SFT Guidance on powers of Scottish public bodies to generate/procure heat and electricity supplies, and to supply heat and electricity to third parties, and the constraints on those powers.

Appendix 8

Legislation and case law referred to in the public procurement section.

EU: CASE C-107/98

Celex No. 698J0107

European Union Cases

Teckal Srl v Comune di Viano (Reggio Emilia)

European Court of Justice (Fifth Chamber)

18 November 1999

Reference for a preliminary ruling: Tribunale amministrativo regionale per l'Emilia-Romagna - Italy. Public service and public supply contracts - Directives 92/50/EEC and 93/36/EEC - Award by a local authority of a contract for the supply of products and provision of specified services to a consortium of which it is a member.

SUMMARY

1) Where, under the procedure provided for by Article 177 of the Treaty (now Article 234 EC), questions are formulated imprecisely, the Court may extract - from all the information provided by the national court and from the documents concerning the main proceedings - the points of Community law requiring interpretation, having regard to the subject-matter of the dispute. In order to provide the national court with a satisfactory answer, the Court may deem it necessary to consider provisions of Community law which the national court has not mentioned in its question. On the other hand, by virtue of the division of functions provided for under the above provision, it is for the national court to apply the rules of Community law, as interpreted by the Court, to a specific case. No such application is possible without a comprehensive appraisal of the facts of the case.

2) Directive 93/36 coordinating procedures for the award of public supply contracts is applicable in cases where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making - which is not the position where the local authority exercises over a legally distinct person a form of control similar to that exercised over its own departments and, at the same time, the person carries out the essential part of its activities together with the controlling local authority or authorities - a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority.

The only permitted exceptions to the application of Directive 93/36 are those which are exhaustively and expressly mentioned therein. That Directive does not contain any provision comparable with

Article 6 of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, which excludes from its scope public contracts awarded, under certain conditions, to contracting authorities.

PARTIES

In Case C-107/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunale Amministrativo Regionale per l'Emilia-Romagna, Italy, for a preliminary ruling in the proceedings pending before that court between

Teckal Srl

and

Comune di Viano, Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia

on the interpretation of 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 (OJ 1992 L 209, p. 0001),

THE COURT

(Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevón, J.-P. Puissochet, P. Jann

(Rapporteur) and M. Wathelet, Judges, Advocate General: G. Cosmas, Registrar: H.A. Rühl, Principal Administrator, after considering the written observations submitted on behalf of:

- Teckal Srl, by A. Soncini and F. Soncini, of the Parma Bar, and P. Adami, of the Rome Bar,

- Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, by E.G. Di Fava, of the Reggio d'Emilia Bar, and G. Cugurra, of the Parma Bar,

- the Italian Government, by Professor U. Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, assisted by P.G. Ferri, Avvocato dello Stato,

- the Belgian Government, by J. Devadder, General Adviser in the Legal Service of the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

- the Austrian Government, by W. Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,

- the Commission of the European Communities, by P. Stancanelli, of its Legal Service, acting as Agent, having regard to the Report for the Hearing, after hearing the oral observations of Teckal Srl, represented by A. Soncini and P. Adami; Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, represented by G. Cugurra; the Italian Government, represented by P.G. Ferri; the French Government, represented by A. Bréville-Viéville, Chargé de Mission in the Legal Directorate of the Ministry of Foreign Affairs, acting as Agent; and the Commission, represented by P. Stancanelli, at the hearing on 6 May 1999, after hearing the Opinion of the Advocate General at the sitting on 1 July 1999, gives the following

Judgement

GROUNDS

1) By order of 10 March 1998, received at the Court on 14 April 1998, the Tribunale Amministrativo Regionale per l'Emilia-Romagna (Regional Administrative Court for Emilia Romagna) referred to the

Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of 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 (OJ 1992 L 209, p. 0001).

2) That question has arisen in proceedings between Teckal Srl ('Teckal'), on the one hand, and the Municipality of Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia ('AGAC'), on the other, concerning the award by that municipality of the contract for the management of the heating services for certain municipal buildings.

Community legislation

3) Article 1(a) and (b) of Directive 92/50 provides as follows:

'For the purposes of this Directive:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority...

(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.

4) Article 2 of Directive 92/50 provides:

'If a public contract is intended to cover both products within the meaning of Directive 77/62/EEC and services within the meaning of Annexes I A and I B to this Directive, it shall fall within the scope of this Directive if the value of the services in question exceeds that of the products covered by the contract.'

5) Article 6 of Directive 92/50 provides that: '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.'

6) Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 0001) repealed Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 0001).

References to the repealed directive are, pursuant to Article 33 of Directive 93/36, to be construed as references to the latter directive.

7) Article 1(a) and (b) of Directive 93/36 provides as follows:

'For the purpose of this Directive:

(a) "public supply contracts" are contracts for pecuniary interest concluded in writing involving the purchase, lease [,] rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations;

(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;

National legislation

8) Under Article 22(1) of Italian Law No 142 of 8 June 1990 on the organisation of local authorities (GURI No 135 of 12 June 1990) ('Law No 142/90'), municipalities are to provide for the management of public services involving the production of goods and the performance of activities designed to achieve social purposes and to promote economic and civil development of local communities.

9) Article 22(3) of Law No 142/90 provides that municipalities may ensure the performance of these services on a work-and-materials basis, by way of concession to third parties, or by having recourse to special undertakings, non profit-making institutions or companies in which local public authorities hold the majority of shares.

10) Article 23 of Law No 142/90, which defines special undertakings and non-profit making institutions, provides as follows:

> '1. A special undertaking is a body (ente strumentale) established by a local entity, having legal personality, commercial autonomy and its own statutes, approved by the municipal or provincial council.
>
> …
>
> 3. The organs of the undertaking and of the institution shall be the board of management, the chairman and the director who assumes managerial responsibility. The detailed arrangements for appointment and removal of members of the board of management shall be laid down by the statutes of the local authority.
>
> 4. In performing their activities, the undertaking and institution must satisfy criteria of effectiveness, efficiency and profitability, and must achieve a balanced budget by balancing costs and receipts, including transfers.
>
> …
>
> 6. The local administration shall provide the start-up capital, define objectives and policy, approve the documents of constitution, exercise supervision, monitor management results, and cover any social costs which may arise.
>
> …'

11) Under Article 25 of Law No 142/90, the municipalities and provinces may, for purposes of the joint management of one or more services, set up a consortium in accordance with the provisions governing the special undertakings referred to in Article 23. To that end, each municipal council must approve, by absolute majority, an agreement at the same time as the statutes of the consortium. The general meeting of the consortium shall be composed of the representatives of the member entities, represented by the mayor, the chairman or their deputies. The general meeting shall elect the board of management and approve the documents of constitution prescribed by the statutes.

12) AGAC is a consortium set up by several municipalities - including that of Viano - to manage energy and environmental services, pursuant to Article 25 of Law No 142/90. Under Article 1 of its Statutes ('the Statutes'), it has legal personality and operational autonomy. Article 3(1) of the Statutes states that its function is to assume direct responsibility for, and manage, a number of listed public services, which include 'gas for civil and industrial purposes; heating for civil and industrial purposes; activities related and ancillary to the above'.

13) Under Article 3(2) to (4) of the Statutes, AGAC may extend its activities to other related or ancillary services, hold shares in public or private companies or have interests in bodies for the management of related or ancillary services, and, finally, provide services or supplies to private persons or to public bodies other than the member municipalities.

14) Under Articles 12 and 13 of the Statutes, the most important managerial acts, which include preparation of accounts and budgets, must be approved by the general meeting of AGAC, consisting of representatives of the municipalities. The other managerial bodies are the council, the chairman of the council and the director-general. They are not answerable to the municipalities for their managerial acts. The natural persons who sit on these bodies do not exercise any functions in the member municipalities.

15) Under Article 25 of the Statutes, AGAC must achieve a balanced budget and operational profitability. Pursuant to Article 27 of the Statutes, the municipalities provide AGAC with funds and assets, in respect of which AGAC pays them annual interest. Article 28 of the Statutes provides that any profits in the financial year are to be allocated among the member municipalities, retained by AGAC to increase its reserve funds, or reinvested in other AGAC activities. Under Article 29 of the Statutes, where a loss occurs, the financial deficit may be corrected through, inter alia, the injection of new capital by the member municipalities.

16) Article 35 of the Statutes provides for arbitration to resolve any disputes between the member municipalities or between those municipalities and AGAC.

The dispute in the main proceedings

17) By Decision No 18 of 24 May 1997 ('the Decision'), the municipal council of Viano conferred on AGAC the management of the heating service for a number of municipal buildings. That decision was not preceded by any invitation to tender.

18) The task of AGAC lies, specifically, in the area of the operation and maintenance of the heating installations of the municipal buildings in question, including any necessary repairs and improvements, and the supply of fuel.

19) The remuneration of AGAC was fixed at ITL 122 million for the period from 1 June 1997 to 31 May 1998. Of that amount, the value of the fuel supplied represents 86 million and the cost of operation and maintenance of the installations represents 36 million.

20) Under Article 2 of the Decision, at the expiry of the initial one-year period, AGAC undertakes to continue providing the service for a further period of three years, at the request of the Municipality of Viano, following modification of the conditions set out in the Decision. Provision is also made for a subsequent extension.

21) Teckal is a private company operating in the area of heating services. In particular, it supplies heating oil to individuals and public bodies, purchasing it beforehand from producer undertakings. It also services oil- and gas-operated heating installations.

22) Teckal brought proceedings before the Tribunale Amministrativo Regionale per l'Emilia-Romagna, in which it argued that the Municipality of Viano should have followed the tendering procedures for public contracts required under Community legislation.

23) The national court, which is uncertain as to whether Directive 92/50 or Directive 93/36 is applicable, takes the view that, in any event, the application threshold of ECU 200 000 laid down in both directives was exceeded.

24) In view of the twofold nature of the task entrusted to AGAC, which consists, first, in providing a variety of services, and, second, in supplying fuel, the national court formed the view that it could not discount the applicability of Article 6 of Directive 92/50.

25) In those circumstances, the Tribunale Amministrativo Regionale stayed proceedings and requested the Court to interpret Article 6 of Directive 92/50 'from the points of view set out in the grounds of this judgment'.

Admissibility

26) AGAC and the Austrian Government contend that the question submitted for preliminary ruling is inadmissible. AGAC submits, first, that the amount of the contract at issue in the main proceedings is below the threshold laid down in Directives 92/50 and 93/36. The price of fuel, it argues, should be deducted from the estimated amount of the contract, inasmuch as AGAC, being itself a contracting authority, acquires its stock of fuels through public tendering procedures. Furthermore, the contract in question is not one of indeterminate duration.

27) Second, AGAC contends that the request for a preliminary ruling concerns in reality the interpretation of national law. The national court is in fact asking the Court to interpret certain provisions of national law to enable it to determine whether the exception under Article 6 of Directive 92/50 applies.

28) For its part, the Austrian Government submits that the request for a preliminary ruling is inadmissible on the ground that it does not contain any question. In the area of the law relating to public contracts, it is particularly important that questions should be precisely formulated.

29) As regards, first of all, the question whether the value of the contract in question exceeds the threshold laid down in Directives 92/50 and 93/36, it should be borne in mind that Article 177 of the Treaty is based on a clear separation of functions between the national courts and the Court of Justice, which means that, when ruling on the interpretation or validity of Community provisions, the Court of Justice is empowered to do so only on the basis of the facts which the national court puts before it (see, in particular, Case C-30/93 AC-ATEL Electronics Vertriebs v Hauptzollamt München-Mitte [1994] ECR I-2305, paragraph 16).

30) In that context, it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (AC-ATEL Electronics Vertriebs, cited above, paragraph 17).

31) While it is true, therefore, that the method for calculating the amount of the contract is defined in the Community provisions, that is to say, Article 7 of Directive 92/50 and Article 5 of Directive 93/36, on the interpretation of which the national court may, if necessary, submit questions for a preliminary ruling, it is, none the less, by virtue of the division of functions provided for by Article 177 of the Treaty, for the national court to apply the rules of Community law to a specific case. No such application is possible without a comprehensive appraisal of the facts of the case (see Case C-320/88 Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe [1990] ECR I-285, paragraph 11).

32) It follows that the Court cannot substitute its own appraisal in regard to the calculation of the value of the contract for that of the national court and conclude, on the basis of its appraisal, that the reference for a preliminary ruling is inadmissible.

33) Next, it must be pointed out that in the context of Article 177 of the Treaty the Court has no jurisdiction to rule either on the interpretation of provisions of national laws or regulations or on their conformity with Community law. It may, however, supply the national court with an interpretation of Community law that will enable that court to resolve the legal problem before it (Case C-17/92 Federación de Distribuidores Cinematográficos v Spanish State [1993] ECR I-2239, paragraph 8).

34) Finally, according to settled case-law, it is for the Court alone, where questions are formulated imprecisely, to extract from all the information provided by the national court and from the documents in the main proceedings the points of Community law which require interpretation, having regard to the subject-matter of those proceedings (Case 251/83 Haug-Adrion v Frankfurter Versicherungs-AG [1984] ECR 4277, paragraph 9, and Case C-168/95 Arcaro [1996] ECR I-4705, paragraph 21).

35) In the light of the information contained in the order for reference, the national court must be understood to be asking, essentially, whether the provisions of Community law governing the award of public contracts are applicable in a case where a local authority entrusts the supply of products and the provision of services to a consortium of which it is a member, in circumstances such as those in point in the main proceedings.

36) The reference for a preliminary ruling must therefore be declared admissible.

Substance

37) It is clear from the order for reference that the Municipality of Viano entrusted to AGAC, by a single measure, both the provision of certain services and the supply of certain products. It is also common ground that the value of those products is greater than that of the services.

38) It follows a contrario from Article 2 of Directive 92/50 that, if a public contract relates both to products within the meaning of Directive 93/36 and to services within the meaning of Directive 92/50, it will fall within the scope of Directive 93/36 if the value of the products covered by the contract exceeds that of the services.

39) In order to provide a satisfactory answer to the national court which has referred a question to it, the Court of Justice may deem it necessary to consider provisions of Community law to which the national court has not referred in its question (Case 35/85 Procureur de la République v Tissier [1986] ECR 1207, paragraph 9, and Case C-315/88 Bagli Pennacchiotti [1990] ECR I-1323, paragraph 10).

40) It follows that, in order to provide an interpretation of Community law which will be of assistance to the national court in this case, it is necessary to interpret the provisions of Directive 93/36, not Article 6 of Directive 92/50.

41) In order to determine whether the fact that a local authority entrusts the supply of products to a consortium in which it has a holding must give rise to a tendering procedure as provided for under Directive 93/36, it is necessary to consider whether the assignment of that task constitutes a public supply contract.

42) If that is the case, and if the estimated amount of the contract, without value added tax, is equal to or greater than ECU 200 000, Directive 93/36 will apply. Whether the supplier is or is not a contracting authority is not conclusive in this regard.

43) It should be pointed out that the only permitted exceptions to the application of Directive 93/36 are those which are exhaustively and expressly mentioned therein (see, with reference to Directive 77/62, Case C-71/92 Commission v Spain [1993] ECR I-5923, paragraph 10).

44) Directive 93/36 does not contain any provision comparable to Article 6 of Directive 92/50, which excludes from its scope public contracts awarded, under certain conditions, to contracting authorities.

45) It should also be noted that this finding does not affect the obligation on those contracting authorities to apply in turn the tendering procedures laid down in Directive 93/36.

46) In its capacity as a local authority, the Municipality of Viano is a contracting authority within the meaning of Article 1(b) of Directive 93/36. It is therefore a matter for the national court to ascertain whether the relationship between the Municipality of Viano and AGAC also meets the other conditions which Directive 93/36 lays down for a public supply contract.

47) That will, in accordance with Article 1(a) of Directive 93/36, be the case if the contract in question is a contract for pecuniary interest, concluded in writing, involving, inter alia, the purchase of products.

48) It is common ground in the present case that AGAC supplies products, namely fuel, to the Municipality of Viano in return for payment of a price.

49) As to whether there is a contract, the national court must determine whether there has been an agreement between two separate persons.

50) In that regard, in accordance with Article 1(a) of Directive 93/36, it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.

51) The answer to the question must therefore be that Directive 93/36 is applicable in the case where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority.

DECISION ON COSTS

Costs

52) The costs incurred by the Italian, Belgian, French and Austrian Governments 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.

OPERATIVE PART

On those grounds,

THE COURT

(Fifth Chamber), in answer to the question referred to it by the Tribunale Amministrativo Regionale per l'Emilia-Romagna by order of 10 March 1998, hereby rules: Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts is applicable in the case where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision- making, a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority.

DIRECTIVE 2014/24/EU ON PUBLIC PROCUREMENT

Article 12

Public contracts between entities within the public sector

1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.

2. Paragraph 1 also applies where a controlled legal person which is a contracting authority awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

3. A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled.

(a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;

(b) more than 80 % of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative

provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;

(ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

4. A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

(c) the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation.

5. For the determination of the percentage of activities referred to in point (b) of the first subparagraph of paragraph 1, point (b) of the first subparagraph of paragraph 3 and point (c) of paragraph 4, the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.

Where, because of the date on which the relevant legal person or contracting authority was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity based measure such as costs, are either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

DIRECTIVE 2014/25/EU ON PROCUREMENT BY ENTITIES OPERATING IN THE WATER, ENERGY, TRANSPORT AND POSTAL SERVICES SECTORS

Article 28

Contracts between contracting authorities

1. A contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority;

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.

2. Paragraph 1 also applies where a controlled person which is a contracting authority awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

3. A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a contract to that legal person without applying this Directive, where all of the following conditions are fulfilled:

(a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;

(b) more than 80 % of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

For the purposes of point (a) of the first subparagraph, contracting authorities shall be deemed to exercise joint control over a legal person where all of the following conditions are fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;

(ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

4. A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive, where all of the following conditions are met:

(a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

(c) the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation.

5. For the determination of the percentage of activities referred to in point (b) of the first subparagraph of paragraph 1, point (b) of the first subparagraph of paragraph 3 and point (c) of paragraph 4, the average total turnover, or an appropriate alternative activity based measure such as costs incurred by the relevant legal person with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.

Where, because of the date on which the relevant legal person was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity based measure such as costs, are either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

EU: CASE C-295/05

Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Another

(Case C-295/05)

Before the Court of Justice of the European Communities (Second Chamber)

19 April 2007

[2007] 2 C.M.L.R. 45

Presiding, Timmermans P.C.; Schintgen, Silva de Lapuerta, Arestis (Rapporteur) and Bay Larsen JJ.; Geelhoed A.G.

April 19, 2007

EC law; National legislation; Public companies; Public procurement; Tenders

H1 Public procurement— Directives 92/50 , 93/36 and 93/37 —national legislation enabling public undertaking to perform operations on direct instructions of public authorities—not being subject to general rules for award of public procurement contracts—ECJ procedure—reference for preliminary ruling—admissibility—guidance enabling national court to determine compatibility of national rules with Community law—necessity to provide factual and legal material for Court to give useful answer to questions referred—explanation of choice of Community provisions—link between those provisions and facts of case—Art.86(1) EC—absence of independent effect—scope of public procurement directives—contract for pecuniary interest—subordinate nature of public undertaking—not free to fix tariff for its actions—relationship with State not being contractual—exemption from compulsory call for tenders even where contracting party distinct legal entity from contracting authority—conditions—public authority to exercise over distinct entity control similar to that exercised over its own departments—distinct entity to carry out essential part of its activities with public authority or authorities controlling it.

H2 Reference from Spain by the Tribunal Supremo (Supreme Court) under Art.234 EC.

H3 A lodged a complaint against T, a State company providing essential services in the field of rural development and environmental protection under a separate legal regime, for a declaration that T was abusing its dominant position in the Spanish forestry works, services and projects market. It considered that T was carrying out a large number of works at the direct demand of the Administration, in breach of the principles relating to public procurement and to free competition. As a public undertaking for the purposes of Community law, T could not be entitled, under the pretext of being a technical service of the Administration, to privileged treatment in relation to the rules governing public procurement. The referring court held that T was an “instrument” of the Administration and that it confined itself to carrying out the instructions of the public authorities, without being able to refuse them or fix the price of its activities. However, it had doubts as regards the compatibility of T's legal status with Community law in the light of the application to public undertakings of the provisions of Community law relating to public procurement and free competition. The referring court therefore sought a preliminary ruling from the Court of Justice, in

essence asking: (a) whether, having regard to Art.86(1) EC, a Member State might confer on a public undertaking a legal regime enabling it to carry out operations without being subject to Council Directives 92/50 , 93/36 and 93/37 , or; (b) whether those directives precluded such a regime, and; (c) whether statements by the Court of Justice in Spain v Commission , finding T to be a means by which the Administration acted directly, remained applicable to T and its subsidiaries in the light of the facts in the case at issue.

