or commercial character.

47.

It follows that Article 1(b) of Directive 92/50 may apply to a particular body even if private undertakings meet, or may meet, the same needs as it and that the absence of competition is not a condition necessarily to be taken into account in defining a body governed by public law.

48.

It must be emphasised, however, that the existence of competition is not entirely irrelevant to the question whether a need in the general interest is other than industrial or commercial.

49.

The existence of significant competition, and in particular the fact that the entity concerned is faced with competition in the marketplace, may be indicative of the absence of a need in the general interest, not having an industrial or commercial character.

50.

Conversely, the latter needs are as a general rule met otherwise than by the availability of goods or services in the marketplace, as evidenced by the list of bodies governed by public law contained in Annex I to Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as amended by Directive 93/37, to which Article 1(b) of Directive 92/50 refers. Although not exhaustive, that list is intended to be as complete as possible.

51.

An analysis of that list shows that in general the needs in question are ones which, for reasons associated with the general interest, the State itself chooses to provide or over which it wishes to retain a decisive influence.

52.

In this case it is undeniable that the removal and treatment of household refuse may be regarded as constituting a need in the general interest. Since the degree of satisfaction of that need considered necessary for reasons of public health and environmental protection cannot be achieved by using disposal services wholly or partly available to private individuals from private economic operators, that activity is one of those which the State may require to be carried out by public authorities or over which it wishes to retain a decisive influence.

53.

In the light of the foregoing, the answer to the third question must be that the term 'needs in the general interest, not having an industrial or commercial character' does not exclude needs which are or can be satisfied by private undertakings as well.

The fourth, fifth and seventh questions

54.

By its fourth, fifth and seventh questions, the national court asks whether the condition that a body must have been set up for the specific purpose of meeting needs in the general interest means that the activity of that body must, to a considerable extent, be concerned with meeting such needs.

55.

It must be borne in mind here that, in *Mannesmann Anlagenbau Austria*, cited above, paragraph 25, the Court held that it was immaterial whether, in addition to its duty to meet needs in the general interest, an entity was free to carry out other activities. The fact that meeting needs in the general interest constitutes only a relatively small proportion of the activities actually pursued by that entity is also irrelevant, provided that it continues to attend to the needs which it is specifically required to meet.

56.

Since the status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character, it is *a fortiori* immaterial that commercial activities may be carried out by a separate legal person forming part of the same group or concern as it.

57.

Conversely, the fact that one of the undertakings of a group or concern is a body governed by public law is not sufficient for all of them to be regarded as contracting authorities (see, to that effect, *Mannesmann Anlagenbau Austria*, cited above, paragraph 39).

58.

The answer to the fourth, fifth and seventh questions must therefore be that the status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character. It is likewise immaterial that commercial activities may be carried out by a separate legal person forming part of the same group or concern as it.

The sixth question

59.

By its sixth question, the national court, finally, wishes to ascertain what inferences are to be drawn from the fact that the provisions setting up the entity in question and specifying the needs which it must meet are in the nature of laws, regulations or administrative or other provisions.

60.

It must be stated here that, whilst the requirement that the exclusive right be based on published laws, regulations or administrative provisions must be met for Article 6 of Directive 92/50 to be applicable, it forms no part of the definition of a body governed by public law.

61.

The wording of the second subparagraph of Article 1(b) of Directive 92/50 makes no reference to the legal basis of the activities of the entity concerned.

62.

Furthermore, it must be borne in mind that, with a view to giving full effect to the principle of freedom of movement, the term 'contracting authority' must be interpreted in functional terms (see, to that effect, *Case 31/87 Beentjes v Netherlands State* [1988] ECR 4635, paragraph 11). In view of that need, no distinction should be drawn by reference to the legal form of the provisions setting up the entity and specifying the needs which it is to meet.

63.

The answer to the sixth question must therefore be that the second subparagraph of Article 1(b) of Directive 92/50 must be interpreted as meaning that the existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal form of the provisions in which those needs are mentioned being immaterial in that respect.

Costs

64.

The costs incurred by the Netherlands, Danish, German, Spanish, French, Austrian, Finnish, Swedish and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the *Gerechtshof, Arnhem*, by judgment of 29 October 1996, hereby rules:

1. The second subparagraph of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts must be interpreted as meaning that the

legislature drew a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character.

2. The term 'needs in the general interest, not having an industrial or commercial character' does not exclude needs which are or can be satisfied by private undertakings as well.

3. The status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character. It is likewise immaterial that commercial activities may be carried out by a separate legal person forming part of the same group or concern as it.

4. The second subparagraph of Article 1(b) of Directive 92/50 must be interpreted as meaning that the existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal form of the provisions in which those needs are mentioned being immaterial in that respect.

Delivered in open court in Luxembourg on 10 November 1998.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President

[1](#): Language of the case: Dutch.

12 December 2002 [\(1\)](#)

(Directive 93/37/EEC - Public works contracts - Definition of 'contracting authority' - Body governed by public law - Restricted procedure - Rules for weighting of criteria for selecting candidates invited to tender - Advertisement - Directive 89/665/EEC - Review procedures relating to public procurement - Time-limits for review)

In Case C-470/99,

REFERENCE to the Court under Article 234 EC by the Vergabekontrollsenat des Landes Wien (Austria) for a preliminary ruling in the proceedings pending before that court between

Universale-Bau AG,

Bietergemeinschaft: 1. Hinteregger & Söhne Bauges.mbH Salzburg,

2. ÖSTU-STETTIN Hoch- und Tiefbau GmbH,

and

Entsorgungsbetriebe Simmering GesmbH,

on the interpretation of Article 1(a), (b) and (c) of 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), and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by 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),

THE COURT (Sixth Chamber),

composed of: J.-P. Puissechet, President of the Chamber, R. Schintgen, C. Gulmann, V. Skouris (Rapporteur), and F. Macken, Judges,

Advocate General: S. Alber,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Universale-Bau AG, by M. Neidhart, Direktor der Rechtsabteilung, and J. Mauch, Vorstandsdirektor Ingenieur,

- the Bietergemeinschaft 1. Hinteregger & Söhne Bauges.mbH Salzburg, 2. ÖSTU-STETTIN Hoch- und Tiefbau GmbH, by J. Olischar and M. Kratky, Rechtsanwälte,

- Entsorgungsbetriebe Simmering GesmbH, by T. Wenger, Rechtsanwalt,

- the Austrian Government, by H. Dossi, acting as Agent,

- the Netherlands Government, by M. Fierstra, acting as Agent,

- the Commission of the European Communities, by M. Nolin, acting as Agent, and by R. Roniger, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Entsorgungsbetriebe Simmering GmbH, represented by C. Casati, Rechtsanwalt, of the Austrian Government, represented by M. Fruhmann, acting as Agent, and of the Commission, represented by H. van Lier, acting as Agent, assisted by R. Roniger, at the hearing on 12 September 2001,

after hearing the Opinion of the Advocate General at the sitting on 8 November 2001,

gives the following

Judgment

1.

By order of 12 November 1999, received at the Court on 7 December 1999, the Vergabekontrollsenat des Landes Wien (Public Procurement Review Chamber of the *Land* of Vienna) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 1(a), (b) and (c) of 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), and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by 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 89/665').