Held:

Admissibility

H4 (a) Even though it was not for the Court to rule on the compatibility of national rules with the provisions of Community law in proceedings brought under Art.234 EC, since the interpretation of such rules was a matter for the national courts, the Court did have jurisdiction to supply the latter with all the guidance as to the interpretation of Community law necessary to enable them to rule on the compatibility of such rules with the provisions of Community law. [29]

Wilson (C-506/04) [2006] E.C.R. I-8613; [2007] 1 C.M.L.R. 7, followed.

H5 (b) A reference from a national court might be refused only if it was quite obvious that the interpretation of Community law sought bore no relation to the actual facts of the main action or to its purpose, or where the problem was hypothetical or the Court did not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. Furthermore, the need to provide an interpretation of Community law which would be of use to the national court made it necessary that the national court should define the factual and legislative context of the questions it was asking or, at the very least, explain the factual circumstances on which those questions were based. It was essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions which it required to be interpreted and on the link it established between those provisions and the national legislation applicable to the dispute. [31]–[33]

Asnef-Equifax and Administración del Estado (C-238/05) [2006] E.C.R. IA-11125; [2007] 4 C.M.L.R. 6 ; Nemec (C-205/05) [2007] 1 C.M.L.R. 29; Confederación Española de Empresarios de Estaciones de Servicio (C-217/05) [2007] 4 C.M.L.R. 5 ; Cipolla and Others (C 94 & 202/04) [2007] 4 C.M.L.R. 8, followed.

H6 (c) In the case at issue, while the Court could not itself rule on the compatibility of T's legal status with Community law, there was nothing to prevent it from providing the canons of construction of Community law which would enable the referring court itself to rule on the compatibility of T's legal status with Community law. The order for reference set out, briefly but precisely, the facts which gave rise to the main proceedings and the relevant provisions of the applicable national law in relation to the second and third questions, the reasons for which the national court requested the interpretation of the directives relating to public procurement, and the link between the relevant Community legislation and the national legislation applicable to the matter. However, the first question was concerned with whether the body of rules governing T was contrary to Art.86(1) EC. Article 86(1) EC had no independent effect: it had to be read in conjunction with the relevant rules of the Treaty, in casu, according to the referring court, Art.82 EC.

However, there was no precise information in the order for reference concerning the existence of a dominant position, its unlawful exploitation by T or the effect of such a position on trade between the Member States. The Court did not therefore have before it the factual and legal material necessary to give a useful answer to the first question. The first question had to be declared inadmissible, while the reference for a preliminary ruling was admissible in relation to the two other questions. [34]–[45]

Public procurement: contract for pecuniary interest

H7 (a) According to the definitions given in Art.1(a) of Directives 92/50, 93/36 and 93/37, a public service, supply or works contract assumed the existence of a contract for pecuniary interest in writing between, first, a service provider, a supplier or a contractor and, secondly, a contracting authority within the meaning of Art.1(b) of those directives. [48]

H8 (b) Under Spanish law, T was a State company the share capital of which might also be held by the Autonomous Communities. The relevant legislation stated that T was an instrument and a technical service of the General State Administration and of the administration of each of the Autonomous Communities concerned. T was required to carry out the orders given it by the General Administration of the State, the Autonomous Communities and the public bodies subject to them, in the areas covered by its company objects, and it was not entitled to fix freely the tariff for its actions. T's relations with those public bodies, inasmuch as that company was an instrument and a technical service of those bodies, were not contractual, but in every respect internal, dependent and subordinate. Being an instrument and technical service of the Spanish Administration, T was required to implement, itself or using its subsidiaries, only work entrusted to it by the General Administration of the State, the Autonomous Communities or the public bodies subject to them. If T had no choice, either as to the acceptance of a demand made by the competent authorities in question, or as to the tariff for its services, the requirement for the application of the directives concerned relating to the existence of a contract was not met. [49]–[54]

Spain v Commission (C-349/97) [2003] E.C.R. I-3851, followed.

Public procurement: conditions for exemption from requirement of call for tenders

H9 In any event, a call for tenders, under the directives relating to public procurement, was not compulsory, even if the contracting party was an entity legally distinct from the contracting authority, where two conditions were met. First, the public authority which was a contracting authority had to exercise over the distinct entity in question a control which was similar to that which it exercised over its own departments and, secondly, that entity should carry out the essential part of its activities with the local authority or authorities which controlled it. [55]

Teckal (C-107/98) [1999] E.C.R. I-8121; Stadt Halle and RPL Loclau (C-26/03) [2006] 1 C.M.L.R. 39; Commission v Spain (C-84/03) [2005] E.C.R. I-139 ; Commission v Austria (C-29/04) [2005] E.C.R. I-9705; [2006] 1 C.M.L.R. 40; Carbotermo and Consorzio Alisei (C-340/04) [2006] E.C.R. I-4137; [2006] 3 C.M.L.R. 7, followed .

Control of T by contracting authority

H10 As to the first of those conditions, the fact that the contracting authority held, alone or together with other public authorities, all of the share capital in a successful tenderer tended to indicate, generally, that that contracting authority exercised over that company a control similar to that which it exercised over its own departments. In the case at issue, 99 per cent of T's share capital was apparently held by the Spanish State itself and through a holding company and a guarantee fund, while four Autonomous Communities, each with one share, held 1 per cent of such capital. Under its governing legal regulations, T was apparently required to carry out the orders given it by the public authorities, including the Autonomous Communities. It also appeared that, as with the Spanish State, in the context of its activities with those Communities, as an instrument and technical service, T was not free to fix the tariff for its actions and that its relationships with them were not contractual. It therefore seemed that T could not be regarded as a third party in relation to the Autonomous Communities which held a part of its capital. [57]–[61]

Carbotermo and Consorzio Alisei (C-340/04) [2006] E.C.R. I-4137; [2006] 3 C.M.L.R. 7, followed.

Essential part of T's activities to be carried out with authority or authorities owning it

H11 Where several authorities controlled an undertaking, the second condition might be met if that undertaking carried out the essential part of its activities, not necessarily with any one of those authorities, but with all of those authorities together. In the case at issue, T carried out more than 55 per cent of its activities with the Autonomous Communities and nearly 35 per cent with the State. It thus appeared that the essential part of its activities was carried out with the public authorities and bodies which controlled it. [62]–[64]

Carbotermo and Consorzio Alisei (C-340/04) [2006] E.C.R. I-4137; [2006] 3 C.M.L.R. 7, followed.

H12 *Cases referred to in the judgment*:

1 Asnef-Equifax Servicios de Información sobre Solvencia y Crédito SL v Asociación de Usuarios de Servicios Bancarios (AUSBANC) (C-238/05) [2006] E.C.R. IA-11125; [2007] 4 C.M.L.R. 6

2 Bellio F.lli Srl v Prefettura di Treviso (C-286/02) [2004] E.C.R. I-3465; [2004] 3 C.M.L.R. 34

3 Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA (C-340/04) [2006] E.C.R. I-4137; [2006] 3 C.M.L.R. 7

4 Cipolla v Fazari (C 94 & 202/04) [2007] 4 C.M.L.R. 8

5 Commission of the European Communities v Austria (C-29/04) [2005] E.C.R. I-9705; [2006] 1 C.M.L.R. 40

6 Commission of the European Communities v Spain (C-84/03) [2005] E.C.R. I-139

7 Confederación Española de Empresarios de Estaciones de Servicio v Compania Española de Petroleos SA (C-217/05) [2007] 4 C.M.L.R. 5

8 Nemec v Caisse Régionale d'Assurance Maladie du Nord-Est (C-205/05) [2007] 1 C.M.L.R. 29

9 Ordine degli Architetti delle province di Milano e Lodi and Others v Comune di Milano and Others (C-399/98) [2001] E.C.R. I-5409

10 Spain v Commission of the European Communities (C-349/97) [2003] E.C.R. I-3851

11 Stadt Halle v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREALeuna (C-26/03) [2006] 1 C.M.L.R. 39

12 Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia (C-107/98) [1999] E.C.R. I-8121

13 Wilson v Ordre des Avocats du Barreau de Luxembourg (C-506/04) [2006] E.C.R. I-8613; [2007] 1 C.M.L.R. 7

H13 Further cases referred to by the Advocate General:

14 ARGE Gewasserschutz v Bundesministerium für Land- und Forstwirtschaft (C-94/99) [2000] E.C.R. I-11037; [2002] 3 C.M.L.R. 39

15 Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari (C-410/04) [2006] E.C.R. I-3303; [2006] 2 C.M.L.R. 63

16 Commission of the European Communities v Italy (C-283/99) [2001] E.C.R. I-4363

17 Consorzio Aziende Metano (CoNaMe) v Comune di Cingia de Botti (C-231/03) [2005] E.C.R. I-7287; [2006] 1 C.M.L.R. 2

18 Djabali v Caisse d'Allocations Familiales de l'Essonne (C-314/96) [1998] E.C.R. I-1149

19 Foglia v Novello (244/80) [1981] E.C.R. 3045; [1982] 1 C.M.L.R. 585

20 Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd (C-167/01) [2003] E.C.R. I-10155; [2005] 3 C.M.L.R. 34

21 Parking Brixen GmbH v Gemeinde Brixen (C-458/03) [2005] E.C.R. I-8612; [2006] 1 C.M.L.R. 3

22 Reyners v Belgium (2/74) [1974] E.C.R. 631; [1974] 2 C.M.L.R. 305

23 Rijksdienst voor Werknemerspensioenen v Vlaeminck (132/81) [1982] E.C.R. 2953; [1983] 3 C.M.L.R. 557

24 Siemens AG Osterreich and ARGE Telekom & Partner v Hauptverband der Österreichischen Sozialversicherungstrager (C-314/01) [2004] E.C.R. I-2549; [2004] 2 C.M.L.R. 27

H14 Legislation referred to by the Court:

EC Treaty, Arts 86(1), 234

Directive 92/50, Art.1(a)

Directive 93/36, Art.1(a)

Directive 93/37, Art.1(a)

H15 Representation

D.P. Thomas de Carranza y Méndez de Vigo , procuradora, and R. Vázquez del Rey Villanueva , abogado, for the Asociación Nacional de Empresas Forestales (Asemfo).

S. Ortiz Vaamonde and I. Pereña Pinedo , abogados, for Transformación Agraria SA (Tragsa).

F. Díez Moreno , acting as Agent, for the Spanish Government.

D. Kriaučiūnas , acting as Agent, for the Lithuanian Government.

X. Lewis and F. Castillo de la Torre, acting as Agents, for the Commission of the European Communities.

Opinion

I— Introduction

AG1 This case concerns the compatibility with Community law, and in particular with the Community directives governing the award of public contracts and with Arts 12, 43, 46 and 86(1) EC, of a national statutory regime for a public undertaking constituted under private law which, under that statutory regime, is an “instrument” or executive service of the public authorities, but which may also carry out work for public bodies other than those to which it is subject as an executive service, as well as for private undertakings and organisations. In addition, this legal person may be asked by the competent public authorities to provide services other than those included in its statutory remit.

AG2 Those questions have arisen in connection with a complaint by the Asociación Nacional de Empresas Forestales (hereinafter: ASEMFO) against Empresa de Transformación Agraria SA (hereinafter: TRAGSA), in which ASEMFO accused TRAGSA of infringing Spanish competition law by failing to comply with the public procurement procedures laid down in Spanish legislation, which constituted an abuse of its dominant position in the market for forestry works, services and projects. In considering ASEMFO's appeal against the decision of the Sala de lo Contencioso-Administrativo (Chamber for contentious administrative proceedings) of the Audiencia Nacional (National High Court), the Spanish Tribunal Supremo (Supreme Court) eventually decided that it needed to refer questions to the Court of Justice for a preliminary ruling.

II— Legal framework

A— National legislation

AG3 In order to have a clear understanding of the practical and legal implications of the questions referred to the Court, a more than usually detailed summary is needed of the extensive and complicated national legislation applicable to TRAGSA.

AG4 TRAGSA was set up on May 24, 1977 under Royal Decree 379/1977 of January 21, 1977, which authorised its constitution as a public undertaking. Its legal personality is regulated partly by the general

rules that apply to companies governed by private law, and partly by the general rules of law that apply for public undertakings. Its company objects were originally laid down in Art.2 of Royal Decree 379/1977, but were subsequently extended by Royal Decrees 424/1984 of February 8, 1984 and 1422/1985 of July 17, 1985. Today its principal activities involve the execution of various types of works, installations and studies, the provision of services and the preparation of plans and projects in the field of agriculture and forestry, the protection and improvement of the physical environment, fish-farming, fishing and nature conservation.

AG5 It is to be inferred from Art.88 of Spanish Law 66/97 of December 30, 1997 concerning fiscal, administrative and social measures that TRAGSA is a public company, as defined in Art.6(1)(a) of the General Budget Law, providing essential services in the field of rural development and environmental protection. It is “an instrument and technical service of the Administration” which is required to carry out, either itself or using its subsidiaries, any work entrusted to it by the general Administration of the State, the Autonomous Communities or the public bodies subject to them.

AG6 Ultimately, the legal regime for TRAGSA is set out in Royal Decree 371/1999 of May 5, 1999 laying down the regime governing the “Land Transformation Company PLC” (TRAGSA).

AG7 TRAGSA is required to carry out the works and activities entrusted to it by the Administration. That requirement specifically includes the work it is given as an executive organisation and technical service of the Administration in the areas covered by its company objects (Art.3(2) of Royal Decree 371/1999). In addition TRAGSA is required to give priority to urgent and exceptional work arising from natural disasters and similar events (Art.3(3) of the Decree). It cannot refuse the work entrusted to it or negotiate the deadline for completion, and must execute the works assigned in accordance with the instructions it is given (Art.5(3) of the Decree).

AG8 The Royal Decree classifies TRAGSA's relations with the central and decentralised public administrations as instrumental rather than contractual, and they are therefore, for all purposes, internal, dependent and (for TRAGSA) subordinate (Art.3(6) of the Decree).

AG9 Under the financial system to which TRAGSA is subject its work is paid according to a system of tariffs laid down in Art.4 of Royal Decree 371/1999. The tariffs are decided by a joint ministerial committee partly on the basis of information supplied by TRAGSA on its costs.

AG10 TRAGSA can call on the help of private undertakings in its activities (Art.5 of Royal Decree 371/1999). There are a number of restrictions on such co-operation with private contractors: the work may involve only the processing or manufacturing of movable property, the amounts for which such contracts may be concluded are limited, and the principles of prior public tender (publication and competition) must be observed in the selection of private partners.

AG11 It should also be pointed out here that TRAGSA can also operate as an undertaking company, even vis-à-vis the administration, without having to retain its capacity as an “executive organisation and technical service of the Administration”. In such cases its activities are governed, pursuant to Art.1 of Royal Decree 371/1999, by the rules which generally apply to commercial undertakings.

AG12 The administrative context in which TRAGSA operates changed significantly in the 1980s as a result of the entry into force of the Spanish Constitution of 1978 , when responsibility for agriculture and

environmental protection was transferred from the General State Administration to the Autonomous Communities or regions (hereinafter: the Autonomous Communities). The transfer of administrative powers also necessarily involved the transfer of the resources and instruments needed to enable those powers to be fully exercised. For that reason TRAGSA was placed at the disposal of the Autonomous Communities to enable them to exercise their powers even before the EC Treaty came into force for Spain.

AG13 The transfer of public powers with respect to TRAGSA from the General State Administration to the Autonomous Communities took the form of public law agreements which each of the communities concluded with TRAGSA, laying down the rules governing the use of TRAGSA as an “instrument” of the Autonomous Community concerned. Most of the Autonomous Communities concluded such agreements with TRAGSA, although only four became shareholders in it as a company.

AG14 Under the Spanish laws and regulations in force, however, an Autonomous Community does not need to become a shareholder in TRAGSA in order to use its services: TRAGSA operates as an “instrument” of the Autonomous Communities, so that as a rule it makes no difference whether they are shareholders or not. That is borne out by Law 66/97, which provides that the regions may, but need not, be shareholders in TRAGSA.

AG15 In order to assess the questions referred to the court it is also useful to reproduce a number of other sections of the Spanish legislation on public procurement, which determine the legal framework in which TRAGSA operated, and still operates, on the basis of its legal status as a public undertaking.

Article 60 of the Law on Public Procurement, as confirmed by Royal Decree 923/1965 of April 8, 1965, provides as follows:

“Only those works which are carried out in the following circumstances may be executed directly by the Administration:

1. Where the Administration has available plant, stocks, facilities or technical or industrial services suitable for the execution of the planned works, in which case use should usually be made of those resources.”

Article 153 of Law 13/1995 of May 18, 1995 on public procurement provides as follows:

“1. The Administration may carry out works using its own services and its own staff or material resources, or in cooperation with private undertakings, in the latter case on condition that the financial interest of the works in question is less than ESP 681,655,208, excluding VAT, where one of the following circumstances occurs:

(a) where the Administration has available plant, stocks, facilities or technical or industrial services suitable for the execution of the planned works, in which case use should usually be made of those resources.”

Article 152 of the Revised Text of the Law on Public Procurement, confirmed by Royal Decree 2/2000 of January 16, 2000, reads:

“The Administration may carry out works using its own services and its own staff or material resources, or in co-operation with private undertakings, in the latter case on condition that the amount of the works in

question is lower than EUR 5,923,624, the equivalent of 5,000,000 special drawing rights, where one of the following circumstances occurs:

(a) where the Administration has available plant, stocks, facilities or technical or industrial services suitable for the execution of the planned works, in which case use should usually be made of those resources."

Article 194 of the Law on Public Procurement provides that:

"The Administration may manufacture movable property using its own services and its own staff or material resources, or in co-operation with private undertakings, in the latter case on condition that the amount of the works in question is lower than the maximum amounts laid down in Article 177(2), where one of the following circumstances occurs:(a) where the Administration has available plant, stocks, facilities or technical or industrial services suitable for the execution of the planned works, in which case use should usually be made of that method of execution."

AG16 As the referring court explains, the legislation cited in the previous point summarises the various conditions on which the Administration itself is allowed to execute works directly, including the condition that it must have its own resources, as is the case with TRAGSA in its activities. That condition is not linked to any other more detailed requirement or circumstance, such as reasons of urgency or public interest, for instance. Those are covered by a separate provision: "in the case of the execution of works considered urgent according to the provisions of this Law". 5 Therefore, the Administration need only have its own services, like TRAGSA and its subsidiaries, to be able to entrust to them all types of work or works without any other requirement, the only restriction being the quantitative limit that applies if TRAGSA involves private parties in the execution of the services. It would then be a possibility, but not an obligation, for the Administration concerned.

AG17 Finally, I would point out that TRAGSA is itself a contracting authority. That is clear from Art.88(7) of Law 66/97, as amended by Law 53/2002.

B— Further details of TRAGSA's structure and activities

AG18 In its written observations the Commission provided a number of details about TRAGSA's structure and activities which shed light on the legal and administrative framework described above, and which may be relevant in assessing and answering the questions referred to the court.

AG19 At present the vast majority of the shares in TRAGSA—more than 99 per cent—are held directly or indirectly by the Spanish state. Four Autonomous Communities have an almost symbolic share, which combined accounts for less than 1 per cent of TRAGSA's share capital.

AG20 TRAGSA's activities have become considerably diversified over time. Apart from the more conventional activities such as designing and constructing infrastructure and other works needed to modernise agricultural production and livestock farming, technologies promoting efficient water use and activities protecting the physical and natural environment as well as the historical and cultural heritage of the countryside have become increasingly important. There are also activities promoting forestry, the protection of fish stocks and fish-farming.

AG21 TRAGSA is financed by the payments it receives for its work. In the 2004 financial year its turnover was €674 million, and its profits after deduction of corporation tax were €22.24 million.

AG22 More than half the turnover of TRAGSA and its subsidiaries 6 comes from work for the Autonomous Communities. That is logical, because the Autonomous Communities exercise most of the public powers in the areas in which this undertaking operates. Around 30 per cent of turnover comes from the Spanish State Administration, around 5 per cent from other public bodies, including local authorities, and 2 to 3.5 per cent from private undertakings.

AG23 The Commission asserts that it cannot tell from the figures available what proportion of the total turnover comes from TRAGSA's activities in its capacity as an “instrument and technical service” of the Administration.

AG24 In order to analyse the questions raised by the Tribunal Supremo more closely, I feel it useful at this stage to make the following points on the basis of the above observations:

—In its capacity as an executive organisation for—primarily—the Autonomous Communities, TRAGSA, as a legal entity, is almost entirely owned by the Spanish state, which holds more than 99 per cent of its share capital.

—As a constitutionally independent executive organisation TRAGSA is entirely subject, when providing services for the General State Administration and the Autonomous Communities, to the orders and instructions given by those administrations in the exercise of their public powers: it is required to accept the work entrusted to it and to carry it out in accordance with the specifications and time periods given and at the tariffs laid down by regulation.

—Under the Spanish legislation on public procurement it is entirely possible for TRAGSA to receive contracts from the General State Administration and the Autonomous Communities which have no connection with the exercise of public powers, duties and responsibilities, but which are entrusted to it solely because it is available as a technical service, and which are also carried out by private operators under normal market conditions.

—The system of statutory and administrative rules under which TRAGSA operates expressly and tacitly allows scope for activities other than those which it carries out as an executive organisation of the General State Administration and the Autonomous Communities. However, the extent of that scope cannot be accurately deduced from the information available, since TRAGSA carries out some of its activities through its subsidiaries.

III— Facts, procedure and the questions referred

AG25 On February 23, 1996, ASEMFO lodged a complaint with the Spanish Competition Authority, accusing TRAGSA of abusing its dominant position in the Spanish forestry (works, services and projects) market because its public clients did not comply with the award procedures laid down in Ley 13/1995 de Contratos de las Administraciones Publicas (Law 13/1995 on public procurement) of May 18, 1995, cited in point AG15 above.

According to ASEMFO the constitution governing TRAGSA's operations meant that it could carry out a wide range of works at the direct request of the central or decentralised authorities, without a prior invitation to tender. As a result, competition on the market for services and works in the areas of agriculture and forestry in Spain was eliminated.

AG26 In a decision of October 16, 1997, the Competition Authority dismissed the complaint. It ruled that in that particular case TRAGSA operated as an “instrument” or executive service of the Administration, without any independent decision-making powers, and was required to carry out the works entrusted to it itself. It was therefore a question of relations between contracting authority and contractor within the State Administration itself, and TRAGSA's operations had nothing to do with the market or the competition law applicable to private and public undertakings.

AG27 ASEMFO lodged an appeal against that decision before the Tribunal de Defensa de Competencia (Competition Court). By judgment of March 30, 1998, that court dismissed the appeal on the same grounds as the Competition Authority. It emphasised that the activities which TRAGSA carried out for the relevant authorities were to be seen as works carried out by those authorities themselves. Only when TRAGSA acted independently as a public undertaking could there be any question of a breach of competition law.

AG28 ASEMFO then appealed to the Sala de lo Contencioso-Administrativo (Chamber for contentious administrative proceedings) of the Audiencia Nacional (National High Court), which confirmed the Competition Court's decision in a judgment of September 26, 2001.

AG29 ASEMFO finally appealed to the Tribunal Supremo (Supreme Court), arguing that TRAGSA, in its capacity as a public undertaking, could not be regarded as an “instrument” or executive service of the Administration, to which the Community rules on public procurement did not apply, and that the legal regime applicable to TRAGSA, as laid down in art.88 of Law 66/1997 in particular, was not compatible with Community law.

AG30 The Supreme Court had a number of doubts about the compatibility of TRAGSA's legal regime with Community law.

AG31 It therefore felt it desirable to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Does Art. 86(1) EC permit a Member State to grant ex lege to a public undertaking a legal status which allows it to execute public works without being subject to the general rules on the award of public contracts by tender, where there are no special circumstances of urgency or public interest, both below and above the financial threshold laid down by the European Directives in this regard?

(2) Is such a legal regime compatible with the provisions of Council Directives 93/36 and 93/37, European Parliament and Council Directive 97/52 and Commission Directive 2001/78 amending the three previous directives—legislation recently recast in European Parliament and Council Directive 2004/18?

(3) Are the statements contained in the judgment of the Court of Justice of the European [Communities] of May 8, 2003 in Spain v Commission (C-349/97) [2003] E.C.R. I-3851 applicable in any event to TRAGSA and its subsidiaries, in the light of the rest of the case law of the European Court regarding public

procurement and in view of the fact that the Administration entrusts to TRAGSA a large number of works which are not subject to the rules governing free competition, and that this situation might cause considerable distortion of the relevant market?

A— Procedure before the court

AG32 ASEMFO, TRAGSA, the Spanish Government, the Lithuanian Government and the Commission have submitted written observations. At the hearing on June 15, 2006, TRAGSA, the Spanish Government and the Commission provided further information in support of their positions.

IV— Assessment

A— Preliminary remarks

AG33 TRAGSA, the Spanish Government and the Commission have all to some extent challenged the admissibility of the questions referred to the court for a preliminary ruling.

AG34 In my view, given the complexity of the factual and legal situation in Spain, it is not possible to examine the doubts raised concerning the relevance of the questions referred and whether they are necessary to the resolution of the dispute in the main proceedings until the substance of the questions has been addressed in the light of the court's existing case law.

AG35 For that reason I shall not examine the admissibility of the questions referred until the end of this opinion.

AG36 In all the written observations and also at the hearing detailed consideration was given to the court's judgments concerning the applicability of Community law to the award of public contracts for supplies and for the execution of works, and in the award of concessions by administrations, in cases where the public authority which is a contracting authority exercises over the contracting entity concerned a control which is similar to that which it exercises over its own departments and that entity carries out the essential part of its activities with the controlling public authority or authorities.

AG37 As the Commission rightly pointed out at the hearing, those judgments were delivered in cases where the contracting authorities awarded contracts for pecuniary interest for the supply of goods and/or services to entities over which they exercised more or less extensive control and which carried out most or a significant part of their activities with those authorities.

AG38 However, the factual and legal situation underlying the questions referred in this case differs in two respects from that of the judgment cited in point AG36 above:

—The Spanish State Administration and the Autonomous Communities are TRAGSA's contracting authorities in a strictly hierarchical sense, in that TRAGSA cannot refuse the work entrusted to it by the relevant authorities, is wholly bound by the instructions and specifications of those authorities and receives payment for its work which is calculated and determined by regulation. In short, even though its legal personality is governed partly by private and partly by public law, TRAGSA has to be characterised as an executive service of the Spanish State Administration and the Autonomous Communities. The contractual

element between the contracting authority and the contractor, which always existed in the cases in which the court delivered the judgments cited above, is entirely absent here.

—Although TRAGSA currently carries out the essential part of its activities with the Autonomous Communities, the assumption that it is controlled by these territorial entities is problematic, to say the least. Its status under public law is, as is clear from the above summary, entirely or almost entirely determined by Spain's state legislature, while only four of the 17 Autonomous Communities have shares in TRAGSA on a symbolic scale, together accounting for less than 1 per cent of the total share capital. It may be inferred from this that, as an executive organisation TRAGSA is indeed at the service of the Autonomous Communities, but not necessarily that it is controlled by them.

AG39 These differences suggest that the questions referred cannot automatically be answered on the basis of the court judgments cited, although they may, of course, provide significant guidance for interpreting the relevant rules of law by analogy.

AG40 Below I shall look first in broad terms at the possible questions of Community law that might arise in a legal and organisational context such as that in the main proceedings.

AG41 I shall then examine, as far as possible using the court's judgments cited earlier in point AG36, how the questions referred might be answered.

AG42 I will consider separately the relevance of Art.86(1) EC in the context of those questions.

AG43 Finally, I will briefly examine the question of admissibility.

B— The legal and organisational context

AG44 As I said earlier in point AG38 above, TRAGSA must be characterised as an “instrument” or executive service of Spain's State Administration and, perhaps, of the Autonomous Communities, and must, both as a result of its legal status and because of its ownership—with over 99 per cent of TRAGSA's shares owned directly or indirectly by the Spanish State Administration—be regarded as an entity entirely under the control of the Spanish State Administration.

AG45 The vast majority of its activities, as is clear from its statutory remit, concern work associated with structural improvements in Spanish agriculture and forestry, as well as fishing and fish-farming. Over time these activities have come to include environmental protection and work on maintaining the natural and cultural heritage of the countryside.

AG46 In additional to these “regular” activities, TRAGSA is also on stand-by to be called into action in exceptional circumstances, such as in the event of floods or other similar natural disasters. TRAGSA is also sometimes involved in implementing certain sections of the Common Agricultural Policy, as is clear from the court's judgment in Spain v Commission (C-349/97).

AG47 The vast majority of those activities must be regarded as practical work carried out as part of the exercise of public responsibility for agricultural structural development in the broad sense, and for the quality of the rural environment.

AG48 The nature of those activities and the public objectives pursued mean that they can be carried out both by the Administration's own services, by entities that are to some extent independent but under public control, and by private entities contracted by the authorities responsible.

AG49 In principle the Member States are free to decide how they organise the performance of activities for which they are publicly responsible, although the Court in the judgments cited earlier ruled that authorities may award public contracts and concessions to their own “instruments” without a prior competitive tendering procedure only on strict conditions.

AG50 As is clear from para.[48] of the judgment in Stadt Halle , the Court considers that in cases where a public authority which is a contracting authority has the possibility of performing the tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments, the Community rules in the field of public procurement do not apply. In such cases there can be no question of a contract for pecuniary interest concluded with an entity which is legally distinct from the contracting authority.

AG51 Such a situation appears also to occur in the relationship between the Spanish State Administration and TRAGSA. Whether that is also the case in the relationship between the Autonomous Communities and TRAGSA, which the Spanish Government and TRAGSA appear to take for granted, is one of the questions requiring further analysis at the very least. Can TRAGSA automatically be regarded as the Autonomous Communities' “own” technical or administrative resource, given that they cannot exercise any powers of control over that “resource” under national legislation, nor can they derive such powers from their ownership of shares in it?

AG52 Whatever the answer to that question may be, the issue of compatibility with primary Community law, and in particular Arts 12, 43 and 49 EC, must be assessed. That is, in my opinion, the implication of the recent judgments in Coname and Parking Brixen.

AG53 However, before I deal with the question OF whether the Spanish Autonomous Communities, as TRAGSA's principals, exercise actual control over that entity, I must first examine what relevance the answer to that question might have in the light of Arts 12, 43, 49 and, if appropriate, 86 EC.

AG54 It is apparent from what I said in point AG47 above that the vast majority of the actual activities which TRAGSA carries out for the Spanish State Administration do not include activities for the exercise of the Spanish state's official authority. The fact that those activities serve objectives of public policy and public responsibility does not in principle distinguish them from activities carried out by private undertakings contracted by the Administration, such as infrastructure construction works.

AG55 It follows from this that the first sentence of Art.45 EC in conjunction with Art.55 EC is not applicable. In so far as secondary Community law on public contracts does not apply to them, therefore, the compatibility of TRAGSA's operations with Arts 43, 49 and, if appropriate, 86 EC must be assessed.

AG56 Now, does the fact that the Spanish Autonomous Communities can in the broad sense “entrust” a considerable proportion of their agricultural structural improvement works to an executive organisation of the Spanish State Administration have actual or potential consequences for freedom of establishment and the free movement of services with in the Community?

AG57 The answer to that question clearly appears to be affirmative, since the result of this arrangement is that a large proportion of the activities in question, which might also be allocated to private operators, are thereby reserved for TRAGSA as the State Administration's executive organisation. The market for possible private candidates from elsewhere in the Community is then correspondingly restricted.

AG58 The fact that the services at issue here are entrusted by one authority (the Autonomous Community) to an executive service (TRAGSA) of another authority (the Spanish State Administration), and that not a single element of a contract for pecuniary interest is involved, does not alter the fact that this administrative arrangement has the same effect in economic terms as an arrangement in which one authority entrusts services under contracts for pecuniary interest to an entity which is under the control of another authority.

AG59 In both arrangements contracts for the supply of goods, services and public works are removed from competition, with real and potential consequences for the free movement of goods and services and freedom of establishment in the Community market. They should therefore be judged as far as possible by the same measure.

AG60 The same applies in respect of the requirement that the contracting authority must control the entity or service to which it entrusts works, whether or not by means of a contract for pecuniary interest.

AG61 In their written and oral statements TRAGSA and the Spanish Government have emphasised above all that TRAGSA is an “instrument” serving the Spanish State Administration and the Autonomous Communities. That does not alter the fact that TRAGSA is more than just an executive service for the Spanish state and the Autonomous Communities. It also acts as a contractor for local authorities, other public bodies and private parties. In that capacity it competes with other economic operators in order to win contracts.

AG62 The proportion of its total turnover accounted for by those contracts varies. Paragraph 34 of the Commission's written observations suggests that it fluctuates between 7 and 8.5 per cent. Paragraph 96 of TRAGSA's written observations quotes slightly different figures from the Commission's in that the data for two subsidiaries are given separately. In any event, the figures given by the Commission and TRAGSA are roughly of the same order of magnitude.

AG63 Whether it can automatically be concluded from these figures that TRAGSA carries out the essential part of its activities with the public authority that controls it—which is the view taken by the Spanish Government and TRAGSA itself—is doubtful.

AG64 First of all, it cannot be concluded from quantitative data for a small number of years that the proportion of the work carried out on a competitive basis for other public bodies and private parties rather than for the Spanish State Administration and the Autonomous Communities will remain less than 10 per cent of the total turnover. In the legal and administrative regime by which TRAGSA is governed there is, at any rate, no provision limiting the extent of such work.

AG65 Secondly, there is of course still the question of which authority controls TRAGSA. If it were solely the Spanish State Administration, from contracts with which TRAGSA generates around 30 per cent of its turnover, it would be difficult to argue that it carries out the essential part of its activities with its controlling authority.

AG66 However, there is a further complication that is legally relevant, to do with the hybrid nature of TRAGSA's legal personality.

AG67 If a legal entity carries out the essential part of its activities as the “own” executive service of one or more public authorities and a smaller proportion of its activities on a competitive basis for other public authorities and private clients, the question arises in what capacity it supplies the latter services.

AG68 Must TRAGSA be regarded for the smaller proportion as a legal entity which may be governed by a special constitution, but which competes on the same footing as other private candidates to win contracts from “other” public authorities and private parties?

AG69 Or does TRAGSA not rather remain an executive service of the public authorities with which it carries out the essential part of its activities, making its remaining capacity available on the market and thereby absorbing more of the remaining work on the market in the field of agricultural infrastructure and nature conservation?

AG70 This question is particularly important in that TRAGSA's statutory constitution does not appear to require a clear distinction to be drawn for legal and accounting purposes between the two capacities in which it can operate, or at least it does not contain any unambiguous safeguards against possible distortions of competition that could arise on the remaining market as a result of TRAGSA's hybrid nature.

AG71 Thus a situation could arise where private candidates for the type of contracts that TRAGSA carries out, which are already excluded from the arrangement in which TRAGSA works for the Spanish State Administration and the Autonomous Communities, also miss out on the remaining sub-markets (carrying out work for other public authorities and private parties) because TRAGSA starts from an advantageous competitive position as a result of being, if not the only, then at least a privileged candidate on the sizeable closed market for contracts from the State Administration and the Autonomous Communities.

AG72 The second Teckal criterion, that the entity, concession-holder or independent executive service concerned must carry out the essential part of its activities with its controlling public authority, is therefore not in itself sufficient to prevent real or potential obstacles to the free movement of goods and services and freedom of establishment, or to avoid possible distortion of competition. I shall come back to this later.

AG73 Finally, a further question arises concerning the provisions of arts 152 and 194 of the Revised Text of the Law on Public Procurement.

AG74 Under those provisions the Administration may carry out works or produce goods using its own services and its own staff or material resources. If the Administration has appropriate staff and material resources for the purpose, it is as a rule required to do so. If this method of execution is chosen, private undertakings may also be involved without a prior award procedure if the cost of the works in question is lower than a maximum of euro 5,923,624.

AG75 Those provisions do not make it a condition that the works in question must be executed or the goods in question produced within the framework of the statutory remit of the executing organisations and services involved.

AG76 It is naturally for the competent national court to interpret and apply this national legislation. That does not alter the fact, however, that the texts in question appear to create powers and obligations for the administrative authorities in Spain which may conflict with Community law.

AG77 The provisions of the Spanish legislation in question appear to mean that the various administrative authorities in Spain are freely able, or even in principle required, to use the capacity of their executive services to carry out works or to provide services for purposes other than the statutory duties of those executive services.

AG78 Where the execution, provision or production of the works, services or goods in question entails costs lower than the statutory maximum, the relevant services may also have recourse to private companies.

AG79 Without there being any need to interpret the relevant national legislation more closely, it may be concluded that it allows scope for national sub-markets for public contracts to be extensively protected or even shut off. The extent to which this may occur depends on the capacity which the relevant executive services have available. By increasing their capacity and improving their equipment and staffing, it is very easy to bring sizeable sub-markets for public contracts into the exclusive domain of the executive services of the authorities concerned.

AG80 The fact that private companies can also be involved in the execution of such contracts without a prior award procedure, provided that the costs associated with those contracts do not exceed a certain maximum, increases that risk still further.

AG81 The fact that TRAGSA is prohibited under Art.88(5) of Law 66/97 from tendering for public contracts from the Spanish State Administration and the Autonomous Communities does not alter the risks presented by the application of arts 152 and 194 of the Law on Public Procurement, since the purpose of those provisions is precisely to ensure that public contracts are generally not awarded publicly if they can be executed by departments of the Administration.

AG82 To summarise, the Spanish legislation in question here, in encouraging the Administration not to place public contracts through public award procedures even when that is not justified by the public interest, raises serious doubts as to its compatibility with the Community directives on public procurement. In addition, it accords a privileged position to the Administration's own executive services, which may be considered for public contracts that have no connection whatsoever with any legal or statutory duties. Even though they are de jure instruments of the Administration, they are placed de facto in the position of privileged market operators. The question is very much whether such an arrangement is consistent with the principle laid down in Art.86(1) EC, which prohibits such forms of unequal treatment.

AG83 Finally, with more direct reference to the legal and factual situation underlying the questions referred, the issue also arises whether the very possibility that TRAGSA may, under Art.152 of the Spanish Law on Public Procurement, be entrusted to carry out works and supply services outside its own remit, has implications for whether this public undertaking is still able to satisfy the second Teckal criterion, which is that it should carry out the essential part of its activities with the public authority that controls it.

C— Answers to the questions

Questions 1 and 2

AG84 As I observed earlier in points AG38 and AG44 of this opinion, the legal and factual situation in the main proceedings is not one in which a contracting public authority awards a contract for pecuniary interest to an independent entity over which the contracting authority exercises a control “which is similar to that which it exercises over its own departments”. In the present case TRAGSA, even though it has a separate legal personality, must be regarded as a “service” of the contracting authority. That follows unequivocally from the relevant Spanish legislation.

AG85 In Stadt Halle, the court specifically ruled that a public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. In such a case, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority. There is therefore no need to apply the Community rules in the field of public procurement.

AG86 In my view, it is apparent from the statutory regime that applies for TRAGSA that it must be regarded as an “instrument” or executive service of the Spanish State Administration, in any event. In so far as TRAGSA carries out, as part of its statutory remit, contracts awarded to it by the Spanish State Administration, the Community rules in the field of public procurement do not apply to it.

AG87 I infer from the court's judgments in Coname and Parking Brixen that where the relationship between a contracting public authority and an executive service or entity is not governed by the Community rules on public procurement, the general provisions of the Treaty, and in particular the provisions on fundamental freedom of movement and competition remain applicable.

AG88 Although the Community rules on public procurement do not apply where a public entity performs the tasks conferred on it in the public interest by using its own administrative, technical and other services, without calling on outside entities, if the entity in question exercises a control over those services which is similar to that which it exercises over its other internal departments, and if the services in question also carry out the essential part of their activities with the public entity that controls them. However, those two criteria—known as the Teckal criteria—constitute an exception. They must therefore be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying the derogation lies on the person seeking to rely on those circumstances.

AG89 It is apparent from these somewhat paraphrased considerations in Parking Brixen that it must also be examined whether the Teckal criteria can be invoked in respect of TRAGSA. That is a matter for the national court, which will have to investigate the legal and factual situation in which TRAGSA operates. The court can provide it with the necessary information which might help it to resolve the dispute in the main proceedings.