2.

Those questions were raised in the course of proceedings between Universale-Bau AG (hereinafter 'Universale'), and the consortium of undertakings ('Bietergemeinschaft') formed by Hinteregger & Söhne Bauges.mbH and ÖSTU-STETTIN Hoch- und Tiefbau GmbH (hereinafter 'the consortium'), and Entsorgungsbetriebe Simmering GesmbH (hereinafter 'EBS'), concerning a procedure for the award of a public works contract.

Relevant provisions

Community legislation

3.

It is apparent from the first and second recitals in the preamble to Directive 89/665 that the mechanisms, which existed at the date of its adoption at both national and Community levels, for ensuring the effective application of Community directives in relation to public procurement, were not always adequate to ensure compliance with the relevant Community provisions, particularly at a stage when infringements could still be corrected.

4.

In the terms of the third recital in the preamble to that directive, 'the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination and ... for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law'.

5.

Article 1(1) and (3) of Directive 89/665 provide:

'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 rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

6.

As is apparent from the first recital in its preamble, Directive 93/37, for reasons of clarity and better understanding, consolidated Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5), as subsequently amended.

7.

In the words of its second recital, 'the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts'.

8.

The 10th recital in the preamble to Directive 93/37 states that, 'to ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community; whereas the information contained in these notices must enable contractors established in the Community to determine whether the proposed contracts are of interest to them; whereas, for this purpose, it is appropriate to give them adequate information on the works undertaken and the conditions attached thereto; whereas, more particularly, in restricted procedures advertisement is intended to enable contractors of Member States to express their interest in contracts by seeking from the contracting authorities invitations to tender under the required conditions'.

9.

Further, it is apparent from the 11th recital in the preamble to Directive 93/37 that 'additional information concerning contracts must, as is customary in Member States, be given in the contract documents for each contract or else in an equivalent document'.

10.

Article 1(a) to (c) of Directive 93/37 provides:

'For the purposes of this Directive:

(a) public works contracts are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

(b) contracting authorities shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

A body governed by public law means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

...

(c) a work means the outcome of building or civil engineering works, taken as a whole that is sufficient of itself to fulfil an economic and technical function.'

11.

Article 7(2) of Directive 93/37 provides:

'The contracting authorities may award their public works contracts by negotiated procedure, with prior publication of a contract notice and after having selected the candidates according to publicly known qualitative criteria, in the following cases:

...'

12.

Article 13(2)(e) of Directive 93/37, which applies to restricted and negotiated procedures provides:

'The contracting authorities shall simultaneously and in writing invite the selected candidates to submit their tenders. The letter of invitation shall be accompanied by the contract documents and supporting documents. It shall include at least the following information:

...

(e) the criteria for the award of the contract if these are not given in the notice.'

13.

Article 30(1) and (2) of Directive 93/37 provides:

'1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the case referred to in paragraph 1(b), the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of importance.'

Austrian legislation

14.

Paragraph 48(2) of the Wiener Landesvergabegesetz (Law of the *Land* of Vienna on public procurement, *LGBl.* No 36/1995, hereinafter 'the WLVergG'), provides:

'The contract must be awarded to the tender which is technically and economically the most advantageous in the light of the criteria stated in the contract notice ...'

15.

Paragraph 96(1) and (2) of the WLVergG, entitled 'Pre-litigation procedure', provides:

'(1) If a contractor considers that a decision taken by a contracting authority before the award of a contract infringes this Law and he has been or risks being harmed thereby, he shall formally communicate in writing to the contracting authority a statement of reasons and his intention to institute review proceedings.

(2) On receipt of the communication under subparagraph 1, the contracting authority shall either rectify the alleged infringement without delay and inform the contractor thereof or communicate in writing to the complainant why the alleged infringement does not exist.'

16.

Paragraph 97 of the WLVergG, entitled 'Application for review', is as follows:

'(1) An application for review prior to the award of a contract shall be admissible only if the contractor has formally notified the contracting authority of the alleged infringement and of his intention to apply for review (Paragraph 96(1)) and the contracting authority has not informed him within two weeks that the infringement has been rectified.

(2) Review may be applied for by:

1. a contractor who claims a business interest in the conclusion of a supply, works, works concession or service contract or a contract in the water, energy, transport or telecommunications sectors, in respect of a ground of nullity under Paragraph 101;

2. a tenderer who claims that the contract was not awarded to him in spite of the inapplicability of the grounds of elimination within the meaning of Paragraph 47 and contrary to Paragraph 48(2).

(3) The application under subparagraph 2 shall contain:

1. the precise designation of the award procedure concerned and of the decision challenged;

2. the precise designation of the contracting authority;

3. a precise statement of the facts;

4. particulars of how the applicant risks being or already has been harmed;

5. the grounds on which the allegation of infringement is based;

6. a specific request for a declaration of nullity or amendment;

7. in cases under subparagraph 1, evidence that the contracting authority was notified in a pre-litigation procedure in accordance with Paragraph 96 of the alleged infringement and of the intention to apply for review, and reference to the contracting authority's failure to rectify the infringement within the specified time-limit.

(4) The review procedure does not have suspensory effect on the contract award procedure to which it relates.

...'

17.

In addition, Paragraph 98 of the WLVergG, entitled 'Time-limits', provides:

'Applications for review on the ground of the following alleged infringements shall be lodged with the Vergabekontrollsenat within the following time-limits:

1. as regards applications which are refused, two weeks, and where Paragraph 52 applies, three days after notification of the refusal;
2. as regards provisions in the notification by which contractors are invited to apply to take part in a restricted or negotiated procedure or as regards provisions of the invitation to tender, two weeks, and where Paragraph 52 applies, one week before expiry of the date for submitting applications or tenders;
3. as regards the award of a contract, two weeks after the publication of the award in the *Official Journal of the European Communities* or, where the award is not published, six months after the award of the contract.

...'

The main proceedings and the questions referred for a preliminary ruling

18.

It is apparent from the order for reference that EBS issued a public invitation to tender for the award, under a restricted procedure, of a public works contract (terrassing, large-scale and specialist works) for the construction of the second biological treatment phase of the principal sewage treatment plant of Vienna.

19.

In the invitation to tender, which was published in the *Amstblatt der Stadt Wien* of 17 March 1999, it was stated, under the heading 'Criteria for the award of the contract', that the contract would be awarded to the economically most favourable tender according to the criteria set out in the invitation to tender.

20.

In the explanatory notes concerning applications to take part, EBS stated the criteria for ranking those applications in the following manner:

'For the ranking of the applications to take part, the technical operating capacity over the last five years of the candidate, of each member of the consortium of contractors and of the sub-contractors indicated will be taken into account.

The five highest ranked candidates shall be invited to submit a tender.

The evaluation of the applications submitted shall be made according to a scoring procedure.

The following works shall be analysed in the following order:

1. sewage treatment plants,
2. prestressed components,
3. large-scale foundations supported by columns in gravel,
4. oscillating pressure compaction,
5. high pressure soil consolidation.'

21.