AG90 On second viewing there is no doubt that the relationship between the Spanish State Administration and the Autonomous Communities on the one hand and TRAGSA on the other satisfies the first Teckal criterion:

—all of the shares in TRAGSA are owned directly or indirectly by the Spanish State and the Autonomous Communities, albeit that only four regions hold shares on a symbolic scale;

—furthermore, the legal framework within which TRAGSA operates as an executive service of the Spanish State Administration and the Autonomous Communities for the purpose of agricultural structural policy in the broad sense, appears to indicate conclusively that it is operating in that capacity as an “instrument” of the public authorities concerned. I refer here in particular to my description of the legal framework in points AG4 to AG9 of this opinion.

AG91 In its more recent judgments the court has defined the first Teckal criterion in greater detail, so that in exercising a control “similar to that which it exercises over its own departments” it must be a case of “a power of decisive influence over both strategic objectives and significant decisions of that company”.

AG92 This more detailed criterion applies not just to the relationship between one public authority and its “own” executive service, but also where different public authorities, whether or not acting together, have a joint executive service.

AG93 It is not unusual for a number of public authorities to establish, for the execution of certain public tasks such as sewage treatment, a partnership which is responsible for managing a joint executive service. Where that joint executive service is constituted in the form of a separate company, the authorities concerned can exercise their “decisive influence over strategic objectives and significant decisions of that company” as shareholders and through representation on the company's board of directors.

AG94 Where the executive organisation is constituted as an “instrument” of the public authorities in the partnership, then by analogy with the requirements applied to control over a “shared” independent entity for the execution of public tasks, the control they exercise must be such as to ensure that all the public authorities involved have “influence over both strategic objectives and significant decisions” of that entity.

AG95 In fact, while they cannot influence the strategy and management of their own joint service, nor can the public authorities involved be called to account for their responsibility for that service's actions either. The same also applies to their responsibility for proper compliance with Community law.

AG96 The Commission is also right when it argues that arrangements in which a number of public authorities use an executive service that is constituted, in terms of power of influence over it, as the “instrument” of just one of them, are open to abuse. They can mean that public authorities call on—or are invited to call on—an existing executive service of another public authority to execute works and supply services for which they would otherwise have held a public award procedure. As I described in points AG57 to AG59 earlier, this can result in substantial sub-markets being removed from the operation of primary and secondary Community law on public procurement.

AG97 That leads me to conclude, provisionally, that in cases where an executive service acts as an “instrument” for various public authorities, the statutory regime that applies to it must ensure that all the contracting public authorities have effective influence over its strategic objectives and significant decisions. It must also specify for the exercise precisely which public responsibilities the public authorities in question can award contracts to the joint executive service as an “instrument”.

This is in order to restrict as far as possible the risk of abuse described in the previous point.

AG98 From the description of TRAGSA's statutory regime in points AG4 to AG9 above, it appears to be governed entirely or almost entirely by the laws and regulations of the Spanish State Administration. The tariffs for the work which TRAGSA carries out for the State Administration and the Autonomous Communities are also laid down by and come under the responsibility of the State Administration. The Autonomous Communities do not appear to have any direct influence. It is true, as TRAGSA and the Spanish Government have stressed, that the Autonomous Communities can bring their influence to bear through their contracts, but such control over the design and execution of individual works and projects—which is inherent in any contract which a public authority awards to one of its own services or to an external entity—is not the control intended by the court when it refers to “decisive influence over the strategic objectives and significant decisions” of, in this case, the Autonomous Communities' “own” executive service.

AG99 I would also point out, for the sake of completeness, that the lack of influence which the Autonomous Communities have on and under TRAGSA's statutory regime is by no means compensated for by the influence that they might bring to bear as shareholders in the company, given that only a small minority of the Autonomous Communities have a merely symbolic shareholding in TRAGSA.

AG100 The fact that the statutory regime which governs TRAGSA's operations does not give a clear, restrictive definition of the areas in which the Autonomous Communities can give TRAGSA work—the general legislation on award procedures in Spain discussed in points AG73 to AG83 earlier is relevant here—is a further indication that TRAGSA cannot be regarded as a joint executive service for the execution of restrictively defined works and services in the public interest. I have already described earlier the risks of abuse which such an open arrangement entails.

AG101 I therefore reach the conclusion that, operating under a statutory regime such as that in force, TRAGSA cannot be regarded as an “instrument” of the Autonomous Communities because they cannot exercise any control over TRAGSA's strategic and other significant decisions.

AG102 Since TRAGSA cannot be regarded as an instrument of the Autonomous Communities, the obvious implication is that it is wrong that the contracts given to TRAGSA by the Autonomous Communities should not be subject to a public award procedure.

AG103 The situation is, in principle, different for the tasks entrusted to TRAGSA by the Spanish State Administration, of which it can indeed be regarded as an instrument.

AG104 It is apparent from the analysis of the legal framework within which TRAGSA operates in points AG61 to AG65 of this opinion that that legal framework does not fulfil the requirements of the second Teckal criterion either.

AG105 The court ruled in Carbotermo that the requirement that the local authority must exercise over the person in question a control similar to that which it exercises over its own departments and that person must carry out the essential part of its activities with the controlling authority or authorities is aimed precisely at preventing distortions of competition.

AG106 Only where the person controlled carries out the essential part of its activities with the controlling authority or authorities alone can it be justified that that undertaking is not subject to the restrictions of the directives on public procurement, since they are in place to preserve a state of competition which, in that case, no longer has any raison d'être.

AG107 That implies that the person concerned can be viewed as carrying out the essential part of its activities with the controlling authority within the meaning of Teckal only if that undertaking's activities are devoted principally to that authority and any other activities are only of marginal significance.

AG108 I have established in points AG61 to AG65 that TRAGSA's activities with public authorities other than the Spanish State Administration and the Autonomous Communities and with private companies accounted for between 7 and 8.5 per cent of its total turnover in the last three years, and that the legal regime governing it does not place any restrictions on the scale of those activities.

AG109 Furthermore, if my argument that the Autonomous Communities cannot be regarded as controlling authorities in respect of TRAGSA is followed, it must then be concluded that the requirement that the essential part of the activities must be carried out with the controlling authority is not satisfied, given that the activities with the Autonomous Communities account for more than 50 per cent of TRAGSA's total turnover.

AG110 The condition that the essential part of the activities must be carried out with the controlling authority is a necessary requirement in order to prevent distortion of competition on the Community market, as the court recently emphasised in Carbotermo . However, that condition is not sufficient.

AG111 Even if TRAGSA did carry out the vast majority of its activities with the authority or authorities which control it, it would still be possible for it seriously to distort competition on sub-markets with its remaining activities. As I have already pointed out in points AG66 to AG72, as long as those activities are not kept completely separate in the organisation of this executive service, both for financial and accounting purposes and in terms of personnel and material resources, from the activities which it carries out as an executive service of one or more public authorities, it is in a position to use the advantages that it derives from its public status in competition with other operators in other sub-markets that are still open.

AG112 It is TRAGSA's hybrid nature as part internal executive service working for its controlling authority or the public authorities, and part entity competing for work from other public bodies such as local authorities and from private parties and companies, that demands a more detailed assessment of compatibility with Art.86(1) EC necessary.

AG113 In accordance with that provision, in the case of public undertakings Member States are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty, in particular to those rules provided for in Arts 12 and 81 to 89 .

AG114 Now, if an internal executive service of a public authority seeks work on open sub-markets without adequate and transparent measures being taken to prevent any financial material advantages which that service derives from the fact that it carries out the essential part of its activities as an executive organisation of a public authority from being exploited in the competition on those open sub-markets, then the specific requirements of Art. 86(1) EC are not satisfied.

AG115 That failure to take measures is contrary to Arts 43 and 49 EC in particular, since executive services of public authorities which also operate on open national markets can make it more difficult for potential candidates from other Member States to access those markets.

AG116 The risks which arise, in the light of the prohibition of state aid, from the absence of transparent financial or accounting relations between the state or other public authorities, on the one hand, and public undertakings and companies, on the other, have in the past led the Commission to introduce rules on the basis of Art.86(3) EC.

In the legal and factual situation that lies at the heart of the main proceedings those risks are at least just as great. The absence of any specific safeguards in the legal regime that applies to TRAGSA against open or covert forms of cross-financing between its activities as an executive service of the Administration and as an operator on open sub-markets therefore conflicts with Art.86(1) EC in conjunction with Arts 87 and 88 EC.

AG117 In points AG78 to AG83 above I have examined in detail the risks which the application of provisions such as Arts 152 and 194 of the Spanish Law on Public Procurement may present for the sound operation of Community law on public procurement and for the fundamental freedoms of movement and the state of competition on the Community market.

AG118 Those risks lie in the fact that, if executive services as “instruments” or independent entities which are fully controlled by the contracting authorities can also obtain, outside the scope of the competences or field of work laid down in their legal, administrative or private-law constitutional regime, contracts from the Administrations responsible for them for the provision of services, execution of works or production of goods, simply because they are available, the useful effect of the Community directives on public procurement may be seriously undermined or, where those directives are not applicable, serious obstacles may arise to the movement of goods and services between states and to freedom of establishment, and competition between those executive services or publicly controlled entities and private undertakings on the relevant markets may be seriously distorted. There is only one exception: where compelling public interest requirements provide justification for awarding work directly to an own executive organisation even if that work lies outside its legal or constitutional remit. Examples here would include natural disasters and similar exceptional circumstances, which may require the immediate involvement of all the resources which an administration has available.

AG119 It is precisely those consequences which the court sought to prevent with the second Teckal criterion. If that criterion is to be effective, it must be interpreted in such a way that it also prohibits the award to “own” executive services or publicly controlled entities of public contracts which lie outside their legal, administrative or constitutional remit.

AG120 Furthermore, the referring court has, in my view rightly, questioned the compatibility of provisions such as those of Arts 152 and 194 of the current Spanish Law on Public Procurement with Community competition law.

AG121 Such provisions clearly create a privileged position for own executive services or publicly controlled entities—acting as market operators outside their legal, administrative or constitutional remit—in the award of public contracts, and thus conflict with the provisions of Art.86(1) EC.

Question 3

AG122 The purpose of the Tribunal Supremo's third question is obviously to determine whether the court's judgment in Spain v Commission has implications for the assessment of TRAGSA's legal position in the award of public contracts.

AG123 In that judgment the court concluded that an organisation such as TRAGSA, which, despite its financial and accounting autonomy, is entirely subject to Spanish state control, must be regarded as one of the national administration's own official departments within the meaning of the first sub-paragraph of Art.3(5) of Regulation 154/75 .

AG124 As the Commission has rightly observed, that judgment of the court concerns TRAGSA's activities on behalf of the Spanish state in establishing a register of olive cultivation.

AG125 In answer to the Spanish Government's assertion that for the establishment of that register TRAGSA, as an independent entity, had been given a private contract because of the requirements of confidentiality which such an activity had to satisfy, the court ruled that TRAGSA had to be regarded as an own executive organisation forming part of the Administration, to which the case law developed in Teckal and ARGE applied in principle. The court took the view that this was confirmed by Art.88(4) of Law 66/97 of December 30, 1997, in which it is established that TRAGSA is required, as an instrument and technical service of the Administration, to carry out, either itself or using its subsidiaries, to the exclusion of third parties, any work entrusted to it by the General Administration of the State, the Autonomous Communities and the public bodies subject to them.

AG126 I would point out here that the judgment in Spain v Commission primarily concerned whether Spain was allowed to entrust to TRAGSA the establishment of the olive cultivation register without a public award procedure.

AG127 The court was not required on that occasion to consider questions such as those referred in the present case. For that reason that judgment cannot be interpreted as meaning that TRAGSA, as an executive service in the field of agricultural structural policy in the broad sense, must be regarded as an instrument of the general Spanish State Administration. That is consistent with my finding in point AG103 of this opinion.

D— Admissibility

AG128 In the analysis of the Tribunal Supremo 's first two questions it emerged that both the legal regime under which TRAGSA operates as an "instrument" for, among others, the Autonomous Communities, the authority which that entity has to carry out work for public authorities other than the State Administration and the Autonomous Communities and for private parties and companies, and the rules contained in Arts 152 and 194 of the current Spanish Law, may be criticised as being incompatible with the criteria which the court formulated in para.[50] of the judgment in Teckal .

AG129 That incompatibility has legal implications concerning the applicability of Community directives on public procurement, the supply of services and the execution of works. It may also lead to conflict with Arts 43, 49 and 86 EC.

AG130 The criticism spelled out above is also implied in the form of doubts in the order for reference.

AG131 The Tribunal Supremo makes its doubts particularly clear in paragraph “Four” of the reference order.

AG132 I am sure that the court's answers to the questions referred will, in the light of the doubts expressed, provide the referring court with useful guidance for its decision in the main proceedings.

AG133 The arguments put forward by TRAGSA and the Spanish Government that the legal questions raised by the referring court in its order for reference are “new”, not relevant in an appeals procedure and therefore hypothetical and inadmissible, are not at all convincing, in my view.

AG134 First, the court is usually extremely cautious in assessing the purpose and usefulness of the questions referred to it by the national courts in order to reach a decision in the main proceedings. Only where the questions are manifestly hypothetical in nature does the court deem them inadmissible.

AG135 From the description of the proceedings before various administrative and judicial authorities in Spain it appears that the legal regime under which TRAGSA operates has always been held to be compatible with the principles of national competition law. The fact that the Tribunal Supremo has also chosen to take account of the principles of Community law on public procurement and competition law is a step which does not in itself in any way render the resulting questions hypothetical.

AG136 Whether the Tribunal Supremo was authorised under Spanish law to take that step in the proceedings before it is a question which the Tribunal itself, as the highest national court in the present case, must and can answer.

AG137 Nor can I agree with the Commission's view that the factual and legal information provided in the order for reference is too concise. As has been made clear earlier, it provides sufficient information for a detailed analysis of the questions referred.

AG138 I have therefore come to the conclusion that the Tribunal Supremo 's questions are admissible.

V— Conclusion

AG139 On the basis of the foregoing findings I propose that the court give the following answers to the questions referred by the Tribunal Supremo:

—The Community directives on public contracts for the provision of goods and services and the execution of works do not, in principle, apply to a legal person governed by private law, such as TRAGSA, which under its legal regime must be regarded as an “instrument” of the Administration which is required to carry out the work it is given by the relevant public authorities without contracts for pecuniary interest.

—The national rules of law on the subject must ensure that the relevant national authorities control the entity concerned, in the sense that they have a decisive influence over both its strategic objectives and its significant decisions, and ensure that the entity at the same time carries out the essential part of its activities with the public authorities which control it, so that any other activity is marginal.

—The requirement that the relevant public authorities must be able to have a decisive influence over both the entity's strategic objectives and its significant decisions is not satisfied where the public authorities which use the entity as an executive service do not have a direct influence on the content of the legal regime that applies to it, or on the tariffs it may charge for its activities, and further as shareholders in the entity cannot exercise any decisive influence on its decisions.

—The requirement that the entity must carry out the essential part of its activities with the authorities that control it is not satisfied where the legal regime does not restrict the scale of the other activities so that they remain marginal.

—It follows from Art.86(1) EC that an entity which, for the essential part of its activities, acts as an executive service of the relevant public authorities must separate the activities which it carries out for other public authorities and for private persons in a transparent manner, both in terms of organisation and for financial and accounting purposes, from its activities as an instrument of the relevant public authorities.

—It follows from the same provision of the Treaty that national administrations may not entrust to a legal person operating as their own executive service contracts for the supply of goods and services or the execution of works, where those contracts have no connection with their public responsibilities or where the performance of those contracts falls outside the statutory remit of the legal person in question. The only exception is where there is objective justification for such work, such as in the case of natural disasters or similar exceptional circumstances.

—The national court must examine whether those conditions are satisfied in the legal and factual situation in the main proceedings.

Judgment

1 The reference for a preliminary ruling concerns the question of whether, having regard to Art.86(1) EC, a Member State may confer on a public undertaking a legal regime enabling it to carry out operations without being subject to Council Directives 92/50 relating to the co-ordination of procedures for the award of public service contracts ([1992] O.J. L209/1), 93/36 co-ordinating procedures for the award of public supply contracts ([1993] O.J. L199/1) and 93/37 concerning the co-ordination of procedures for the award of public works contracts ([1993] O.J. L199/54), and whether those directives preclude such a regime.

2 That reference was made in the course of proceedings between the Asociación Nacional de Empresas Forestales (National Association of Forestry Undertakings; hereinafter: Asemfo) and the Administración del Estado (State Administration) over a complaint about the legal regime of Transformación Agraria SA (hereinafter: Tragsa).

Legal background

Relevant provisions of Community law

3 Article 1 of Directive 92/50 stated:

“For the purposes of this Directive:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority …

…

(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 …”

4 Article 1 of Directive 93/36 provided:

“For the purposes of this Directive:

(a) ‘public supply contracts’ are contracts for pecuniary interest concluded in writing involving the purchase, lease rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations;

(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 …”

5 Article 1 of Directive 93/37 was worded as follows:

“For the purpose 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 …”

The relevant provisions of national law

Legislation on public procurement

6 Article 152 of Ley 13/1995 de Contratos de las Administraciones Públicas of May 18, 1995 (Law 13/1995 on Public Procurement) (BOE No.119 of May 19, 1995, p.14601), in its version codified by Real Decreto Legislativo 2/2000 of June 16, 2000 (BOE No.148 of June 21, 2000, p.21775), (hereinafter: Law 13/1995), states:

“1. The Administration may carry out works using its own services and its own human or material resources, or in co-operation with private contractors, provided, in the latter case, that the value of the works in question is lower than … where one of the following situations obtains:

(a) Where the Administration has at its disposal factories, stocks, workshops or technical or industrial services suitable for the execution of the projected works, use should usually be made of that method of execution …”

7 Article 194 of Law 13/1995 provides:

“1. The Administration may manufacture movable property using its own services and its own human or material resources or in co-operation with private contractors, provided, in the latter case, that the value of the works in question is lower than the maximum amounts laid down in Article 177(2) where one of the following situations obtains:

(a) Where the Administration has at its disposal factories, stocks, workshops or technical or industrial services suitable for the execution of the projected works, use should usually be made of that method of execution …”

The body of rules governing Tragsa

8 Tragsa's constitution was authorised by Art.1 of Decreto Real (Royal Decree) 379/1977 of January 21, 1977 (BOE No.65 of March 17, 1977, p.6202).

9 The body of rules governing Tragsa and established by that royal decree was successively amended until the adoption of Ley 66/1997 de Medidis Fiscales Adminstrativas y del Orden Social (Law 66/1997 concerning Fiscal, Administrative and Social Measures) of December 30, 1997 (BOE No.313 of December 31, 1997, p.38589), as amended by Ley 53/2002 of December 30, 2002 (BOE No.313 of December 31, 2002, p.46086), and Ley 62/2003 of December 30, 2003 (BOE No.313 of December 31, 2003, p.46874) (hereinafter: Law 66/1997).

10 Under Art.88 of Law 66/1997, entitled “Legal status”:

“1. [Tragsa] is a state company … which provides essential services in the field of rural development and environmental protection, in accordance with the provisions of the present law.

2. The Autonomous Communities may participate in the share capital of Tragsa by means of acquisitions of shares, the disposal of which requires authorisation by the Ministerio de Economía y Hacienda (Ministry of the Treasury), on the proposal of the Ministerio de Agricultura, Pesca y Alimentación (Ministry of Agriculture, Fisheries and Food) and of the Ministerio de Medio Ambiente (Ministry of the Environment).

3. Tragsa's objects are:

(a) The carrying out of all types of actions, works and supplies of services in respect of agriculture, stock-rearing, forestry, rural development, conservation and protection of nature and the environment, of aquaculture and fisheries, as well as the actions necessary for the improvement of the use and of the

management of natural resources, in particular, the carrying out of works of conservation and enrichment of the historic Spanish patrimony in the countryside …

(b) the preparation of studies plans and projects and of all types of advice and technical assistance and training in respect of agriculture, forestry, rural development, environmental protection and improvement, aquaculture and fisheries, nature conservation, as well as in respect of the use and management of natural resources;

(c) agricultural activities, stock-rearing, forestry and aquaculture and the marketing of the products thereof, administration and management of farms, mountains, agricultural, forestry environmental and nature protection centres and the management of open spaces and natural resources;

(d) the promotion, development and adaptation of new techniques, of new agricultural, forestry, environmental, aquacultural or fishery equipment and nature protection systems, and systems for the logical use of natural resources;

(e) the manufacture and marketing of movable goods of the same character;

(f) the prevention of and campaign against plant and animal disasters and diseases and against forest fires and the performance of works and tasks of emergency technical support;

(g) the financing of the construction or exploitation of agricultural and environmental infrastructures and of equipment for rural populations as well as the formation of companies and participation in companies already formed with purposes corresponding to the social objects of the undertaking;

(h) the execution, at the request of third parties, of actions, works, technical assistance, advice and supplies of rural, agricultural, forestry and environmental services within and outside the national territory, directly or through its subsidiaries.

4. As an instrument and technical service of the Administration, Tragsa shall be required to execute exclusively, by itself or through its subsidiaries, the works entrusted to it by the Administración General del Estado (General Administration of the State), the Autonomous Communities or the public bodies subject to them in matters which come within the company's objects and, in particular, those which are urgent or which are ordered because of declared emergencies.

…

5. Neither Tragsa nor its subsidiaries may participate in public procurement procedures put in place by the public authorities whose instrument they are. However, in the absence of any tenderer, Tragsa may be entrusted with the execution of the activity which is the subject of the public call for tenders.

6. The value of the major works, projects, studies and supplies undertaken by Tragsa shall be determined by applying to the stages carried out the corresponding tariffs, which must be determined by the competent authority. Those tariffs shall be calculated so as to reflect the actual costs of carrying out the works and their application to the stages carried out shall be sufficient evidence of the investment made or services rendered.

7. Contracts for works, supplies, advice and assistance and services which Tragsa and its subsidiaries conclude with third parties shall remain subject to the provisions of [Law 13/1995], as regards publicity, procurement procedures and the forms thereof, provided that the value of the contracts is equal or superior to those laid down in Articles 135(1), 177(2) and 203(2) of [that law].”

11 Decreto Real 371/1999 of March 5, 1999 laying down the rules governing Tragsa (BOE No.64 of March 16, 1999, p.10605; hereinafter: Royal Decree 371/1999) specifies the legal, financial and administrative rules governing that company and subsidiaries in their relations with the public authorities in respect of administrative action in or outside national territory, in their capacity as an instrument and technical service of those administrations.

12 Under Art.2 of Royal Decree 371/1999, Tragsa's entire share capital is to be held by persons governed by public law.

13 Article 3 of Royal Decree 371/1999, entitled “Legal status”, provides:

“1. Tragsa and its subsidiaries are an instrument and a technical service of the General Administration of the state and of those of each of the Autonomous Communities concerned.

The various departments or ministries of the Autonomous Communities of the aforementioned public administrations, as well as the bodies subject to them and the entities of any nature which are connected to them for the purposes of carrying out of their plans of action, may entrust Tragsa or its subsidiaries with works and activities necessary to the exercise of their powers and duties, and with complementary or ancillary works and activities in accordance with the regime established by this royal decree.

2. Tragsa and its subsidiaries shall be required to carry out the works and activities with which they are entrusted by the administration. That obligation covers, exclusively, the demands with which they are entrusted as an instrument and technical service in matters which come within its objects.

3. Emergency action decided upon in connection with catastrophes or disasters of any nature which is entrusted to them by the competent authority shall, for Tragsa and its subsidiaries, in addition to being obligatory, be a priority.

In emergencies, in which the public authorities must take immediate action, they shall be able to call directly on Tragsa and its subsidiaries and instruct them to take the action necessary to provide the most effective possible protection for persons and goods and the maintenance of services.

To that end, Tragsa and its subsidiaries shall be integrated into the present arrangements for the prevention of dangers and into action plans and shall be subject to implementing protocols. In that type of situation, they shall mobilise, on demand, all the means at their disposal.

4. In connection with their relationships of collaboration or co-operation with other authorities or bodies governed by public law, the public authorities may suggest the services of Tragsa and its subsidiaries, regarded as their instrument, in order that those other authorities or bodies governed by public law shall use them as their instrument …

5. … [T]he functions of organisation, supervision and control concerning Tragsa and its subsidiaries shall be exercised by the Ministerio de Agricultura, Pesca y Alimentación (Ministry of Agriculture, Fisheries and Food) as well as by the Ministerio de Medio Ambiente (Ministry of the Environment).

6. Tragsa's and its subsidiaries' relations with other authorities as an instrument and technical service are instrumental and not contractual in nature. Consequently, they are, in every respect, internal, dependent, and subordinate."

14 Article 4 of Royal Decree 371/1999, entitled "Financial structure", is worded as follows:

"1. In accordance with Article 3 of the present royal decree, Tragsa and its subsidiaries shall receive, in return for the works, technical assistance and advice, and for the supplies of goods and services with which they are entrusted, an amount corresponding to the expenses which they have incurred by applying the system of tariffs established by this article …

2. The tariffs shall be calculated and applied by stages of execution and in such a way as to reflect the total actual costs, be they direct or indirect, of executing them.

…

7. New tariffs, modification of existing tariffs and the procedures, mechanisms and formulae for revising them shall be adopted by each public authority of which Tragsa and its subsidiaries are an instrument and technical service …"

15 Finally, Art.5 of Royal Decree 371/1999, entitled "Administrative rules for action", provides:

"1. Mandatory action which is entrusted to Tragsa or its subsidiaries, shall form the subject, as appropriate, of drafts, memoranda or other technical documents …

2. Before finalising the demand, the competent organs shall approve those documents and follow the mandatory procedures and the technical, legal, budgetary, supervisory and approval formalities in respect of the expense.

3. The demand for each mandatory action shall be formally communicated by the authorities to Tragsa or its subsidiaries, by means of an instruction containing, in addition to the appropriate information, the name of the authority, the period within which the instruction is to be carried out, its value, the budgetary heading corresponding to it and, if appropriate, the annual amounts on which the financing is based and the respective amount relating to it, as well as the director designated for the action to be executed …"

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 The facts, as set forth in the order for reference, may be summarised as follows.

17 On February 23, 1996, Asemfo lodged a complaint against Tragsa for a declaration that Tragsa was abusing its dominant position in the Spanish forestry works, services and projects market because of non-compliance with the award procedures laid down in Law 13/1995. According to Asemfo, Tragsa's special status enabled it to carry out a large number of works at the direct demand of the Administration, in breach

of the principles relating to public procurement and to free competition, which eliminates any competition on the Spanish market. Being a public undertaking for the purposes of Community law, Tragsa could not be entitled, under the pretext of being a technical service of the Administration, to privileged treatment as regards the rules governing public procurement.

18 By decision of the competent authority of October 16, 1997, that complaint was rejected on the ground that Tragsa was a service of the Administration, without any independent decision-making powers and was required to carry out the works demanded of it. Tragsa operating outside the market, its activities do not, therefore, come under the law of competition.

19 Asemfo appealed against that decision before the Tribunal de Defensa de la Competencia (Competition Court). By judgment of March 30, 1998, that court dismissed the appeal, holding that the operations carried out by Tragsa were executed by the Administration itself and that, therefore, there could be no breach of competition law unless that company was acting independently.

20 Asemfo appealed to the Audiencia Nacional (National High Court) which, in its turn, by a judgment of September 26, 2001, upheld the judgment at first instance.

21 Asemfo appealed on a point of law against that judgment to the Tribunal Supremo (Supreme Court), arguing that Tragsa, as a public undertaking, could not be treated as a service of the Administration, which would enable it to derogate from the rules of public procurement, and that the company's legal status, as defined in Art.88 of Ley 66/1997 , could not be compatible with Community law.

22 Having held that Tragsa is an “instrument” of the Administration and that it confines itself to carrying out the instructions of the public authorities, without being able to refuse them or fix the price of its activities, the Tribunal Supremo has harboured doubts as regards the compatibility of Tragsa's legal status with Community law in the light of the court's case law on the application to public undertakings of the provisions of Community law relating to public procurement and free competition.

23 In addition, while recalling that, in Spain v Commission (C-349/97) [2003] E.C.R. I-3851 , the court held, in respect of Tragsa, that it must be regarded as a means by which the Administration acts directly, the referring court states that, in the case which is now before it, there are factual circumstances which were not considered in that judgment, such as the strong public participation on the agricultural works market, which causes it significant disruption, even if Tragsa's activities are, in law, unconnected to the market, inasmuch as from a legal point of view it is the Administration which acts.

24 Those were the circumstances in which the Tribunal Supremo decided to stay the proceedings and to refer the following questions to the court for a preliminary ruling:

“(1) Does Article 86(1) EC permit a Member State of the European Union to grant ex lege to a public undertaking a legal status which allows it to execute public works without being subject to the general rules on the award of public contracts by tender, where there are no special circumstances of urgency or public interest, both below and above the financial threshold laid down by the European Directives in this regard?

(2) Is such a legal regime compatible with the provisions of … Directives 93/36 … and 93/37 … European Parliament and Council Directive 97/52/EC of 13 October 1997 [(OJ 1997 L 328 , p.1)] and Commission

Directive 2001/78 [EC of 13 September 2001 (OJ 2001 L 285 , p.1)] amending the three previous directives-legislation recently recast by European Parliament and Council Directive 2004/18/EC of 31 March 2004 [on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134 , p.114)]?

(3) Are the statements contained in the judgment … in Spain v Commission applicable in any event to Tragsa and its subsidiaries, in the light of the rest of the case law of the court regarding public procurement and in view of the fact that the Administration entrusts to Tragsa a large number of works which are not subject to the rules governing free competition, and that this situation might cause considerable distortion of the relevant market?"

The questions referred for a preliminary ruling

Admissibility

25 Tragsa, the Spanish Government and the Commission of the European Communities challenge the court's jurisdiction to give a preliminary ruling on the reference and, relying on several arguments, cast doubt on the admissibility of the questions referred by the national court.

26 First of all, those questions relate only to the evaluation of national measures and, therefore, they do not come within the jurisdiction of the court.

27 Next, those questions are hypothetical inasmuch as they seek an answer to problems which are not relevant or germane to the outcome of the main proceedings. If the only relevant plea in law invoked by Asemfo were a breach of the rules concerning public procurement, such a breach cannot, by itself, found an allegation that Tragsa abuses a dominant position on the market. In addition, it does not seem that the court could be persuaded to interpret the directives relating to public procurement for the purposes of national proceedings intended to establish whether that company has abused an allegedly dominant position.

28 Finally, the order for reference contains no information relating to the relevant market or to Tragsa's allegedly dominant position upon it. Nor does it contain any detailed argument on the applicability of Art.86 EC and offers no comment on its application in conjunction with Art.82 EC.

29 It is appropriate in the first place to recall that, according to settled case law, even though it is true that it is not for the court to rule on the compatibility of national rules with the provisions of Community law in proceedings brought under Art.234 EC since the interpretation of such rules is a matter for the national courts, the court does have jurisdiction to supply the latter with all the guidance as to the interpretation of Community law necessary to enable them to rule on the compatibility of such rules with the provisions of Community law (Wilson (C-506/04) [2006] E.C.R. I-8613; [2007] 1 C.M.L.R. 7 at [34] & [35], and the case law there cited).

30 Secondly, under equally settled case law, in the context of the co-operation between the Court of Justice and the national courts provided for by Art.234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in

order to enable it to deliver judgment and the relevance of the questions which it submits to the court. Consequently, where questions submitted by national courts concern the interpretation of a provision of national law, the Court of Justice is bound, in principle, to give a ruling (see, in particular, Bellio F.lli (C-286/02) [2004] E.C.R. I-3465; [2004] 3 C.M.L.R. 34 at [27]; and Confederación Española de Empresarios de Estaciones de Servicio (C-217/05) [2007] 4 C.M.L.R. 5 at [16] & [17], and the case law there cited).

31 Thirdly, it is settled case law that a reference from a national court may be refused only if it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Asnef-Equifax and Administración del Estado (C-238/05) [2006] E.C.R. IA-11125; [2007] 4 C.M.L.R. 6 at [17], and the case law there cited).

32 Furthermore, the court has also held that the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (Nemec (C-205/05) [2007] 1 C.M.L.R. 29 at [25]; and Confederación Española de Empresarios de Estaciones de Servicio at [26], and the case law there cited).

33 In that regard, according to the case law of the court, it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and on the link it establishes between those provisions and the national legislation applicable to the dispute (Nemec at [26]; and Cipolla (C 94 & 202/04) [2007] 4 C.M.L.R. 8 at [38]).

34 In the case in the main proceedings, while it is admittedly true that the court cannot itself rule on the compatibility of Tragsa's legal status with Community law, there is nothing to prevent it from providing the canons of construction of Community law which will enable the referring court itself to rule on the compatibility of Tragsa's legal status with Community law.

35 In those circumstances, it is necessary to examine whether, in the light of the case law referred to in paras [31] to [33] of the present judgment, the court has before it the factual and legal material necessary to give a useful answer to the questions submitted to it.

36 As regards the second and third questions, it is important to point out that the order for reference sets out, briefly but precisely, the facts which gave rise to the main proceedings and the relevant provisions of the applicable national law.

37 Indeed, it is clear from that decision that those proceedings arose following a complaint lodged by Asemfo concerning Tragsa's legal status, since the latter can, according to Asemfo, carry out a large number of operations at the direct demand of the Administration, without compliance with the rules in respect of publicity set out in the directives relating to public procurement. In those proceedings, Asemfo maintains also that Tragsa, being a public undertaking, cannot be entitled, under the pretext of being a technical service of the Administration, to privileged treatment as regards the rules governing public procurement.

38 In addition, in connection with the second and third questions, the order for reference sets out, referring to the court's case law, first, the reasons for which the national court requests the interpretation of the directives relating to public procurement and, secondly, the link between the relevant Community legislation and the national legislation applicable to the matter.

39 As regards the first question, which concerns the point whether the body of rules governing Tragsa is contrary to Art.86(1) EC, it is appropriate to point out that, according to that article, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States are not to enact or maintain in force any measure contrary to the rules contained in the EC Treaty , in particular to those rules provided for in Arts 12 and 81 to 89 EC inclusive.

40 It follows from the clear terms of Art.86(1) EC that it has no independent effect in the sense that it must be read in conjunction with the relevant rules of the Treaty.

41 It follows from the order for reference that the relevant provision referred to by the national court is Art.86(1) EC in conjunction with Art.82 EC.

42 In that regard, there is no precise information in the order for reference concerning the existence of a dominant position, its unlawful exploitation by Tragsa or the effect of such a position on trade between the Member States.

43 In addition, it seems that, by the first question, the national court refers, in essence, to operations capable of being regarded as public contracts, a premise on which the court is, in any event, requested to rule in the second question.

44 It follows therefore from the foregoing that, in contrast to the second and third questions, the court does not have before it the factual and legal material necessary to give a useful answer to the first question.

45 It follows that, whilst the first question must be declared to be inadmissible, the reference for a preliminary ruling is admissible as regards the two other questions.

Substance

The second question

46 By its second question, the referring court asks the court whether a body of rules such as that governing Tragsa, which enables it to execute operations without being subject to the regime laid down by those directives, is contrary to Directives 93/36 and 93/37 .

47 At the outset, it must be stated that, notwithstanding the references made by the national court to Directives 97/52 , 2001/78 and 2004/18 , in view both of the context and of the date of the facts of the dispute in main proceedings and the nature of Tragsa's activities, as described in Art.88(3) of Ley 66/1997 , it is appropriate to examine that second question having regard to the rules set forth in the directives relating to public procurement, namely, Directives 92/50 , 93/36 and 93/37 , which are relevant in this case.

48 In that regard, it must be observed that, according to the definitions given in Art.1(a) of each of the directives mentioned in the preceding paragraph, a public service, supply or works contract assumes the

existence of a contract for pecuniary interest in writing between, first, a service provider, a supplier or a contractor and, secondly, a contracting authority within the meaning of Art.1(b) of those directives.

49 In this case it is appropriate to hold, first of all, that, under Art.88(1) and (2) of Ley 66/1997 Tragsa is a state company the share capital of which may also be held by the Autonomous Communities. Article 88(4) and the first sub-paragraph of Art.3(1) of Royal Decree 371/1999 state that Tragsa is an instrument and a technical service of the General State Administration and of the administration of each of the Autonomous Communities concerned.

50 Next, as is clear from Arts 3(2) to (5), and 4(1), (2) and (7) of Royal Decree 371/1999, Tragsa is required to carry out the orders given it by the General Administration of the State, the Autonomous Communities and the public bodies subject to them, in the areas covered by its company objects, and it is not entitled to fix freely the tariff for its actions.

51 Finally, under Art.3(6) of Royal Decree 371/1999, Tragsa's relations with those public bodies, inasmuch as that company is an instrument and a technical service of those bodies, are not contractual, but in every respect internal, dependent and subordinate.

52 Asemfo submits that the legal relationship which flows from the orders which Tragsa receives, even though it is formally unilateral, reveals in fact, as is clear from the court's case law, an indisputable contractual link with the limited partner. Asemfo refers, in that regard, to Ordine degli Architetti (C-399/98) [2001] E.C.R. I-5409 . In those circumstances even if Tragsa seems to act on the instructions of the public authorities, it is, in fact, a party contracting with the Administration, so that the rules for public procurement ought to be applied.

53 In that regard, it is appropriate to observe that, in para.[205] of the judgment in Spain v Commission , the court held, in a different context from that of the main proceedings, that being an instrument and technical service of the Spanish Administration, Tragsa is required to implement, itself or using its subsidiaries, only work entrusted to it by the General Administration of the State, the Autonomous Communities or the public bodies subject to them.

54 It must be observed that, if, which it is for the referring court to establish, Tragsa has no choice, either as to the acceptance of a demand made by the competent authorities in question, or as to the tariff for its services, the requirement for the application of the directives concerned relating to the existence of a contract is not met.

55 In any event, it is important to recall that, according to the court's settled case law, a call for tenders, under the directives relating to public procurement, is not compulsory, even if the contracting party is an entity legally distinct from the contracting authority, where two conditions are met. First, the public authority which is a contracting authority must exercise over the distinct entity in question a control which is similar to that which it exercises over its own departments and, secondly, that entity must carry out the essential part of its activities with the local authority or authorities which control it (see Teckal (C-107/98) [1999] E.C.R. I-8121 at [50]; Stadt Halleand RPL Loclau (C-26/03) [2006] 1 C.M.L.R. 39 at [49]; Commission v Spain (C-84/03) [2005] E.C.R. I-139 at [38]; Commission v Austria (C-29/04) [2005] E.C.R. I-9705; [2006] 1

C.M.L.R. 40 at [34]; and Carbotermo and Consorzio Alisei (C-340/04) [2006] E.C.R. I-4137; [2006] 3 C.M.L.R. 7 at [33]).

56 Accordingly, it is appropriate to examine whether the two conditions required by the case law cited in the preceding paragraph are met in Tragsa's case.

57 As regards the first condition, relating to the public authority's control, it follows from the court's case law that the fact that the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer tends to indicate, generally, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments (Carbotermo and Consorzio Alisei at [37]).

58 In the case in the main proceedings, it is clear from the case file, but subject to confirmation by the referring court, that 99 per cent of Tragsa's share capital is held by the Spanish state itself and through a holding company and a guarantee fund, and that four Autonomous Communities, each with one share, hold 1 per cent of such capital.

59 In that regard, the argument cannot be accepted that that condition is met only for contracts performed at the demand of the Spanish state, excluding those which are the subject of a demand from the Autonomous Communities as regards which Tragsa must be regarded as a third party.

60 It appears to follow from Art.88(4) of Ley 66/1997 and Arts 3(2) to (6) and 4(1) and (7) of Royal Decree 371/1999 that Tragsa is required to carry out the orders given it by the public authorities, including the Autonomous Communities. It also seems to follow from that national legislation that, as with the Spanish state, in the context of its activities with those Communities, as an instrument and technical service, Tragsa is not free to fix the tariff for its actions and that its relationships with them are not contractual.

61 It seems therefore that Tragsa cannot be regarded as a third party in relation to the Autonomous Communities which hold a part of its capital.

62 As regards the second condition, relating to the fact that the essential part of Tragsa's activities must be carried out with the authority or authorities which own it, it follows from the case law that, where several authorities control an undertaking, that condition may be met if that undertaking carries out the essential part of its activities, not necessarily with any one of those authorities, but with all of those authorities together (Carbotermo and Consorzio Alisei at [70]).

63 In the case in the main proceedings, as is clear from the case file, Tragsa carries out more than 55 per cent of its activities with the Autonomous Communities and nearly 35 per cent with the state. It thus appears that the essential part of its activities is carried out with the public authorities and bodies which control it.

64 In those circumstances, but subject to confirmation by the referring court, it must be held that the two conditions required by the case law cited in para.[55] of the present judgment are met in this case.

65 It follows from the entirety of the foregoing considerations that the reply to the second question must be that a body of rules such as that governing Tragsa which enables it, as a public undertaking acting as an

instrument and technical service of several public authorities, to execute operations without being subject to the regime laid down by those directives, is not contrary to Directives 92/50 , 93/36 and 93/37 , since first, the public authorities concerned exercise over that undertaking a control similar to that which they exercise over their own departments, and, secondly, such an undertaking carries out the essential part of its activities with those same authorities.