EBS also stated to the candidates, in the said explanatory notes, that the required references would be evaluated according to a 'scoring' method lodged with a notary and that it had lodged with a notary on 9 April 1999, that is prior to the receipt of the first application to take part, the detailed rules of that method.

22.

Universale and the consortium of undertakings (hereinafter together 'the applicants in the main proceedings') made known their interest in taking part in the restricted procedure, without first of all seeking review of the conditions or terms of the invitation to tender. After being informed by EBS, by letter of 7 July 1999, that they were not amongst the five best-ranked candidates and were therefore not invited to submit a tender, they challenged the award procedure before the Vergabekontrollsenat.

23.

In its application dated 3 August 1999, Universale sought a declaration by the Vergabekontrollsenat that the contracting authority's decision to engage in a restrictive procedure was unlawful and void; alternatively, that the limitation of the number of invited contractors to the five best-ranked candidates was unlawful and void; alternatively, that the 'scoring' method applied did not observe the principles of transparency and reconstructability and that therefore the contracting authority's decision on the ranking of applications to take part was unlawful and void; finally, alternatively, that if the 'scoring' method

had been correctly applied, the applicants should have been ranked among the five best candidates and that the contracting authority's ranking was therefore unlawful and void.

24.

In its application dated 20 September 1999, the consortium of undertakings sought a declaration that the decision not to include it among the five best-ranked candidates was unlawful and, alternatively, that the restricted procedure was unlawful.

25.

The applicants in the main proceedings also applied for an interlocutory order restraining EBS from awarding the contract.

26.

In the order for reference, the Vergabekontrollsenat states, on the one hand, that under the WLVerG, it has jurisdiction to determine applications for review of procedures for the award of public supply, works, and service contracts and, on the other hand, that under Paragraph 6(1) of the Allgemeines Verwaltungsverfahrensgesetz of 1991 (Code of Administrative Procedure, *BGBI.* No 1991/51), in the version of *BGBI.* I No 1998/158 (hereinafter 'the AVG'), it is bound to confirm, of its own motion, that it has jurisdiction. It adds that, under Paragraph 6(2) of the AVG, the parties' consent can neither found nor vary the jurisdiction of an administrative authority and that, therefore, the fact that EBS stated in its invitation to tender that the WLVerG was applicable cannot suffice to establish the jurisdiction of the Vergabekontrollsenat.

27.

Therefore, in order to decide whether it has jurisdiction, the Vergabekontrollsenat has to establish, first of all, whether EBS is a 'contracting authority' within the meaning of Article 1(b) of Directive 93/37.

28.

The Vergabekontrollsenat notes that it is clear from the judgment of the Court in Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraph 21, that an entity must satisfy the three conditions set out in the second subparagraph of Article 1(b) of Directive 93/37 to be regarded as a body governed by public law within the meaning of that provision.

29.

After finding that EBS has legal personality and is majority-controlled by the city of Vienna, that is a regional or local authority, the Vergabekontrollsenat concludes that EBS satisfies the conditions set out in the second and third indents of the second subparagraph of Article 1(b) of Directive 93/37.

30.

With regard to the condition laid down in the first indent of that provision, the Vergabekontrollsenat stated that it was apparent from EBS's statutes at the time of its establishment that it operated, on a commercial basis, sewage treatment installations. It states that such activities were not reserved or allotted to the public sector and that there was no indication in the said statutes that EBS was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.

31.

According to the findings of the Vergabekontrollsenat, a substantial change took place when EBS was made responsible for the operation of the city of Vienna's principal sewage treatment plant. In particular, in 1985 EBS entered into a lease with the city of Vienna, under which it undertook to manage the said sewage plant with staff supplied by the city of Vienna, which undertook to reimburse EBS the expenses occasioned by such personnel. Under two contracts made between the city of Vienna and EBS on 8 and 18 July 1996, the city of Vienna further undertook to transfer to EBS an appropriate global amount to cover the operating expenses. In that regard the Vergabekontrollsenat explains that EBS did not carry on that branch of its activities for profit. It was in fact an activity of general interest which the city of Vienna delegated to EBS and which was managed in such a way as to cover the expenses. The Vergabekontrollsenat concludes therefore that that activity is not of an industrial or commercial character.

32.

According to the Vergabekontrollsenat, the possibility that it was an evasive manoeuvre can be ruled out since EBS was established in 1976 as a sanitation undertaking whereas the transfer of the management of the main sewage treatment plant did not take place until 1 January 1986. In particular, it considers that such a time-scale, as well as the fact that the Republic of Austria was not, at that time, a member of the European Union and that EBS was not, in any event, covered by Directive 71/305, which was then in force, which used the term 'legal persons governed by public law', indicate the absence of any intention of evasion.

33.

Nevertheless, since EBS was not responsible for satisfying needs in the general interest having a character other than industrial or commercial at the time of its establishment, but after changes in its sphere of activities, the Vergabekontrollsenat raises the question whether EBS satisfies the condition set out in the first indent of the second subparagraph of Article 1(b) of Directive 93/37.

34.

In addition, the Vergabekontrollsenat points out that clause I of the contract made between EBS and the city of Vienna on 8 July 1996 stipulates that EBS is to carry out the enlargement of the main sewage treatment plant and to enter into the necessary contracts in its own name and on its own account. No specific condition is laid down as regards the detailed performance of that undertaking. Clauses II and III of the contract none the less impose on EBS a specified method of operating the main sewage treatment plant, without however specifying the actual form of the project.

35.

Furthermore, it is apparent from a decision of the Buildings Department of 30 December 1998 that EBS has obtained permission to build on a site of which the city of Vienna is the proprietor. In a letter of 8 September 1999, EBS stated that the sewage treatment plant in question is to be built in its name and on its account, writing in particular: 'We will have ownership of the sewage plant in question. The sewage plant will be transferred in the event of termination of the lease and management contract entered into for an indefinite period with the city of Vienna. In that case the city of Vienna is obliged to buy back our sewage plant. It must pay us the current market value of the sewage plant'.

36.

In those circumstances, the Vergabekontrollsenat inquires whether, in light of the abovementioned agreements between EBS and the city of Vienna which, as a regional or local authority, is in any event a 'contracting authority', the contract at issue in the case before it is a public works contract within the meaning of the combined provisions of Article 1(a) and (c) of Directive 93/37.

37.

Next, if it is appropriate for it to declare that it has jurisdiction to hear the dispute before it, the Vergabekontrollsenat inquires whether the provisions of Paragraphs 96 to 98 of the WLVergG are compatible with Directive 89/665 inasmuch as they provide that an application for review of a particular provision in the invitation to tender is admissible only if made within a certain time-limit. In that regard, it states that, if no application for review of a specific provision of the invitation to tender is brought, or if such an application is brought out of time, it is not then possible to review the contracting authority's decision as to whether that provision of the invitation to tender infringes the WLVergG or Directive 89/665 and that that question is relevant to the dispute before it, because EBS expressly relies upon the fact that the application for review was brought out of time.

38.

Finally, the Vergabekontrollsenat states that, in the context of the dispute before it, it is also called upon to decide whether it was correct for the applications of the applicants in the main proceedings to take part to be not accepted as a result of the 'scoring' method adopted by the contracting authority, the detailed rules of which were only made known after expiry of the time-limit for applications and the award of the contract. The Vergabekontrollsenat makes clear that it cannot be excluded that the results of that method had a decisive influence on the contracting authority's decision.