The third question

66 Having regard to the reply given to the second question referred by the national court, there is no need to reply to the third question.

Costs

67 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. Costs incurred in submitting observations to the court, other than the costs of those parties, are not recoverable.

Order

On those grounds, the court (Second Chamber)

Hereby Rules:

Council Directives 92/50 , 93/36 and 93/37 do not preclude a body of rules such as that governing Tragsa, which enables it, as a public undertaking acting as an instrument and technical service of several public authorities, to execute operations without being subject to the regime laid down by those directives, since, first, the public authorities concerned exercise over that undertaking a control similar to that which they exercise over their own departments, and, secondly, such an undertaking carries out the essential part of its activities with those same authorities.

LOCAL GOVERNMENT (SCOTLAND) ACT 1973

62A. — Incorporation of joint committees.

(1) Where—

(a) arrangements are made (whether under this Act or any other enactment) for two or more local authorities (in this Part of this Act referred to as “the relevant authorities”) to discharge any of their functions, or any functions in any area, jointly;

(b) the relevant authorities have—

(i) appointed, or propose to appoint, a joint committee to discharge those functions;

and

(ii) advertised their proposals in accordance with subsection (2) below; and

(c) application is made, in writing, to the Secretary of State by the relevant authorities for the incorporation of that joint committee (or proposed joint committee) as a joint board to carry out those functions, the Secretary of State may by order establish a joint board in accordance with this section to discharge those functions.

(2) Before applying to the Secretary of State under subsection (1)(c) above, the relevant authorities shall place in at least one daily newspaper circulating in their areas an advertisement—

(a) giving brief details of what they propose to do;

(b) giving an address to which representations about the proposal may be sent; and

(c) fixing a date, being not less than 8 weeks after the date on which the advertisement appears, within which representations may be made, and they shall include with their application evidence that an advertisement has been placed.

(3) Where any representations are timeously made in response to an advertisement placed in accordance with subsection (2) above, the relevant authorities shall consider them and shall include with their application a statement that they have done so.

(4) An order under subsection (1) above shall delegate to the joint board such of the functions of the relevant authorities as may be specified in the order and may include provision with respect to—

(a) the constitution and proceedings of the joint board;

(b) matters relating to the membership of the joint board;

(c) the transfer to the joint board of any property, rights and liabilities of the relevant authorities;

(d) the transfer to the joint board of any staff of the relevant authorities;

(e) the supply of services or facilities by the relevant authorities to the joint board, and may, without prejudice to the generality of paragraphs (a) to (e) above, apply (with or without modifications) any of the provisions of Part V of this Act to a joint board as those provisions apply to a joint committee.

(5) A joint board established under this section shall be a body corporate and shall have a common seal.

(6) An order under subsection (1) above shall be in terms agreed by the relevant authorities.

(7) An instrument containing an order under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

62B.— Power of Secretary of State to establish joint boards.

(1) Where the Secretary of State considers—

(a) that any functions, or any functions in any area, of the relevant authorities should be discharged jointly by those authorities; and

(b) that arrangements, or satisfactory arrangements, for the joint discharge of those functions—

(i) have not been made by the relevant authorities; or

(ii) have ceased to be in operation, he may, after consulting the relevant authorities, by order establish a joint board in accordance with this section.

(2) Subsections (4) and (5) of section 62A of this Act shall apply to a joint board established under this section as they apply to a joint board established under that section with the substitution of a reference to subsection (1) of this section for the reference to subsection (1) of that section.

(3) No order shall be made under subsection (1) above unless a draft of the instrument containing the order has been laid before, and approved by resolution of, each House of Parliament.

(b) for the dissolution of the joint board.

(2) An order shall not be made under subsection (1) above unless the Secretary of State has consulted the relevant authorities.

(3) An instrument containing an order under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(4) The power to make an order under this section or section 62A or 62B of this Act shall include power to make such transitional, incidental, supplemental or consequential provision as the Secretary of State thinks necessary or expedient.

(5) An order under this section or section 62A or 62B of this Act may, for the purpose of making such provision as is mentioned in subsection (4) above—

(a) apply with or without modifications;

(b) extend, exclude or amend; or

(c) repeal or revoke with or without savings, any enactment or any instrument made under any enactment

LOCAL GOVERNMENT (SCOTLAND) ACT 1973

57.— Appointment of committees.

(1) For the purpose of discharging any functions of a local authority in pursuance of arrangements made under section 56 of this Act—

(a) the authority may appoint a committee of the authority; or

(b) two or more local authorities may appoint a joint committee of those authorities; or

(c) any such committee may appoint one or more sub-committees.

(2) Subject to the provisions of this section, the number of members of a committee appointed under subsection (1) above, their term of office, and the area (if restricted) within which the committee are to exercise their authority, shall be fixed by the appointing authority or authorities or, in the case of a sub-committee, by the appointing committee.

(3) A committee appointed under subsection (1) above, other than a committee for regulating and controlling the finance of the local authority or of their area may, subject to section 59 below, include persons who are not members of the appointing authority or authorities or, in the case of a sub-committee, the authority or authorities of whom they are a sub-committee, but at least two-thirds of the members appointed to any such committee (other than a sub-committee) shall be members of that authority or those authorities, as the case may be.

(4) A local authority may appoint a committee, and two or more local authorities may join in appointing a committee, to advise the appointing authority or authorities on any matter relating to the discharge of their functions, and any such committee—

(a) may consist of such persons (whether members of the appointing authority or authorities or not) appointed for such term as may be determined by the appointing authority or authorities; and

(b) may appoint one or more sub-committees to advise the committee with respect to any such matter.

(5) Every member of a committee appointed under this section who at the time of his appointment was a member of the appointing authority or one of the appointing authorities shall, upon ceasing to be a member of that authority, also cease to be a member of the committee; but for the purposes of this section a member of a local authority shall not be deemed to have ceased to be a member of the authority by reason of retirement if he has been re-elected a member thereof not later than the day of his retirement.

EU: CASE C-480/06

Commission of the European Communities v Germany

(Case C-480/06)

Before the Court of Justice of the European Communities (Grand Chamber)

9 June 2009

[2010] 1 C.M.L.R. 32

Presiding, Skouris P. ; Jann , Timmermans , Lenaerts and Bonichot (Rapporteur) PP.C.; Borg Barthet , Malenovský , Klučka and Lõhmus JJ. ; Mazák A.G.

June 9, 2009

EC law; Failure to fulfil obligations; Germany; Invitations to tender; Public service contracts; Waste disposal

H1 *Public service contracts—absence of formal European tendering procedure for award of waste treatment services—scope of Directive 92/50—service provider as public entity distinct from beneficiary of services—absence of control over that entity—cooperation between local authorities—joint conduct of public service tasks—provision of waste treatment facility under most favourable possible economic conditions—no Community law requirement that co-operation between public authorities take any specific form—co-operation not undermining principal objective of public procurement rules—principle of equal treatment respected—action dismissed.*

H2 Action under art.226 EC.

H3 Four *Landkreise* in Lower Saxony concluded a contract with the City of Hamburg Cleansing Department (SH) relating to the disposal of their waste in a new incineration facility. That contract was concluded directly between the four *Landkreise* and SH without there having been a call for tenders in the context of a formal tendering procedure at European Community level for that services contract. Following the procedure required by art.226 EC, the Commission sought a declaration from the Court that Germany had failed to fulfil its obligations under the combined provisions of art.8 and Titles III to VI of Directive 92/50 on the co-ordination of procedures for the award of public service contracts (the Directive).

Held:

Scope of Directive 92/50

H4 (a) Pursuant to art.1(a) of the Directive, public service contracts were contracts for pecuniary interest concluded in writing between a service provider and one of the contracting authorities listed in art.1(b) of the Directive, which included regional or local authorities such as the *Landkreise* concerned. Furthermore, under art.1(c) of that Directive, the service provider party to the contract might be “any natural or legal person, including a public body”. Thus, the fact that the service provider was a public entity distinct from the beneficiary of the services did not preclude the application of the Directive. However, a call for tenders was not mandatory where a public authority which was a contracting authority exercised over the separate

entity concerned control similar to that which it exercised over its own departments, provided that that entity carried out the essential part of its activity with the public authority or with other controlling local or regional authorities. [32]–[33]

Commission of the European Communities v Spain (C-84/03) [2005] E.C.R. I-139 ; *Teckal Srl v Comune di Viano (Reggio Emilia) (C-107/98) [1999] E.C.R. I-8121*; *Stadt Halle v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna (C-26/03) [2005] E.C.R. I-1; [2006] 1 C.M.L.R. 39* , followed.

H5 (b) The delegation by a municipality of a public service to an inter-municipal co-operative the object of which was exclusively to provide services to the affiliated municipalities could legally take place without a call for tenders, since, notwithstanding the autonomous aspects of that co-operative's management by its board, the affiliated municipalities had to be regarded as together exercising control over it. [35]

Coditel Brabant SA v Commune d'Uccle (C-324/07) [2008] E.C.R. I- 8457; [2009] 1 C.M.L.R. 29, followed.

Compatibility of contract with Directive 92/50

H6 (a) The four *Landkreise* concerned did not exercise any control which could be described as similar to that which they exercised over their own departments, whether over the other contracting party or over the operator of the waste incineration facility. Nevertheless, the contract at issue established co-operation between local authorities with the aim of ensuring that a public task they all had to perform, namely waste disposal, was carried out. That task related to the implementation of Directive 75/442 on waste, and sought to ensure that waste was treated in the nearest possible installation in conformity with art.5(2) of Directive 91/156 . Furthermore, the contract between SH and the *Landkreise* concerned should be analysed as the culmination of a process of inter-municipal co-operation between the parties thereto. The purpose of the contract was to enable the City of Hamburg to build and operate a waste treatment facility under the most favourable economic conditions owing to the waste contributions from the neighbouring *Landkreise* . The commitment of the *Landkreise* was essential to that project. [36]–[38]

H7 (b) The contract in question formed both the basis and the legal framework for the future construction and operation of a facility intended to perform a public service. That contract was concluded solely by public authorities, without the participation of any private party, and did not provide for or prejudice the award of any contracts that might be necessary in respect of the construction and operation of the waste treatment facility. [44]

H8 (c) A public authority had the possibility of performing the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities not forming part of its own departments, and it might do so in co-operation with other public authorities. Community law did not require public authorities to use any particular legal form in order jointly to carry out their public service tasks. Moreover, such co-operation between public authorities did not undermine the principal objective of the Community rules on public procurement, that was, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation was governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle

of equal treatment of the persons concerned, referred to in Directive 92/50 , was respected, so that no private undertaking was placed in a position of advantage vis-à-vis competitors. [45]–[47]

Coditel Brabant SA v Commune d'Uccle (C-324/07) [2008] E.C.R. I- 8457; [2009] 1 C.M.L.R. 29; *Stadt Halle v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna (C-26/03) [2005] E.C.R. I-1; [2006] 1 C.M.L.R. 39*, followed.

H9 Cases referred to in the judgment:

- (a) *Asociacion Nacional de Empresas Forestales (ASEMFO) v Transformacion Agraria SA (TRAGSA) (C-295/05) [2007] E.C.R. I-2999; [2007] 2 C.M.L.R. 45*
- (b) *Coditel Brabant SA v Commune d'Uccle (C-324/07) [2008] E.C.R. I- 8457; [2009] 1 C.M.L.R. 29*
- (c) Commission of the European Communities v Spain (C-84/03) [2005] E.C.R. I-139
- (d) *R. (on the application of University of Cambridge) v HM Treasury (C-380/98) [2000] E.C.R. I-8035; [2000] 3 C.M.L.R. 1359*
- (e) *Stadt Halle v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna (C-26/03) [2005] E.C.R. I-1; [2006] 1 C.M.L.R. 39*
- (f) *Teckal Srl v Comune di Viano (Reggio Emilia) (C-107/98) [1999] E.C.R. I-8121*

H10 Further cases referred to by the Advocate General:

- (a) *Carbotermo SpA v Comune di Busto Arsizio (C-340/04) [2006] E.C.R. I-4137; [2006] 3 C.M.L.R. 7*
- (b) Commission of the European Communities v France (C-159/94) [1997] E.C.R. I-5815
- (c) Commission of the European Communities v Germany (C-126/03) [2004] E.C.R. I-11197
- (d) Commission of the European Communities v Germany (C-20/01 & C-28/01) [2003] E.C.R. I-3609
- (e) Commission of the European Communities v Greece (C-394/02) [2005] E.C.R. I-4713
- (f) Commission of the European Communities v Italy (C-337/05) [2008] E.C.R. I-2173
- (g) Commission of the European Communities v Italy (C-371/05) [2008] E.C.R. I-110
- (h) Commission of the European Communities v Spain (C-84/03) [2005] E.C.R. I-139
- (i) *Concordia Bus Finland Oy AB (formerly Stagecoach Finland Oy AB) v Helsingin Kaupunki (C-513/99) [2002] E.C.R. I-7213; [2003] 3 C.M.L.R. 20*

- (j) *GT-Link A/S v De Danske Statsbaner (DSB) (C-242/95) [1997] E.C.R. I-4449; [1997] 5 C.M.L.R. 601*
- (k) *International Mail Spain SL v Administracion del Estado (C-162/06) [2007] E.C.R. I-9911; [2008] 4 C.M.L.R. 1*
- (l) *Mannesmann Anlagenbau Austria AG v Strohal Rotationsdruck GmbH (C-44/96) [1998] E.C.R. I-73; [1998] 2 C.M.L.R. 805*
- (m) *Parking Brixen GmbH v Gemeinde Brixen (C-458/03) [2005] E.C.R. I-8612; [2006] 1 C.M.L.R. 3*
- (n) *TNT Traco SpA v Poste Italiane SpA (C-340/99) [2001] E.C.R. I-4109; [2003] 4 C.M.L.R. 13*

H11 Legislation referred to by the court:

- Directive 92/50, art.1

H12 Representation

- X. Lewis and B. Schima , acting as Agents, for the Commission of the European Communities .
- M. Lumma and C. Schulze-Bahr , acting as Agents, and by C. von Donat , Rechtsanwalt , for the Federal Republic of Germany .
- C.M. Wissels and Y. de Vries , acting as Agents, for the Kingdom of the Netherlands .
- J. Heliskoski , acting as Agent, for the Republic of Finland .

OPINION

Introduction

AG1 In this case, brought under art.226 EC , the Commission of the European Communities is asking the Court to declare that the Federal Republic of Germany has failed to fulfil its obligations under the combined provisions of art.8 and Titles III–VI of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, on the ground that the *Landkreise* (administrative districts) Harburg, Rotenburg (Wümme), Soltau-Fallingbostel and Stade directly concluded with the refuse collection services of the City of Hamburg a contract for waste disposal without there having been a call for tenders in the context of an open or restricted tendering procedure at Community level for that services contract.

AG2 The rules on procedures for the award of public service contracts introduced by Directive 92/50 constitute one of the measures intended to establish the internal market by contributing to the removal of barriers to the freedom to provide services. It cannot be denied that they constitute measures which benefit both providers of services and their recipients.

AG3 In the present case, refuse disposal is a service the recipients of which are four administrative districts. In reality, the number of recipients is much greater. The administrative districts in fact are only

intermediaries for their inhabitants who are the final recipients of that service. It is worth pointing out that, should it become apparent that a service provider had been chosen contrary to the requirements of Community law, it is those inhabitants whose interests would be harmed most.

I— Legal context

AG4 Pursuant to art.1(a) of Directive 92/50 , "public service contracts" are contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of the contracts listed in paras (i)–(ix) of that provision.

AG5 Article 1(b) of Directive 92/50 provides:

'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.
- …"

AG6 Under art.1(c) of Directive 92/50, a "service provider" means any natural or legal person, including a public body, which offers services.

AG7 Under art.8 of Directive 92/50, contracts which have as their object services listed in Annex IA are to be awarded in accordance with the provisions of Titles III–VI of that directive. Annex IA covers, under category No 16 "sewage and refuse disposal services; sanitation and similar services".

AG8 The structure of art.11 of Directive 92/50 shows clearly that contracting authorities are to award their service contracts using the open procedure or the restricted procedure, apart from in the cases set out in paras 2 and 3 of that article, where contracting authorities may award their public service contracts either by negotiated procedure, with prior publication of a contract notice (the case referred to in para.2) or a negotiated procedure without prior publication of a contract notice (the case referred to in para.3).

AG9 Under art.11(3)(b) of Directive 92/50 , contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice where, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider.

II— Facts

AG10 The Commission's action concerns a contract concluded between the administrative districts of Harburg, Rotenburg (Wümme), Sotau-Fallingbostel and Stade ("the districts") on the one hand and the City of Hamburg refuse disposal services on the other ("the contract in dispute").

AG11 The districts and the City of Hamburg refuse disposal services are bodies governed by public law responsible for waste disposal.

AG12 The Land of Lower Saxony, in which the districts are situated, the Land of Schleswig-Holstein and the Free and Hanseatic City of Hamburg make up the Hamburg Metropolitan Region.

AG13 The contract in dispute was concluded on December 18, 1995 directly, without an open or restricted tendering procedure at Community level. It is apparent from the preamble to the contract that the refuse disposal services of the City of Hamburg offered the districts, by letter of November 30, 1994, a partial capacity of 120,000 tonnes per year of the total annual capacity of the waste incineration plant at Rugenberger Damm ("the Rugenberger Damm plant") and the districts accepted that offer by letter of January 6, 1995.

AG14 In the contract in dispute, the City of Hamburg refuse disposal services agreed to make available to the districts a capacity of 120,000 tonnes per year for the purpose of the incineration of waste in the Rugenberger Damm plant and the districts agreed to pay the City of Hamburg refuse disposal services an annual fee, part of which was fixed and part of which depended on the amount delivered.

AG15 The contract in dispute provided that its duration was to be 20 years from April 15, 1999 since, at the time the contract was concluded, work on the Rugenberger Damm plant was at the planning stage.

III— Pre-litigation procedure and procedure before the Court

AG16 The Commission decided to act following a complaint from a citizen who considered that he was paying excessive charges for waste management.

AG17 Since it took the view that, by directly concluding a contract for waste disposal in which the contracting parties were the districts and the City of Hamburg refuse disposal services without a call for tenders or tendering procedure at Community level, the Federal Republic of Germany might have infringed the combined provisions of art.8 and Titles III–VI of Directive 92/50 , the Commission, on March 30, 2004, sent a letter of formal notice to the Federal Republic of Germany pursuant to art.226 EC .

AG18 The Federal Republic of Germany replied by letter of June 30, 2004. It stated that, from its perspective, the contract in dispute was an agreement on the shared performance of a public service which was the responsibility of the districts and the City of Hamburg and that it was a question of cooperation at local district level.

AG19 Being dissatisfied with the comments of the Federal Republic of Germany, the Commission sent it a reasoned opinion dated December 22, 2004 in which it declared that the contract in dispute fell within the scope of Directive 92/50 and that, consequently, the direct conclusion of the contract between the districts and the City of Hamburg refuse disposal services had infringed that directive.

AG20 Notwithstanding the arguments set out by the Federal Republic of Germany in its answer to the reasoned opinion of April 25, 2005, the Commission brought the present action, by which it asked the Court to declare that the Federal Republic of Germany had failed to fulfil its obligations under the combined provisions of art.8 and Titles III–VI of Directive 92/50 and to order the Federal Republic of Germany to pay the costs.

AG21 On the basis of arguments set out in its defence and rejoinder, the Federal Republic of Germany requested the Court to dismiss the action and to order the applicant to pay the costs.

AG22 By order of the President of the Court of June 14, 2007, the Kingdom of the Netherlands and the Republic of Finland were given leave to intervene in this case in support of the form of order sought by the Federal Republic of Germany. However, the Republic of Finland has not lodged a statement in intervention.

AG23 The Federal Republic of Germany requested a hearing. That hearing took place on November 11, 2008 in the presence of the agents of the Federal Republic of Germany and of the Commission.

IV— Analysis

AG24 In its application, the Commission starts from the hypothesis that the districts are contracting authorities within the meaning of art.1(b) of Directive 92/50 , that the City of Hamburg refuse disposal services are service providers for the purposes of art.1(c) of Directive 92/50 and that the contract in dispute concluded between the districts and the City of Hamburg refuse disposal services is a public service contract for the purposes of art.1(a) of Directive 92/50 . Since the object of the contract in dispute is a service listed in Annex IA to Directive 92/50 and that it is not one of the cases which would warrant the award of that contract using the negotiated procedure with prior publication of a contract notice (art.11(2) of Directive 92/50) or use of the negotiated procedure without prior publication of a contract notice (art.11(3) of Directive 92/50), the contract in dispute could only have been concluded by using, as appropriate, the open procedure or the restricted procedure, in accordance with art.11(4) of Directive 92/50.