39.

Having regard to all those considerations, the Vergabekontrollsenat des Landes Wien decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does a legal person constitute a contracting authority within the meaning of Article 1(b) of Directive 93/37/EEC even if it was *not* established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, but *now* meets such needs?

2. If Entsorgungsbetriebe Simmering GesmbH is not a contracting authority, does the planned construction of the second biological treatment phase of the principal sewage plant, Vienna, constitute the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority, and thus a *public works contract* within the meaning of Article 1(a), read in conjunction with Article 1(c), of Directive 93/37/EEC?

3. If Question 1 or Question 2 is answered in the affirmative, does Directive 89/665/EEC preclude a national provision which fixes a time-limit for the review of an individual decision of the contracting authority so that on expiry of that time-limit the decision can no longer be challenged in the course of the ongoing contract award procedure? Is it necessary, for the persons concerned to plead every defect, failure to do so entailing loss of their right to do so?

4. If Question 1 or Question 2 is answered in the affirmative, is it sufficient for the body inviting tenders to determine that the applications will be evaluated according to a method lodged with a notary, or is it necessary for the evaluation criteria already to have been communicated in the call for candidates or the tender documents?'

The first question

40.

By its first question, the Vergabekontrollsenat is asking, in essence, whether an entity which was not established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, but which has subsequently taken responsibility for such needs, which it has subsequently been actually meeting, fulfils the condition required by the first indent of the second subparagraph of Article 1(b) of Directive 93/37 so as to be capable of being regarded as a body governed by public law within the meaning of that provision.

Admissibility

41.

On a preliminary point, it is appropriate to point out that, as is apparent from the order for reference, the Vergabekontrollsenat seeks clarification as to whether an entity such as EBS is a 'contracting authority' within the meaning of Article 1(b) of Directive 93/37, in order to determine whether it has jurisdiction in connection with the applications for review of a decision by that company made by the applicants in the main proceedings.

42.

In that regard, it must be recalled that, according to settled case-law, it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. However, it is the Member States' responsibility to ensure that those rights are effectively protected in each case. Subject to that reservation, it is not for the Court to involve itself in the resolution of questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system (see, in particular, Case C-446/93 *SEIM* [1996] ECR I-73, paragraph 32, and Case C-54/96 *Dorsch Consult* [1997] ECR I-4691, paragraph 40).

43.

However, the Court has power to explain to the national court points of Community law which may help to solve the problem of jurisdiction with which that court is faced (see, in particular, *SEIM*, cited above, paragraph 33, and Joined Cases C-10/97 to C-22/97 *IN.CO.GE.'90 and Others* [1998] ECR I-6307, paragraph 15).

44.

Furthermore, the character of EBS as a contracting authority affects the replies to the third and fourth questions referred, whose admissibility is not disputed.

45.

Therefore, the question must be answered.

Substance

46.

In the dispute in the main proceedings, it is common ground that, since EBS took over the operation of the main sewage treatment plant, under the contract made in 1985 with the city of Vienna, that company satisfies a need in the general interest not having an industrial or commercial character. Therefore, its treatment as a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 93/37 depends on the answer to be given to the question whether the condition set out in the first indent of that provision precludes an entity from being regarded as a 'contracting authority' where it was not established for the purposes of satisfying needs in the general interest having a character other than industrial or commercial, but has undertaken such tasks as a result of a subsequent change in its sphere of activities.

Observations submitted to the Court

47.

EBS submits that it cannot be regarded as a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 93/37, on the ground that it is clear from the actual wording of the first indent of that provision that the sole deciding factor is the task which it was given at the date of its establishment. It adds that the fact that it has, subsequently, taken responsibility for tasks in the general interest having a character other than industrial or commercial does not affect its status since it continues to carry out industrial and commercial assignments.

48.

The Commission also maintains that EBS cannot be regarded as a 'contracting authority' within the meaning of Article 1(b) of Directive 93/37, because the change in its activities stems neither from an amendment to that effect of its objects as defined in its statutes, nor from a legal obligation.

49.

In contrast, the applicants in the main proceedings, as well as the Austrian and Netherlands Governments, submit that it is EBS's current activity which is to be taken into consideration and not its purpose at the date of its establishment, and they assert that a different interpretation would mean that, notwithstanding the fact that an entity corresponded as a matter of fact to the definition of 'contracting authority' in Directive 93/37, it would not be required, in awarding public works contracts, to observe the requirements of that directive. In addition, they maintain that a functional interpretation of the term 'contracting authority' is the only one capable of preventing possible evasion, since, otherwise, Directive 93/37 could easily be circumvented by transferring tasks in the general interest having a character other than industrial or commercial not to an entity newly established for that purpose, but to an existing one which previously had another object.

Findings of the Court

50.

The Court has already had occasion to clarify the scope of the term 'body governed by public law' in Article 1(b) of Directive 93/37, in the light, in particular, of the purpose of that directive.

51.

Thus the Court has held that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, in particular, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16, and Case C-237/99 *Commission v France* [2001] ECR I-939, paragraph 41).

52.

It has deduced therefrom that the aim of Directive 93/37 is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones (see, in particular, both cases cited above, *University of Cambridge*, paragraph 17, and *Commission v France*, paragraph 42).

53.

The Court has therefore held that it is in the light of those objectives that the concept of 'body governed by public law' in the second subparagraph of Article 1(b) of Directive 93/37 must be interpreted in functional terms (see, in particular, *Commission v France*, cited above, paragraph 43).

54.

Thus, at paragraph 26 of the judgment in *Mannesmann Anlagenbau Austria and Others*, cited above, in relation to the treatment of an entity which had been established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, but which also carried on commercial activities, the Court held that the condition laid down in the first indent of the second subparagraph of Article 1(b) of Directive 93/37 does not entail that the

body concerned may be entrusted only with meeting needs in the general interest, not having an industrial or commercial character.

55.

In particular, as is clear from paragraph 25 of the judgment in *Mannesmann Anlagenbau Austria and Others*, cited above, the Court has held that it is immaterial that, in addition to the specific task of meeting needs in the general interest, the entity concerned is free to carry out other activities, but, on the other hand, decided that it is a critical factor that it should continue to attend to the needs which it is specifically required to meet.

56.

It follows therefrom that, for the purposes of deciding whether a body satisfies the condition set out in the first indent of the second subparagraph of Article 1(b) of Directive 93/37, it is necessary to consider the activities which it actually carries on.

57.

In that regard, it should be pointed out that the effectiveness of Directive 93/37 would not be fully upheld if the application of the scheme of the directive to a body which satisfies the conditions set out in the second subparagraph of Article 1(b) thereof, could be excluded owing solely to the fact that the tasks in the general interest having a character other than industrial or commercial which it carries out in practice were not entrusted to it at the time of its establishment.

58.

The same concern to ensure the effectiveness of the second subparagraph of Article 1(b) of Directive 93/37 also militates against drawing a distinction according to whether the statutes of such an entity were or were not amended to reflect actual changes in its sphere of activity.

59.