AG25 I intend to examine the merits of the Commission’s complaint in the light of the arguments put forward by the Federal Republic of Germany, in which it does not deny that the contract in dispute was not the subject of a call for tenders, but seeks to establish that the districts were not obliged to issue a call for tenders for the purposes of concluding the contract in dispute, on four grounds.

AG26 First, the contract in dispute is an example of cooperation between State bodies and, thus, concerns only internal relationships of the organisation of the State in the performance of public tasks. It follows that it does not fall under Directive 92/50 . Secondly, the contract in dispute does not constitute a contract within the meaning of art.1(a) of that directive. Thirdly, even if the contract at issue should be regarded as a contract for the purposes of Directive 92/50 , there is a technical reason, within the meaning of art.11(3)(b) thereof, on the grounds of which the contract could have been concluded using a negotiated procedure without prior publication of a contract notice. Fourthly, in accordance with art.86(2) EC , it was not necessary to initiate an open or restricted procedure, given that such a procedure would have prevented the districts and City of Hamburg refuse disposal services from carrying out their duties.

A— Scope of Directive 92/50

AG27 In defence of its position, the Federal Republic of Germany submits that the contract in dispute was a transaction internal to the State which, as a general rule, does not fall within the scope of Directive 92/50 . It submits, like the Netherlands Government, that that directive concerns the award of tenders to undertakings and applies only where the State has decided that it does not want to carry out a task itself but to procure the corresponding service on the market**.**

AG28 In this connection, the Court has held that the directives on public procurement are, in general, applicable in the case where a contracting authority plans to conclude a contract for pecuniary interest with an entity which is legally distinct from it, whether or not that entity is itself a contracting authority. Likewise, that directive applies both where a contract is awarded for the purposes of fulfilling the task of meeting needs in the general interest and where it is unrelated to that task.

AG29 However, according to the Court there is an exception to that general rule. The directives on public procurement are not applicable, even if the contracting party is an entity legally distinct from the contracting authority, where two conditions are met. First, the public authority, which is a contracting authority, must exercise over the distinct entity in question a control which is similar to that which it exercises over its own departments and, secondly, that entity must carry out the essential part of its activities with the local authority or authorities which control it.

AG30 It is moreover in accordance with that derogation that the Court has held that it is impossible automatically to exclude relations established between public law institutions from the scope of those directives on public procurement, regardless of the nature of those relations.

AG31 In the present case, it is obvious that, as the Federal Republic of Germany states, the contract in dispute is a means of cooperation between State bodies. It does not follow from that fact alone, however, that the contract in dispute does not fall within the scope of Directive 92/50 . The opposite finding would be possible only were it to be established that the two conditions set out for the first time in the judgment in *Teckal [1999] E.C.R. I-8121* are met.

AG32 As the Federal Republic of Germany correctly points out, there is another option for a public authority falling within the definition of a “contracting authority” for the purpose of art.1(b) of Directive 92/50 to avoid the application of that directive. That is a situation in which a public authority performs the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. Since in such a case there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority, there is therefore no need to apply the Community rules in the field of public procurement.

AG33 That means that public authorities are not obliged, when performing tasks in the public interest, to turn to the market to obtain the provision of a service. They have the option of choosing between using their own resources (in which case, Directive 92/50 is not applicable) or turning to the market.

AG34 In this respect, I do not share the opinion held by the Federal Republic of Germany that, in the present case, cooperation between two distinct State bodies can be considered to amount to the use of the

resources of the contracting authority. The City of Hamburg refuse disposal services cannot be regarded as the resources of the districts concerned, which are the contracting authorities.

B— Public service contracts for the purposes of article 1(a) of Directive 92/50

AG35 The Federal Republic of Germany takes the view that the contract in dispute is not a public service contract within the meaning of art.1(a) of Directive 92/50 for three reasons. First, the contract is an internal measure of wider cooperation between State bodies covered by the Hamburg Metropolitan Region. Secondly, the refuse collection services of the City of Hamburg are not, in relation to the contract, service providers but, on the other hand, as the public body responsible for waste disposal, offer administrative assistance to the districts, who also deal with waste disposal. Thirdly, as regards its content, the contract goes beyond a contract for current services.

AG36 I am of the opinion that those arguments are not such as to cast doubt on the conclusion that the contract entered into between, on the one hand, the four districts and, on the other, the City of Hamburg refuse disposal services is a public service contract within the meaning of art.1(a) of Directive 92/50 .

AG37 It is apparent from the Court's case law that the existence of a contract for the purpose of art.1(a) of Directive 93/36 requires an agreement between two separate persons.

AG38 That condition is indeed fulfilled in the present case. Moreover, the subject-matter of the contract in dispute, that is, the incineration of waste, falls within the services covered by category No.16 of Annex IA to Directive 92/50 .

AG39 Since the City of Hamburg refuse disposal services cannot be regarded as the districts' own resources, the application of Directive 92/50 could only be excluded if the two cumulative conditions for the application of the exception which I referred to in point 29 of this Opinion were fulfilled.

AG40 Thus, it is necessary to examine whether the districts exercise over the City of Hamburg refuse disposal services a control which is similar to that which they exercise over their own departments and whether the City of Hamburg refuse disposal services carry out the essential part of their activities with the districts.

AG41 The Court has been required on several occasions to consider the condition relating to "similar control". It is clear from its case law that, in order to determine whether a public authority exercises over the other party to the contract a control similar to that which it exercises over its own departments, it is necessary to take account of not only all the legislative provisions but also the relevant circumstances. It must result from that examination that a contracted body is subject to a control which enables the contracting authority to influence that body's decisions. That must be a power of decisive influence over both strategic objectives and significant decisions of that entity.

AG42 The Federal Republic of Germany submits, in this connection, that the condition of similar control was fulfilled, since the districts concerned exercise a reciprocal control over one another at the level of the Hamburg Metropolitan Region.

AG43 On this issue, there is nothing to indicate that the districts participate in the City of Hamburg refuse disposal services and thus exercise control over them.

AG44 Besides, as the Commission correctly observes, the refuse disposal services do not perform their activities for the districts under statute or other public law provisions, but on the basis of a contract. The contract in dispute represents the only legal connection between the districts and the City of Hamburg refuse disposal services and that contract does not make it possible for the districts to exercise control.

AG45 In my opinion, a general reference to common objectives is clearly insufficient; in order for control to exist, there must be something more substantial.

AG46 The principle of “something given for something received”, on which cooperation in Hamburg Metropolitan Region is founded according to the Federal Republic of Germany, allows the districts to exercise, at the most, an indirect control over the City of Hamburg refuse disposal services.

AG47 Since the first condition for the application of the exception is not, in my view, fulfilled, it is unnecessary to examine whether the second has been met. I note, however, that waste disposal represents only part of the activities of the City of Hamburg refuse disposal services.

AG48 In the light of the foregoing, I can find nothing which indicates that the contract in dispute does not constitute a public service contract for the purpose of Directive 92/50 . That means that it could only lawfully have been awarded in accordance with that directive.

C— Negotiated procedure without prior publication of a contract notice as an exception to the general rule for the award of public service contracts

AG49 In its defence, the Federal Republic of Germany also submits that the only party with which the districts could conclude the contract in dispute was the City of Hamburg refuse disposal services, who had a guaranteed site for the construction of a waste incineration plant. The fact that in the Hamburg Metropolitan Region no other site was available for the construction of such plants and that the existing plants did not have enough capacity available constitutes a technical reason within the meaning of art.11(3)(b) of Directive 92/50 which would justify the award of a public service contract using the negotiated procedure without prior publication of a contact notice.

AG50 It is evident from the structure of art.11 of Directive 92/50 that para.3 is an exception to the general rule in para.4, according to which contracting authorities must award their service contracts using the open procedure or the restricted procedure.

AG51 In this respect, as an exception to the rules seeking to guarantee the effectiveness of the rights granted by the EC Treaty in the public service contracts sector, art.11(3) of Directive 92/50 must be interpreted strictly, and the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances.

AG52 The Court has already had to consider the existence of “technical reasons” in Commission of the European Communities v Germany (C-20/01 & C-28/01). The Court ruled that a technical reason relating to environmental protection might, in certain circumstances, be taken into consideration in order to assess

whether the contract at issue could be awarded to a given supplier. Admittedly, in that judgment the Court did not give an exhaustive definition of technical reasons, but it did define them negatively by stating the facts which did not constitute technical reasons for the purposes of art.11(3) of Directive 92/50 .

AG53 In Commission of the European Communities v Greece , the Court held, concerning art.20(2)(c) of Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, which includes a rule similar to that set out in art.11(3) of Directive 92/50 , that the application of that provision was subject to two cumulative conditions, namely, first, that there are technical reasons connected to the works which are the subject matter of the contract and, secondly, that those technical reasons make it absolutely necessary to award that contract to a particular contractor.

AG54 I am of the view that, having regard to the case law cited, the Federal Republic of Germany has not proven that the use of art.11(3) of Directive 92/50 was justified in the present case.

AG55 If we were to accept the Federal Republic of Germany's line of argument, which is based on Directive 75/442 on waste, that would mean that that directive would deprive Directive 92/50 of its full effect.

D— Directive 92/50 as a factor preventing the districts from performing the task of waste disposal

AG56 The Federal Republic of Germany also submits that the only way in which the districts and City of Hamburg refuse disposal services, as public law bodies charged with waste disposal, could undertake their duties was by concluding the contract in dispute. Directive 92/50 obliges the districts to award a contract to the service provider offering the lowest prices or the most economically advantageous offer in an open or restricted procedure. Thus, the obligation stemming from Directive 92/50 to issue the call for tenders in an open or restricted tendering procedure would prevent performance of the duties which the districts and City of Hamburg refuse disposal services are obliged to undertake. By virtue of art.86(2) EC , it does not apply, as such, to the districts and City of Hamburg refuse disposal services.

AG57 Article 86(2) EC provides that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly must be subject to the rules contained in the Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The Court has ruled that, in the case of a provision which allows, in certain circumstances, derogation from the rules of the Treaty, that article is to be interpreted strictly and that it was incumbent on the Member State or the undertaking which sought to rely on that provision to show that the conditions for its application were fulfilled.

AG58 I am of the opinion that the Federal Republic of Germany has not satisfied the burden of proof imposed on it.

AG59 It appears that the Federal Republic of Germany's line of argument is based, as regards this issue, on two premises. First, if the contract in dispute had not existed, neither the districts not the City of Hamburg refuse disposal services would have been able to carry out their duties in relation to waste disposal. The Rugenberger Damm plant was built only as a result of that contract. Secondly, the contract in

dispute would not have been concluded if the districts had carried out a call for tenders as part of an open or restricted tendering procedure because, in such a procedure, it would have been necessary to award the contract to the service provider with the lowest prices or the offer which was most economically advantageous.

AG60 In my opinion, both the first and the second premise are incorrect.

AG61 I am not convinced that the contract in dispute was the only means of enabling the performance of the duties in relation to waste disposal. As the Commission correctly points out, the City of Hamburg refuse disposal services could also have offered their available facilities to other takers.

AG62 Nor do I consider that the application of the open or restricted procedure would have precluded the conclusion of such a contract, in the form in which it was concluded between the districts and the City of Hamburg refuse disposal services, given that, in those procedures, a tender must be awarded to the service provider with the lowest prices or the most economically advantageous offer.

AG63 The Court has already held that in order to award contracts the contracting authority may rely, where the tender is awarded to the most economically advantageous offer, on various criteria which may change according to the tender at issue, and that each of the award criteria used by the contracting authority to identify the most economically advantageous offer need not necessarily be of a purely economic nature. The Court has explicitly stated that the contracting authority could take into account criteria relating to the preservation of the environment at the various stages of a public procurement procedure.

V— Conclusion

AG64 In the light of the foregoing, I propose that the Court should rule as follows:

- – declare that the Federal Republic of Germany has failed to fulfil its obligations under the combined provisions of art.8 and Titles III–VI of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, on the ground that the *Landkreise* of Harburg, Rotenburg (Wümme), Soltau-Fallingbostel and Stade directly concluded with the City of Hamburg refuse collection services a contract for waste disposal and that there had been no call for tenders in the context of an open or restricted tendering procedure at Community level for that services contract;

- – order the Federal Republic of Germany to pay the costs;

- – order the Kingdom of the Netherlands, as intervener, to pay its own costs.

JUDGMENT

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by reason of the fact that the *Landkreise* (administrative districts) Rotenburg (Wümme), Harburg, Soltau-Fallingbostel and Stade directly concluded with *Stadtreinigung* Hamburg (City of Hamburg Cleansing Department) a contract for waste disposal without there having been a call for tenders in the context of a formal tendering procedure at European Community level for that services contract, the Federal Republic of Germany has failed to fulfil its obligations under the combined provisions of art.8 and Titles III–VI of

Directive 92/50 relating to the coordination of procedures for the award of public service contracts [1992] OJ L209/1.

Legal context

Community law

2 Article 1 of Directive 92/50 provides:

For the purposes of this Directive:

- (a) *public service contracts* shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, …

- (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.

…

- (c) *service provider* shall mean any natural or legal person, including a public body, which offers services. A service provider who submits a tender shall be designated by the term *tenderer* and one who has sought an invitation to take part in a restricted or negotiated procedure by the term *candidate."*

3 Pursuant to art.11(3)(b) of Directive 92/50:

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

- …

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

The factual background to the case and the pre-litigation procedure

4 Four *Landkreise* in Lower Saxony, namely Rotenburg (Wümme), Harburg, Soltau-Fallingbostel and Stade, concluded a contract on December 18, 1995 with *Stadtreinigung* Hamburg relating to the disposal of their waste in the new incineration facility at Rugenberger Damm, with a capacity of 320,000 tonnes per annum. That facility is intended to produce both electricity and heat and its construction was to be completed by April 15, 1999.

5 In that contract, *Stadtreinigung* Hamburg reserve a capacity of 120,000 tonnes per annum for the four *Landkreise* in question, for a price calculated using the same formula for each of the parties concerned. That price is to be paid to the facility's operator, the other party to the contract with *Stadtreinigung* Hamburg, through the intermediary of the latter. The contract is to run for 20 years. The parties agreed to open negotiations five years at the latest before the end of that contract in order to make a decision as to its extension.

6 The contract at issue was concluded directly between the four *Landkreise* and *Stadtreinigung* Hamburg without following the tendering procedure provided for in Directive 92/50.

7 By letter of formal notice sent on March 30, 2004, pursuant to the first paragraph of art.226 EC, the Commission informed the German authorities that, by concluding a contract on waste disposal directly, without issuing a call for tenders or conducting a tendering procedure at European level, the Federal Republic of Germany had disregarded the combined provisions of art.8 and of Titles III–VI of Directive 92/50.

8 By letter of June 30, 2004 to the Commission, the Federal Republic of Germany stated that the contract at issue finalised an agreement on the shared performance of a public service which was the responsibility of the *Landkreise* concerned and the City of Hamburg. That Member State explained that the cooperation at district level at issue, the subject-matter of which was an activity taking place within the ambit of the State, did not affect the market and therefore did not fall within the scope of the law on public procurement.

9 Since it considered, despite these explanations, that the *Landkreise* concerned were public contracting authorities, that the contract on waste disposal was a contract for services for pecuniary interest, concluded in writing, which exceeded the threshold set for the application of Directive 92/50 , and that, consequently, it fell within the scope of that directive, the Commission sent a reasoned opinion on December 22, 2004 to the Federal Republic of Germany pursuant to the first paragraph of art.226 EC .

10 By letter of April 25, 2005, the Federal Republic of Germany reiterated its previous arguments.

11 Taking the view that that line of argument could not refute the claims set out in the reasoned opinion, the Commission decided, under the second paragraph of art.226 EC, to bring this action.

The action

Arguments of the parties

12 The Commission submits, first, that the *Landkreise* concerned must be regarded as contracting authorities within the meaning of Directive 92/50 and that the contract at issue is a written contract for

pecuniary interest exceeding the threshold set for the application of that directive. In addition, waste disposal is an activity classified as a “service” for the purposes of category 16 in Annex IA to that directive.

13 The Federal Republic of Germany contends, for its part, that the contract at issue is the culmination of a transaction internal to the administrative authorities and that, consequently, it does not fall within the scope of Directive 92/50 .

14 According to that Member State, the contracting parties concerned must be regarded as providing administrative cooperation in the performance of their public tasks. In that respect, *Stadtreinigung* Hamburg could be regarded not as a service provider acting in return for payment, but as a body governed by public law responsible for waste disposal and offering administrative cooperation to neighbouring local authorities in return for reimbursement of its operating costs.

15 In this connection, the Kingdom of the Netherlands, like the Federal Republic of Germany, bases its arguments on [16] and [17] of the judgment in *R. (on the application of University of Cambridge) v HM Treasury (C-380/98) [2000] E.C.R. I-8035; [2000] 3 C.M.L.R. 1359*, concluding that “provision of services” must be understood as referring exclusively to provision of services which may be offered on the market by operators under certain fixed conditions.

16 Those two Member States submit that the content of the contract at issue goes beyond what is provided for under a “service contract” for the purposes of Directive 92/50 , since it requires the *Landkreise* concerned, in return for treatment of waste in the Rugenberger Damm facility, to make available to *Stadtreinigung* Hamburg, at an agreed rate, landfill capacity which the *Landkreise* do not themselves use, in order to alleviate the lack of landfill capacity confronting the City of Hamburg.

17 The Federal Republic of Germany also points out that that legal relationship is described in the preamble to the contract as a “regional cooperation agreement for waste disposal”. It paves the way for cooperation between the contracting parties who, if necessary, will assist each other in the performance of their legal obligation to dispose of waste and will therefore perform that service jointly in the region concerned. It is thus envisaged that, in certain circumstances, the *Landkreise* concerned will agree to reduce, for a specified period, the quantity of waste delivered in the event of the treatment facility malfunctioning. They thus agree to limit their right to performance of the contract.

18 According to the Commission, the services provided in the present case cannot be regarded as administrative cooperation, insofar as the refuse disposal services do not carry out their activities under statute or other unilateral measures, but on the basis of a contract.

19 The Commission adds that the only permitted exceptions to the application of the directives on public procurement are those which are exhaustively and expressly mentioned therein (see, *Teckal Srl v Comune di Viano (Reggio Emilia) (C-107/98) [1999] E.C.R. I-8121* at [43], concerning Directive 93/36 coordinating procedures for the award of public supply contracts [1993] OJ L199/1). It submits that, in Commission of the European Communities v Spain (C-84/03) [2005] E.C.R. I-139 at [38]–[40], the Court confirmed that contracts for horizontal cooperation concluded by local authorities, such as that which the present case concerns, are subject to the law on public procurement.

20 The Federal Republic of Germany disputes that interpretation of the judgment in Commission v Spain [2005] E.C.R. I-139 , taking the view that in the case which gave rise to those proceedings the Court did not expressly hold that all agreements concluded between administrative bodies fell within the scope of public procurement law but merely criticised the Kingdom of Spain for its general exclusion of agreements concluded between public law bodies from the scope of that law.

21 Secondly, the Commission does not accept that the Federal Republic of Germany can rely on the “in house” exception, according to which contracts awarded by a contracting authority where, first, the public body exercises over the other contracting party, which is a person legally distinct from that public body, control similar to that which it exercises over its own departments and insofar as, secondly, that person carries out the essential part of its activities with the public body do not fall within the scope of the public procurement directives (see, to that effect, *Teckal [1999] E.C.R. I-8121* at [49] and [50]). According to the Commission, the condition relating to the existence of such control is not fulfilled in the present case, since none of the contracting bodies concerned exercises any power over the management of *Stadtreinigung* Hamburg.

22 By contrast, the Federal Republic of Germany takes the view that, in the context of the Hamburg Metropolitan Region, the requirement relating to the intensity of the control exercised, which must be measured against the yardstick of the public interest (see, to that effect, *Stadt Halle v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna (C-26/03) [2005] E.C.R. I-1* at [50]), is satisfied since the authorities concerned exercise reciprocal control over each other. Any divergence from the objectives jointly defined would cause the cooperation to cease altogether. The principle of “give and take” implies that *Stadtreinigung* Hamburg and the *Landkreise* concerned have an interest in maintaining that cooperation and, consequently, in complying with the objectives jointly defined.