In addition, the wording of the second subparagraph of Article 1(b) of Directive 93/37 contains no reference to the legal basis of the activities of the entity concerned.

60.

It is appropriate, furthermore, to point out that, in relation to the definition of the expression 'body governed by public law' in the second subparagraph of Article 1(b) of Directive 92/50, which is in terms identical to those contained in the second subparagraph of Article 1(b) of Directive 93/37, the Court has already held that the existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal form of the provisions in which those needs are mentioned being immaterial in that regard (Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraph 63).

61.

It follows that the fact that, in the main proceedings, the extension of EBS's sphere of activities did not give rise to an amendment to the provisions of its statutes concerning its objects is irrelevant.

62.

Although EBS's assumption of responsibility for needs in the general interest not having an industrial or commercial character has not been formally incorporated in its statutes, it is none the less set out in the contracts which EBS made with the city of Vienna and is therefore capable of being objectively established.

63.

It is therefore appropriate to reply to the first question that a body which was not established to satisfy specific needs in the general interest not having an industrial or commercial character, but which has subsequently taken responsibility for such needs, which it has since actually satisfied, fulfils the condition required by the first indent of the second subparagraph of Article 1(b) of Directive 93/37 so as to be capable of being regarded as a body governed by public law within the meaning of that provision, on condition that the assumption of responsibility for the satisfaction of those needs can be established objectively.

The second question

64.

In light of the reply to the first question, there is no need to reply to the second question, since it was referred to the Court only in the event of a negative reply to the first question.

The third question

65.

By its third question, the referring court is asking, in essence, whether Directive 89/665 precludes national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity.

Observations submitted to the Court

66.

The applicants in the main proceedings claim that the short periods prescribed for the commencement of applications for review by Paragraphs 97 and 98 of the WLVergG do not allow interested parties to check the grounds of a contracting authority's negative decision and, if appropriate, to ascertain the wrongful nature of the reasons advanced. Thus, it would be practically impossible for a reasoned application having some chance of success to be commenced within those periods.

67.

Universale adds that candidates from other Member States cannot, as a general rule, comply with the time-limit of two weeks laid down in Paragraph 98 of the WLVergG, which is contrary to the fundamental principles of Community policy in the public procurement sector, namely, first, that of awarding public procurement contracts without discrimination and, secondly that of access for undertakings to a common market with large-scale opportunities strengthening the competitiveness of European undertakings.

68.

In contrast, EBS submits that Directive 89/665 itself establishes a swift and effective procedure, calling for short time-limits after the expiry of which contracting authorities should be able to be sure that they can proceed with the procedure for awarding contracts. The necessity for short time-limits has clearly been shown in the main proceedings.

69.

EBS emphasises, in particular, that nothing prevented the applicants in the main proceedings from the timeous expression of their reservations with regard to the invitation to tender, since it had mentioned to them, both that it would apply a 'scoring' procedure to select the candidates who would be invited to tender and that it would not disclose the precise nature of the decision-making process. EBS adds that the application for review of the decision to invite certain candidates to tender had to be decided very quickly, otherwise it could not have pursued the procedure for the award of the contract. EBS points out finally that a time-limit of two weeks for applications for review of administrative decisions continues to be the general rule, citing as an example Paragraph 63(5) of the AVG, which provides that any decision of an administrative authority must be challenged within a time-limit of two weeks.

70.

The Austrian and Netherlands Governments and the Commission maintain, in essence, that Directive 89/665 leaves it to Member States to lay down the specific detailed rules governing applications for review of public procurement procedures. They deduce therefrom that the Member States have discretion to fix the time-limits for applications for review, on the dual condition that the purposes of Directive 89/665 are not circumvented and that the fundamental principles of Community law are observed. The Austrian Government submits further that the time-limits for applications for review at issue in the main proceedings prevent public procurement procedures from being delayed more than necessary and reduce the risk of improper recourse to litigation, which are both in accordance with the objectives of Directive 89/665.

Findings of the Court

71.

It should be noted, first of all, that, whilst the objective of Directive 89/665 is to guarantee the existence, in all Member States, of effective remedies for infringements of Community law in the field of public procurement or of the national rules implementing that law, so as to ensure the effective application of the directives on the coordination of public procurement procedures, it contains no provision specifically covering time-limits for the applications for review which it seeks to establish. It is therefore for the internal legal order of each Member State to establish such time-limits.

72.

None the less, since there are detailed procedural rules governing the remedies intended to protect rights conferred by Community law on candidates and tenderers harmed by decisions of contracting authorities, they must not compromise the effectiveness of Directive 89/665.

73.

It is therefore appropriate to determine whether, in light of the purpose of that directive, national legislation such as that at issue in the main proceedings does not adversely affect rights conferred on individuals by Community law.

74.

In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in its preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community levels, to ensure the effective application of the directives relating to public procurement, in particular at a stage when infringements can still be corrected. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible.

75.

The full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringement of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements.

76.

Moreover, the setting of reasonable limitation periods for bringing proceedings must be regarded as satisfying, in principle, the requirement of effectiveness under Directive 89/665, since it is an application of the fundamental principle of legal certainty (see, by analogy, in relation to the principle of the effectiveness of Community law, Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 28, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 33).

77.

In light of the foregoing considerations, it must be held, first, that the conditions governing time-limits such as those at issue in the main proceedings appear to be reasonable with regard both to the objectives of Directive 89/665, as set out in paragraph 74 of this judgment, and to the principle of legal certainty.

78.

Secondly, there can be no doubt that penalties such as prescription are such as to ensure that unlawful decisions of contracting authorities, from the moment they become known to those concerned, are challenged and corrected as soon as possible, which is also in accordance both with the objectives of Directive 89/665 and with the principle of legal certainty.

79.

The answer to the third question must therefore be that Directive 89/665 does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within

the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the time-limit in question is reasonable.

The fourth question

80.

By its fourth question, the referring court is asking whether Directive 93/37 prohibits, in the context of a restricted procedure, the contracting authority from selecting those candidates who will be invited to tender according to methods of evaluation which have not been set out in the contract notice or in the tender documents, even if documents specifying those methods have been lodged with a notary.

Observations submitted to the Court

81.

The applicants in the main proceedings claim that the procedure followed by EBS of not revealing to the candidates either the detailed rules of the 'scoring' procedure or the importance of the different criteria for ranking the applications to take part is incompatible with the principles of transparency and objectivity. They add that the respective importance of the different ranking criteria must, in any event, appear in the contract notice, so as to exclude any arbitrariness in the contracting authority's decision and to enable the candidates to scrutinise the lawfulness thereof and to make use of their right of review.

82.

In contrast, EBS and the Austrian Government submit that a procedure such as depositing with a notary documents specifying the detailed rules for evaluating the applications to take part is sufficient guarantee of compliance with the principles of non-discrimination and objectivity. They submit that, whilst it is clear from those principles that the contracting authority must prescribe in advance the procedure which it will use to choose the candidates and that such method of selection may not be subsequently changed, they do not thereby require the contracting authorities to divulge the precise details of the rules for evaluating the candidatures.

83.

EBS makes clear that, in the main proceedings, it set out the principal criteria for ranking the applications to take part in the order of their importance, and that it was precisely to encourage lawful and fair competition that it did not make known in advance to the candidates the precise detailed rules for evaluating the applications. EBS in fact sought the five construction undertakings which were objectively the best for the works contract in issue, and not undertakings which adapt their tenders to the contracting authority's views, which usually show through in the choice of evaluation methods.

Findings of the Court

84.

At the outset, it is appropriate to state that, in the main proceedings, it is common ground that EBS ordained from the beginning the value which would be attributed to each of the selection criteria which it intended using, but provided no indication in that respect in the invitation to tender, merely lodging the documents relating to the 'scoring' procedure with a notary.

85.

It is also clear that in this case the national court does not seek to ascertain whether a contracting authority is obliged, under Community law, to lay down prior to the contract notice the rules as to the ranking of the selection criteria which it intends to use, but that it is asking the Court only about compliance with the requirements for advertisement under Directive 93/37 in a situation where the contracting authority has laid down such rules in advance.

86.

The fourth question must therefore be understood as asking whether Directive 93/37 is to be interpreted as meaning that, where, in the context of a restricted procedure, the contracting authority has laid down in advance the rules as to the weighting of the criteria for selecting the candidates who will be invited to tender, it is obliged to state them in the contract notice or the tender documents.

87.

In order to reply to the question thus rephrased, it is appropriate to point out, from the outset, that Directive 93/37 contains no specific provision relating to the requirements for prior advertisement concerning the criteria for selecting the candidates who will be invited to tender in the context of a restrictive procedure.

88.

The title of Directive 93/37 and the second recital in its preamble show that its aim is simply to coordinate national procedures for the award of public works contracts, although it does not lay down a complete system of Community rules on the matter (Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 33).

89.

The Directive nevertheless aims, as is clear from its preamble and 2nd and 10th recitals, to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition between entrepreneurs in the Member States (see, among others, *Lombardini and Mantovani*, cited above, paragraph 34).

90.

As the Court has already stated in respect of Directive 71/305, which, as was pointed out in paragraph 6 of this judgment, was consolidated by Directive 93/37, in order to meet that aim, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts (Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 21).

91.

The principle of equal treatment, which underlies the directives on procedures for the award of public contracts, implies an obligation of transparency in order to enable verification that it has been complied with (see, in particular, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 61, and Case C-92/00 *HI* [2002] ECR I-5553, paragraph 45).

92. That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed (see *Telaustria and Telefonadress*, cited above, paragraph 62).

93. It follows therefrom that the procedure for awarding a public contract must comply, at every stage, particularly that of selecting the candidates in a restricted procedure, both with the principle of the equal treatment of the potential tenderers and the principle of transparency so as to afford all equality of opportunity in formulating the terms of their applications to take part and their tenders (see, to that effect, in relation to the stage of comparison of tenders, Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, paragraph 54).

94. It is in that perspective that, in accordance with the 10th and 11th recitals in its preamble, Directive 93/37 lays down advertising requirements in respect of both the criteria for selecting candidates and those for awarding the contract.

95. Thus, in relation, first, to the selection criteria, Article 7(2) of Directive 93/37, which concerns negotiated procedures, requires that the candidates are to be selected according to known qualitative criteria.

96. In relation, secondly, to the criteria for awarding contracts, Article 13(2)(e) of that directive, relating both to negotiated and restricted procedures, provides that they form part of the minimum information which must be mentioned in the letter of invitation to tender, if they do not already appear in the contract notice.

97. Similarly, for all types of procedure, where the award of the contract is made to the most economically advantageous tender, Article 30(2) of Directive 93/37, which applies both to the open procedure and the restricted and negotiated procedures, imposes on the contracting authority the obligation to state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of their importance. Also according to that article, where the contracting authority has set out a ranking in their order of importance of the criteria for the award which it intends to use, it may not confine itself to a mere reference thereto in the contract documents or in the contract notice, but must, in addition, inform the tenderers of the ranking which it has used.

98. As the Court has stated in respect of Article 27(2) of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1), the terms of which are substantially the same as those of Article 30(2) of Directive 93/37, the requirement thus imposed on the contracting authorities is intended precisely to inform all potential tenderers, before the preparation of their tenders, of the award criteria to be satisfied by t

JUDGMENT OF THE COURT (Fifth Chamber)

3 October 2000 [\(1\)](#)

(Public contracts - Procedure for the award of public contracts for services, supplies and works - Contracting authority - Body governed by public law)

In Case C-380/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), for a preliminary ruling in the proceedings pending before that court between

The Queen

and

H.M. Treasury,

ex parte: **University of Cambridge,**

on the interpretation of Article 1 of 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), Article 1 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and Article 1 of 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),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, P.J.G. Kapteyn (Rapporteur), A. La Pergola, P. Jann and H. Ragnemalm, Judges,

Advocate General: S. Alber,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- the University of Cambridge, by D. Vaughan QC, A. Robertson, Barrister, and G. Godar, Solicitor,
- the United Kingdom Government, by M. Ewing, of the Treasury Solicitor's Department, acting as Agent, and K. Parker QC,
- the Netherlands Government, by M.A. Fierstra, Head of the European Law Department at the Ministry of Foreign Affairs, acting as Agent,
- the Austrian Government, by W. Okresek, Departmental Head at the Chancellor's Office, acting as Agent,
- the Commission of the European Communities, by R. Wainwright, Principal Legal Adviser, and M. Shotter, a national civil servant on secondment to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the University of Cambridge, represented by D. Vaughan and A. Robertson, the United Kingdom Government, represented by G. Amodeo, of the Treasury Solicitor's Department, acting as Agent, and R. Williams, Barrister, the French Government, represented by G. Taillandier, *rédacteur* in the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agent, the Austrian Government, represented by M. Winkler, of the Chancellor's Office, acting as Agent, and the Commission, represented by R. Wainwright and M. Shotter, at the hearing on 9 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2000,

gives the following

Judgment

1.

By order of 21 July 1998, which was received at the Court on 26 October 1998, the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) four questions concerning the interpretation of Article 1 of 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), Article 1 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and Article 1 of 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).

2.

The questions arose in proceedings brought by the University of Cambridge ('the University') in the High Court following the decision of H.M. Treasury ('the Treasury') to retain universities of the United Kingdom of Great Britain and Northern Ireland in the list of bodies governed by public law notified to the Commission and reproduced in Annex I to Directive 93/37, while amending the text of that annex.

Community legislation

3.

Article 1 of Directive 93/37 provides:

'For the purpose of this directive:

...

(b) contracting authorities shall be the State, regional or local authorities, bodies governed by public law, [or] associations formed by one or several of such authorities or bodies governed by public law;

A body governed by public law means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35. To this end, Member States shall periodically notify the Commission of any changes of their lists of bodies and categories of bodies;

...

4.

Article 1(b) of Directive 92/50 and Article 1(b) of Directive 93/36 were drafted in terms essentially identical to Article 1(b) of Directive 93/37.

5.

As far as the United Kingdom is concerned, the list of bodies and categories of bodies governed by public law in Annex I to Directive 93/37 includes 'universities and polytechnics, maintained schools and colleges.

National legislation

6.

Directives 92/50, 93/36 and 93/37 were transposed into United Kingdom law by the following measures:

- Public Services Contracts Regulations 1993 (S.I. 1993/3228)

- Public Supply Contracts Regulations 1995 (S.I. 1995/201)

- Public Supply Contracts Regulations 1991 (S.I. 1991/2680).

7.

Those regulations do not reproduce Annex I to Directive 93/37. However, each of them contains a definition of the bodies governed by public law based on the definition provided by Community law.

The main proceedings and the questions referred

8.

In 1995 and 1996 the Committee of Vice-Chancellors and Principals of the Universities communicated to the Treasury its view that Directives 92/50, 93/36 and 93/37 did not apply universally to universities, so that the reference to 'universities in Annex I to Directive 93/37, to which the third indent of Article 1(b) of those directives refers, should be deleted.

9.

On 17 January 1997 the Treasury suggested to the Commission that the reference to 'Universities and polytechnics, maintained schools and colleges be replaced by the words 'Maintained schools. Universities and colleges financed for the most part by other contracting authorities, thereby restricting the circumstances in which the abovementioned directives were applicable in the case of universities and taking into account the most recent developments, the Further and Higher Education Act of 1992 having rendered obsolete, in this context, the title of 'polytechnics.

10.

That proposal has not yet been adopted by the Commission under the procedure provided for in Article 35 of Directive 93/37.

11.

The amendment to Annex I of Directive 93/37 proposed by the Treasury did not satisfy the University, which brought an application for judicial review (dated 7 November 1996) in the High Court contesting the position adopted by the Treasury.

12.

On 21 March 1997 the matter came before the Queen's Bench Division of the High Court, which gave the University leave to seek judicial review on the ground that there was a substantive issue concerning the interpretation of Directives 92/50, 93/36 and 93/37, and more specifically the exact interpretation of the expression 'financed, for the most part by one or more contracting authorities.

13.

By order of 21 July 1998, the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), stayed proceedings pending a preliminary ruling on the following questions:

'1. Where Article 1 of Council Directive 92/50/EEC, Council Directive 93/37/EEC and Council Directive 93/36/EEC (the directives) refers to any body financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law what monies are to be included in the expression financed ... by [one or more contracting authorities]? In particular, in relation to payments to an entity such as the University of Cambridge, does the expression include:-

(a) awards or grants paid by one or more contracting authorities for the support of research work;

(b) consideration paid by one or more contracting authorities for the supply of services comprising research work;

(c) consideration paid by one or more contracting authorities for the supply of other services, such as consultancy or the organisation of conferences;

(d) student grants paid by local education authorities to universities in respect of tuition for named students?

2. What percentage or other meaning is to be given to the expression for the most part in Article 1 of the directives?

3. If the expression for the most part is defined in terms of a percentage figure, is the calculation limited to considering sources of finance for academic and related purposes or should it include finance obtained in relation to commercial activities as well?

4. Over what period should any calculation be made for determining whether a university is a contracting authority in respect of any particular procurement, and how are foreseeable or future changes to be taken into account?

First question

14.

As appears from the order for reference, universities in the United Kingdom are financed from various sources and those funds are provided for a variety of purposes and on various grounds. Some funds go to universities on the basis of periodical assessments of the quality of the research they do and/or depending on the number of students they receive; other funds come from awards, grants or the supply of food and accommodation; still others represent payment for services commissioned by charities, government departments, industry or commerce.

15.

It is therefore necessary to determine the real nature of each of the forms of financing referred to in the first question in order to determine their significance for the University and hence the influence they have on whether that body is to be regarded as a 'contracting authority.

16.

It should be borne in mind at the outset that, as far as the purpose of Directives 92/50, 93/36 and 93/37 is concerned, the Court has held that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, to that effect, Case C-360/96 *Gemeente Arnhem, Gemeente Rheden v BFI Holding* [1998] ECR I-6821, paragraph 41).

17.

Consequently, the aim of the directives is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones (see, to that effect, Case C-44/96 *Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck* [1998] ECR I-73, paragraph 33, and *BFI Holding*, cited above, paragraphs 42 and 43).

18.

According to Article 1(b), second subparagraph, of Directives 92/50, 93/36 and 93/37, a 'body governed by public law means any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character (first indent), having legal personality (second indent) and financed for the most part by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law (third indent).

19.

In the main proceedings it is common ground that the University meets the two conditions mentioned in the first two indents of Article 1(b), second subparagraph, of the directives. Consequently, whether the University is to be included in the list for Annex I of Directive 93/37 depends in this case solely on the answer to the question whether that university is 'financed for the most part by one or more contracting authorities within the meaning of the third indent of that provision.

20.

As regards the alternative conditions set out in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37, paragraph 20 of the judgment in *Mannesmann Anlagenbau Austria* (cited above) indicates that each reflects the close dependency of a body on the State, regional or local authorities or other bodies governed by public law. The provision thus defines the three forms of body governed by public law as three types of 'close dependency on another contracting authority.'

21. Whilst the way in which a particular body is financed may reveal whether it is closely dependent on another contracting authority, it is clear that that criterion is not an absolute one. Not all payments made by a contracting authority have the effect of creating or reinforcing a specific relationship of subordination or dependency. Only payments which go to finance or support the activities of the body concerned without any specific consideration therefor may be described as 'public financing.'

22. It follows that payments in the form of awards or grants for the support of research work, such as those referred to in paragraph (a) of the first question, may be regarded as financing by a contracting authority. Though the recipient of such financing need not be the university itself, but a member of it in his capacity as a provider of services, we are concerned with financing that goes to the institution as a whole in the context of its research work.

23. Similarly, the grants referred to in paragraph (d) of the first question may be classified as 'public financing.' Those payments constitute a social measure introduced for the benefit of certain students who by themselves would not be able to meet tuition fees which are sometimes very high. Since there is no contractual consideration for those payments, they should be regarded as financing by a contracting authority in the context of its educational activities.

24. The position is quite different in the case of the sources of financing referred to in paragraphs (b) and (c) of the first question. The sums paid by one or more contracting authorities constitute in that case consideration for contractual services provided by the university, such as the execution of particular research work or the organisation of seminars and conferences. It matters little in this context whether those activities of a commercial nature happen to coincide with the teaching and research activities of the university. The contracting authority has in fact an economic interest in providing the service.

25. Naturally, such a contractual relationship may also make the body concerned dependent on the contracting authority. However, as the Advocate General has noted in paragraph 46 of his Opinion, the nature of the relationship is not the same as that which would result from a mere subsidy. Rather, it is analogous to the dependency that exists in normal commercial relationships formed by reciprocal contracts freely negotiated between the contracting parties. Consequently, the payments referred to in paragraphs (b) and (c) of the first question do not fall within the concept of 'public financing.'

26. Accordingly, the reply to the first question is that the expression 'financed ... by [one or more contracting authorities]' in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37, properly construed, includes awards or grants paid by one or more contracting authorities for the support of research work and student grants paid by local education authorities to universities in respect of tuition for named students. Payments made by one or more contracting authorities either in the context of a contract for services comprising research work or as consideration for other services such as consultancy or the organisation of conferences do not, by contrast, constitute public financing within the meaning of those directives.

Second question

27. The second question asks, in essence, what meaning is to be given to the expression 'financed for the most part' in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37.

28. For that purpose it is necessary to consider whether 'for the most part' means a specific percentage, or whether it is to have some other meaning.

29. Contrary to the submissions of the Commission and the Governments under Article 20 of the EC Statute of the Court of Justice, supporting a quantitative interpretation of the term 'for the most part', so that it would refer to public financing in excess of 50%, the University maintains that it is to be interpreted qualitatively. The University contends that account should be taken only of payments which confer on those making them control of procurement. However, if the interpretation should be quantitative, then the term must on any view be taken to mean that the financing in question is predominant. This, according to the University, can only be the case where it represents three quarters of the total financing.

30. That interpretation cannot be upheld. Apart from the fact that there is no support for it in the wording of Directives 92/50, 93/36 and 93/37, it does not reflect the ordinary meaning of the phrase 'for the most part', which in normal usage always means 'more than half', without it being necessary for one group to be predominant or preponderant as regards another.

31. That is, moreover, borne out by the wording of Article 1(2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), which defines 'public undertaking' as, *inter alia*, an undertaking in which the public authorities hold, directly or indirectly, the majority of the undertaking's subscribed capital or control, directly or indirectly, the majority of the votes attaching to shares issued by the undertaking. As the Advocate General noted in paragraph 58 of his Opinion, if such quantitative criteria are sufficient to classify an undertaking as a 'public undertaking', that must be the case *a fortiori* when determining the conditions under which public financing is to be regarded as 'for the most part.'

32.

In addition, interpreting 'for the most part as meaning 'more than half is consistent with the provisions in respect of one of the other cases referred to in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37. According to those provisions, the term 'body governed by public law also includes any body having an administrative, managerial or supervisory board 'more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

33.

Accordingly, the reply to the second question is that, on a proper construction, the term 'for the most part in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37 means 'more than half.

Third question

34.

In the third question, which is closely linked to the previous two, the national court asks, in essence, what is to be included in the basis for calculating the financing which is 'for the most part public. In particular, it asks whether all sources of financing for the university are to be taken into account when determining whether financing is 'for the most part public or whether regard should be had only to sources of finance for academic and related activities.

35.

As to that, it is sufficient to note that when Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37 refers to financing which is 'for the most part from public sources, that necessarily implies that a body may also be financed in part in some other way without thereby losing its character as a contracting authority.

36.

The reply to the third question is therefore that in order to determine correctly the percentage of public financing of a particular body account must be taken of all of its income, including that which results from a commercial activity.

Fourth question

37.

In the fourth question the national court asks what period is to be taken into consideration in calculating the university's financing and how account is to be taken of changes which may occur in the course of a procurement procedure, when determining whether the university is a 'contracting authority for the purposes of a particular procurement.

38.

It is to be noted at the outset that in the absence of an express provision to that effect in Directives 92/50, 93/36 and 93/37, the reply to both parts of this question must take into account the requirement of legal certainty, as stated by the Court in paragraph 34 of *Mannesmann Anlagenbau Austria* (cited above). Although in determining whether a body is to be regarded as a 'contracting authority for the purposes of a specific procurement regard must be had to its precise financial situation, it is also necessary to ensure a measure of foreseeability for the procurement procedure, when the financing of a body such as the University may vary from one year to the next.

39.

Although the directives are silent as to the period to be taken into consideration when determining whether a body is a 'contracting authority, they do contain provisions regarding the publication of indicative notices from time to time which may provide useful guidance for the reply to this question. Article 15(1) of Directive 92/50 and Article 9(1) of Directive 93/36 provide expressly that indicative notices are to be published by the contracting authorities 'as soon as possible after the beginning of the budgetary year where the total amount of the procurement 'which they envisage awarding during the subsequent 12 months is equal to or greater than ECU 750 000. The provisions thus imply that the contracting authority retains that status for 12 months from the beginning of each budgetary year.

40.

Accordingly, the decision as to whether a body such as the University is a 'contracting authority must be made annually and the budgetary year during which the procurement procedure is commenced must be regarded as the most appropriate period for calculating how that body is financed.

41.

That being so, legal certainty and transparency require that both the University and third parties concerned are in a position to know from the beginning of the budgetary year whether the procurement contracts they envisage awarding during that year fall within the scope of Directives 92/50, 93/36 and 93/37. It follows that for the purposes of deciding whether a university is a 'contracting authority the way in which it is financed must be calculated on the basis of the figures available at the beginning of the budgetary year, even if they are only provisional.

42.

As regards the second part of the fourth question, the national court asks, in essence, whether, and if so how, account is to be taken of any changes in financing which may occur during a procurement procedure compared with the way in which the body had been financed at the date of the commencement of the procedure.

43.

As the Court noted in paragraph 34 of *Mannesmann Anlagenbau Austria* (cited above), the principle of legal certainty requires that the Community rules be clear and their application foreseeable for all those concerned. As a result of that requirement, and of those pertaining to the protection of the interests of tenderers, it is necessary for a body which on the date of the commencement of the procurement procedure constitutes a 'contracting authority for the purposes of Directives 92/50, 93/36 and 93/37 to remain, as far as that procurement is concerned, subject to the requirements of those directives until the relevant procedure has been completed.

44.

Accordingly, the reply to the fourth question is that the decision as to whether a body such as the University is a 'contracting authority must be made annually and the budgetary year in which the procurement procedure commences must be regarded as the most appropriate period for calculating the way in which that body is financed, so that the calculation must be made on the basis of the figures available at the beginning of the budgetary year, even if they are provisional. A body which constitutes a 'contracting authority for the purposes of Directives 92/50, 93/36 and 93/37 when a procurement procedure commences remains, as far as that procurement is concerned, subject to the requirements of those directives until such time as the relevant procedure has been completed.

Costs

45.

The costs incurred by the Governments of the United Kingdom, France, the Netherlands and Austria, and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court) by order of 21 July 1998, hereby rules:

- 1. The expression 'financed ... by [one or more contracting authorities] in Article 1(b), second subparagraph, third indent, of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, properly construed, includes awards or grants paid by one or more contracting authorities for the support of research work and student grants paid by local education authorities to universities in respect of tuition for named students. Payments made by one or more contracting authorities either in the context of a contract for services comprising research work or as consideration for other services such as consultancy or the organisation of conferences do not, by contrast, constitute public financing within the meaning of those directives.**
- 2. On a proper construction, the term 'for the most part in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37 means 'more than half.**
- 3. In order to determine correctly the percentage of public financing of a particular body account must be taken of all of its income, including that which results from a commercial activity.**
- 4. The decision as to whether a body such as the University of Cambridge is a 'contracting authority must be made annually and the budgetary year in which the procurement procedure commences must be regarded as the most appropriate period for calculating the way in which that body is financed, so that the calculation must be made on the basis of the figures available at the beginning of the budgetary year, even if they are provisional. A body which constitutes a 'contracting authority for the purposes of Directives 92/50, 93/36 and 93/37 when a procurement procedure commences remains, as far as that procurement is concerned, subject to the requirements of those directives until such time as the relevant procedure has been completed.**

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