23 On the basis of the judgment in *Asociacion Nacional de Empresas Forestales (ASEMFO) v Transformacion Agraria SA (TRAGSA) (C-295/05) [2007] E.C.R. I-2999; [2007] 2 C.M.L.R. 45*, the Kingdom of the Netherlands submits that the condition relating to the intensity of the control exercised may be fulfilled even if the control exercised by the public body concerned is more limited than that exercised over its own departments. It does not regard that condition as implying identical control. Only similar control is required.

24 In the Commission’s opinion, that judgment does not constitute a relaxation of the case law resulting from *Teckal [1999] E.C.R. I-8121*. It finds only that the criterion relating to the intensity of the control exercised may also be satisfied where a specific legal framework establishes a relationship of dependency and subordination, allowing similar control to be exercised by several contracting authorities. That is not the situation in the present case.

25 Thirdly, the Commission submits that the Federal Republic of Germany has not proved that, for technical reasons, solely *Stadtreinigung* Hamburg was in a position to conclude the contract at issue and that, consequently, it could rely on the derogation provided for in art.11(3)(b) of Directive 92/50 .

26 The Federal Republic of Germany submits that, had a call for tenders been issued, *Stadtreinigung* Hamburg would not necessarily have been able to submit a tender because, in 1994, that city did not have the capacity to recover waste that could have prompted it to participate in such a call for tenders. It is only

in the light of the need of the *Landkreise* concerned to recover their waste, which only later became apparent, and of the assurance that the *Landkreise* would use a future facility that the construction of Rugenberger Damm facility was envisaged.

27 That Member State also points out that the said *Landkreise* were assured that the facility planned by *Stadtreinigung* Hamburg would be commissioned within a foreseeable period, an assurance that no other tenderer would have been able to provide.

28 Fourthly, the Commission rejects the arguments of the Federal Republic of Germany that the application of Directive 92/50 must be excluded, pursuant to art.86(2) EC , where, as in the present case, it leads to the performance by public bodies of the task of waste disposal assigned to them being obstructed.

29 The Federal Republic of Germany considers that the interpretation of Directive 92/50 adopted by the Commission would lead, first, to the *Landkreise* concerned being unable to entrust waste disposal—which is a task in the public interest at Community level—to *Stadtreinigung* Hamburg, and to their having to entrust that task to the operator providing the most economically advantageous offer, without any guarantee that the public service would be carried out satisfactorily or on a permanent basis, and, secondly, to the capacities of the new plant not being used profitably.

30 That Member State points out that if the contract at issue had not been concluded, none of the parties would have been able to perform its public task. The City of Hamburg, in particular, would not have been able to build a facility with extra capacity in order to then try, without any guarantee of success, on economic grounds to sell unused capacity on the market.

Findings of the Court

31 First of all, it must be observed that the Commission's action concerns only the contract concluded between *Stadtreinigung* Hamburg and four neighbouring *Landkreise* for reciprocal treatment of waste, and not the contract governing the relationship between *Stadtreinigung* Hamburg and the operator of the Rugenberger Damm waste treatment facility.

32 Pursuant to art.1(a) of Directive 92/50 , public service contracts are contracts for pecuniary interest concluded in writing between a service provider and one of the contracting authorities listed in art.1(b) of that directive, which includes regional or local authorities such as the *Landkreise* concerned in this action for failure to fulfil obligations.

33 Under art.1(c) of that directive, the service provider party to the contract may be "any natural or legal person, including a public body". Thus, the fact that the service provider is a public entity distinct from the beneficiary of the services does not preclude the application of Directive 92/50 (see, to that effect, Commission v Spain [2005] E.C.R. I-139 at [40], regarding a public supply and works contract).

34 However, the Court's case law shows that a call for tenders is not mandatory where a public authority which is a contracting authority exercises over the separate entity concerned control similar to that which it exercises over its own departments, provided that that entity carries out the essential part of its activity with the public authority or with other controlling local or regional authorities (see, to that effect, *Teckal [1999] E.C.R. I-8121* at [50], and *Stadt Halle and RPL Lochau [2005] E.C.R. I-1* at [49]).

35 Likewise, the Court has held, in respect of the delegation by a municipality of a public service to an inter-municipal cooperative the object of which was exclusively to provide services to the affiliated municipalities, that that could legally take place without a call for tenders, since it considered that, notwithstanding the autonomous aspects of that cooperative's management by its board, the affiliated municipalities had to be regarded as together exercising control over it (see, to that effect, *Coditel Brabant SA v Commune d'Uccle (C-324/07) [2008] E.C.R. I- 8457; [2009] 1 C.M.L.R. 29* at [41]).

36 However, it is undisputed in the present case that the four *Landkreise* concerned do not exercise any control which could be described as similar to that which they exercise over their own departments, whether over the other contracting party, namely *Stadtreinigung* Hamburg, or over the operator of the Rugenberger Damm waste incineration facility, which is a company whose capital consists in part of private funds.

37 It must nevertheless be observed that the contract at issue establishes cooperation between local authorities with the aim of ensuring that a public task that they all have to perform, namely waste disposal, is carried out. That task relates to the implementation of Directive 75/442 on waste [1975] OJ L194/39, which requires the Member States to draw up plans for waste management providing, in particular for "appropriate measures to encourage rationalisation of the collection, sorting and treatment of waste", one of the most important of such measures being, pursuant to art.5(2) of Directive 91/156 amending Directive 75/442 [1991] OJ L78/32, ensuring that waste be treated in the nearest possible installation.

38 In addition, it is common ground that the contract between *Stadtreinigung* Hamburg and the *Landkreise* concerned must be analysed as the culmination of a process of inter-municipal cooperation between the parties thereto and that it contains requirements to ensure that the task of waste disposal is carried out. The purpose of that contract is to enable the City of Hamburg to build and operate a waste treatment facility under the most favourable economic conditions owing to the waste contributions from the neighbouring *Landkreise* , making it possible for a capacity of 320,000 tonnes per annum to be attained. For that reason, the construction of that facility was decided upon and undertaken only after the four *Landkreise* concerned had agreed to use the facility and entered into commitments to that effect.

39 The subject matter of that contract, as expressly indicated in the first clauses thereof, is primarily the undertaking given by *Stadtreinigung* Hamburg that it would make available annually to the four *Landkreise* concerned a treatment capacity of 120,000 tonnes of waste with a view to thermal utilisation in the Rugenberger Damm facility. As is subsequently stated in the contract, *Stadtreinigung* Hamburg does not assume any responsibility for the operation of that facility and does not offer any guarantee in that regard. In the event of the facility ceasing to operate or malfunctioning, its obligations are limited to offering replacement capacity, that obligation being conditional, however, in two respects. First, the disposal of the City of Hamburg's waste has to take priority and, secondly, some capacity must be available in other facilities to which *Stadtreinigung* Hamburg has access.

40 In return for the treatment of their waste in the Rugenberger Damm facility, as described in the preceding paragraph of this judgment, the four *Landkreise* concerned are to pay *Stadtreinigung* Hamburg an annual fee, the method of calculation and means of payment of which are specified in the contract. The waste delivery and removal capacity are to be agreed upon for each week between *Stadtreinigung*

Hamburg and a representative designated by those *Landkreise* . It is also apparent from the contract that *Stadtreinigung* Hamburg, which has a right to the payment of damages against the operator of the facility, undertakes, should those *Landkreise* have suffered damage, to defend the latter's interests against that operator by means of litigation if necessary.

41 The contract at issue also provides for some commitments on the part of the contracting local districts that are directly related to the public service objective. While the City of Hamburg assumes responsibility for most of the services forming the subject-matter of the contract concluded between it and the four *Landkreise* concerned, the latter are to make available to *Stadtreinigung* Hamburg the landfill capacity which they do not use themselves in order to alleviate the lack of landfill capacity of the City of Hamburg. They also agree to take for disposal in their landfill the quantities of slag remaining after incineration that cannot be utilised in proportion to the quantities of waste which they have delivered.

42 Moreover, under the contract, the parties thereto must, if need be, assist each other in the context of the performance of their legal obligation to dispose of waste. It is thus provided, inter alia, that in some circumstances, for example where the facility concerned has temporarily exceeded its capacity, the four *Landkreise* concerned agree to reduce the amount of waste delivered and thus to restrict their right of access to the incineration facility.

43 Lastly, the supply of waste disposal services gives rise to payment to the operator of the facility only. By contrast, the terms of the contract at issue show that the cooperation which the latter establishes between *Stadtreinigung* Hamburg and the four *Landkreise* concerned does not give rise to any financial transfers between those entities other than those corresponding to the reimbursement of the part of the charges borne by those *Landkreise* but paid by *Stadtreinigung* Hamburg to the operator.

44 It thus appears that the contract in question forms both the basis and the legal framework for the future construction and operation of a facility intended to perform a public service, namely thermal incineration of waste. That contract was concluded solely by public authorities, without the participation of any private party, and does not provide for or prejudice the award of any contracts that may be necessary in respect of the construction and operation of the waste treatment facility.

45 The Court has pointed out, in particular, that a public authority has the possibility of performing the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities not forming part of its own departments, and that it may do so in cooperation with other public authorities (see *Coditel Brabant [2009] 1 C.M.L.R. 29* at [48] and [49]).

46 The Commission stated at the hearing, moreover, that, had the cooperation at issue here taken place by means of the creation of a body governed by public law to which the various local authorities concerned entrusted performance of the task in the public interest of waste disposal, it would have accepted that the use of the facility by the *Landkreise* concerned did not fall under the rules on public procurement. It takes the view, however, that, in the absence of such a body for inter-municipal cooperation, a call for tenders should have been issued for the service contract concluded between *Stadtreinigung* Hamburg and the *Landkreise* concerned.

47 It must be observed though, first, that Community law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks. Secondly, such cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, referred to in Directive 92/50 , is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors (see, to that effect, *Stadt Halle and RPL Lochau [2005] E.C.R. I-1* at [50] and [51]).

48 It must, furthermore, be stated that there is nothing in the information in the file submitted to the Court to indicate that, in this case, the local authorities at issue were contriving to circumvent the rules on public procurement.

49 In the light of all those factors, and without there being any need to rule on the other pleas of the Federal Republic of Germany in its defence, the Commission's action must be dismissed.

Costs

50 Under art.69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Federal Republic of Germany applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

Order

On those grounds, the Court (Grand Chamber) HEREBY:

- dismisses the action;
- orders the Commission of the European Communities to pay the costs.

ELEKTA LTD V COMMON SERVICES AGENCY

Outer House

25 March 2011

2011 S.L.T. 815 / [2011] CSOH 107

Lord Glennie

25 March 2011

Administrative law — Public works contracts — Procurement — Common Services Agency issuing invitation to tender notice for radiotherapy equipment — Contract awarded to sole tenderer — Whether tender requirements discriminatory — Whether tender requirements incompatible with open procedure — Whether court's discretion should be exercised to end contractual standstill period — Public Contracts (Scotland) Regulations 2006 (SSI 2006/1), regs 47(10) and 47A(2).

A supplier of radiotherapy equipment raised an action against the Common Services Agency complaining of breaches of European Union law and the 2006 Regulations in the conduct of a procurement exercise. The defenders moved the court to grant an order in terms of reg.47(10) , ending the standstill period on contracting with the successful tenderer. The defenders had undertaken the procurement exercise on behalf of five health boards, using open procedure, seeking tenders for a prime contractor to supply a range of radiotherapy equipment. The sole tenderer was successful. The pursuers submitted that (1) technical criteria in relation to compatibility with existing equipment made it impossible for another party to be successful; (2) use of the open procedure imposed a duty on the defenders to frame the criteria in such a way as to enable a range of tenderers to bid; (3) there was an absolute duty to observe equal treatment and not to discriminate, and the defenders had to define its functional requirements in a way that enabled effective competition to take place; (4) the requirement that there should be a single provider of the equipment was discriminatory.

Held, (1) that the adoption of criteria which recognised that the new equipment had to be compatible with existing equipment was self evidently objectively justifiable and on that basis, those criteria which essentially defined what the defender wanted to purchase could not be regarded as discriminatory, even if the application thereof resulted in there being only one tenderer (paras 14-17); (2) that use of open procedure did not necessitate removing the criteria regarded as essential by the defenders to define its requirements (para.18); (3) that the defender, in the exercise of its judgment as the contracting authority, could properly take the decision that there should be a sole tenderer to provide the equipment, and the decision was proportionate and objectively justifiable (paras 22-23); (4) that, having regard to the considerations in reg.47A(2) , the court's discretion would be exercised in favour of granting the order (paras 26-30); and order granted .

Concordia Bus Finland Oy AB v Helsingin Kaupunki [2004] All E.R. (EC) 87; [2002] E.C.R. I-7213;

[2003] 3 C.M.L.R. 20 , and EVN AG v Austria [2003] E.C.R. I-14527; [2004] 1 C.M.L.R. 22 , considered .

Action

Elekta Ltd raised an action against the Common Services Agency complaining of breaches of European Union law and the Public Contract (Scotland) Regulations 2006 (SI 2006/1).

The action came before the Lord Ordinary (Glennie) on the defenders' motion for an order under reg.47(10) of the 2006 Regulations.

Commission of the European Communities v Netherlands [1995] E.C.R. I-157; [1996] 1 C.M.L.R. 477.

Concordia Bus Finland Oy Ab v Helsingen Kaupunki [2004] All E.R. (EC) 87; [2002] E.C.R.

I-7213; [2003] 3 C.M.L.R. 20.

EVN AG v Austria [2003] E.C.R. I-14527; [2004] 1 C.M.L.R. 22.

Exel Europe Ltd v University Hospitals Coventry and Warwickshire NHS Trust [2010] EWHC 3332 (TCC); [2011] B.L.R. 167; 134 Con. L.R. 102.

Halo Trust v Secretary of State for International Development [2011] EWHC 87 (TCC); [2011] B.L.R. 229.
Indigo Services (UK) Ltd v Colchester Institute Corp [2010] EWHC 3237 (QB); [2011] Eu. L.R. 384.

Scottish Power Generation Ltd v British Energy Generation UK Ltd, 2002 S.C. 517; 2002 S.L.T. 870.

Vestergaard v Spottrup Boligselskab [2001] E.C.R. I-9505; [2002] 2 C.M.L.R. 42.

On 25 March 2011 the Lord Ordinary granted the order.

LORD GLENNIE.—

[1] The pursuer is a company specialising in providing clinical solutions for treating cancer and brain disorders. In particular, so far as relevant for the present case, it develops and manufactures radiotherapy equipment. The defender is the Common Services Agency, also known as NHS National

Health Service, National Services Scotland. It is a contracting authority in terms of the Public Contract (Scotland) Regulations 2006 (“the regulations”).

[2] In November 2010 the defender commenced a procurement exercise on behalf of five Scottish health boards, viz . Lothian Health Board, Greater Glasgow Health Board, Tayside Health Board,

Grampian Health Board and Highland Health Board, in terms of which it sought to place a contract for a prime contractor to supply, install, maintain and train staff for a range of radiotherapy equipment for five cancer centres within NHS Scotland, viz . Edinburgh Cancer Centre, Beatson West of Scotland Cancer Centre, Aberdeen Royal Infirmary, Ninewells Hospital in Dundee and Raigmore Hospital, Inverness. The estimated value of the contract was about £21,000,000, excluding VAT. That is above the threshold in art.8 of the regulations.

[3] It is not in dispute that in carrying out the procurement exercise the defender is bound to comply with the regulations and that its obligation to do so is a duty owed to an economic operator, i.e. to a contractor or supplier such as the pursuer who seeks to be awarded the contract. In terms of the regulations the defender has adopted the open procedure for seeking tenders from interested parties.

The contract notice was issued in the official Journal of the European Union on 5 November 2010 and the invitation to tender was produced subsequently which required tenders to be received by 4 January 2011, a date which was later extended to 11 January 2011.

[4] The contract was for a range of equipment including a number of linear accelerators, a CT simulator, a conventional simulator and, in Tayside only, a record and verifying ("R&V") system, sometimes referred to as or as part of radiotherapy management system ("RMS").

[5] The technical issues involved are explained helpfully in the affidavits put in by both parties. I am not now concerned to determine any disputed facts between the deponents of those affidavits but it is convenient to proceed for the moment on the basis of the explanations put forward by Jill Stief on behalf of the pursuer. In her first affidavit, at paras 2–8, Ms Stief explains the components of the radiotherapy treatment:

"2. … Radiation therapy treatment is used mainly in the treatment of malignant disease. The radiation treatment is delivered using a Linear Accelerator ('Linac'), which is composed of a rotating gantry system and hardware for radiation delivery, a radiation beam shaping device such as a Multi-leaf Collimator ('MLC'), and a Patient Support system, along with a Control System that runs must sophisticated software to control all the parameters of the Linac [sic]. Imaging devices may also be part of the radiation treatment system. These devices will use either kilovolt or megavolt radiation to capture images of the patient before treatment all whilst having [sic].

"3. A Treatment Plan is individually prepared for each patient and can vary from very simple set-up to a complex plan depending on patient tumour type, stage, histology etc. This can be prepared in computer Treatment Planning System ('TPS') software, which utilises imaging data of the patient from CT, MRI or PET. The Radiation Oncologist defines the area to be treated. The Physicist or Dosimetrist uses the TPS to optimise the best treatment plan for that patient is then approved by the Radiation Oncologist [sic]. The plan may range from a simple 3D Conformal plan to a more complex Volumetric Modulated Arc Therapy ('VMAT') plan.

"4. The treatment plan data is electronically transferred via the Oncology Information System ('OIS'). Record and Verification ('R&V') software is utilised in the transfer of the treatment plan to the Linac. Image data may also be transferred via the OIS and the R&V system to the Imaging system software on the Linac, which will be used to compare the current position of the patient or tumour at the time of treatment.

"5. The treatment parameters for an individual patient's treatment are sent from the R&V system via a computer interface to the Linac Control System software to be able to deliver the radiation dose. Once the machine and patient are set up, the prescribed parameters in the R&V system are checked against the actual parameters within the Linac Control System to ensure there are no discrepancies before the radiation beam is allowed to be switched on.

“6. Imaging may be used before the treatment commences to ensure the patient position/tumour position is still in the correct place. Adjustments may be made to the patient position to correct any misalignments at this stage. Imaging may also take place during treatment delivery to confirm the treatment setting or monitor patient position especially during longer treatment delivery.

“7. MOSAIQ is Elekta's OIS. MOSAIQ manages the treatment of cancer from the initial diagnosis of the patient, through planning, treatment and long term follow up. At the heart of MOSAIQ is an image enabled electronic medical record (‘EMR’) which is used by healthcare professionals to communicate information about their patients' treatment. MOSAIQ also provides functionality to manage the administrative side of the practice including scheduling, billing support, management reporting and analysis. MOSAIQ also includes an R&V system which interfaces with the Linac for radiation treatment delivery.

“8. For patients receiving radiation therapy treatment MOSAIQ provides verification and recording (R&V) capability as an extension of the EMR. Verification and recording software is designed to detect and prevent mistakes in the delivery of external beam radiation therapy by linear accelerators. It helps to provide accidental delivery of dangerous doses, improves quality control, provides a record of the treatment and supports report generating capabilities.”

[6] At para.9 of that affidavit, Ms Stief describes the different forms of intensity modulated radiotherapy (“IMRT”), including (i) segmental (step and shoot), (ii) dynamic, (iii) dynamic arc, and (iv) volumetric modulated arc therapy. She points out in para.10 that the Elekta system, i.e. the pursuer's system, of linear accelerator can interact with the Varian “ARIA” R&V system for segmental (step and shoot) IMRT only. That may be in dispute but for present purposes I shall assume that is correct.

[7] In her second affidavit, No.15 of process, Ms Stief explains that the pursuer's own MOSAIQ R&V system is an open system capable of accommodating the linear accelerators and other equipment provided by a range of different suppliers whereas the “ARIA” system provided by Varian is a closed system. In particular at paras 9 and 10 she says this: “9. The Varian R&V system does not accommodate anything other than Segmental (Step and Shoot) IMRT from Elekta and other Linac manufacturers. It does not currently facilitate the interoperability that would allow dynamic IMRT, such as dynamic arc treatment or volumetric modulated arc therapy, to be provided clinically on an Elekta Linac. It is not within the power of the Linac manufacturer to insist that the R&V provider expand its capabilities … .”

In para.10 she makes the same point, saying: “10. As the ARIA R&V system is installed in 4 of the 5 sites in Scotland, only Varian Linacs can fully interoperate with that system … .” She says that Varian may argue that other linear accelerators can communicate with the ARIA R&V system, but that is only to the extent of basic segmental (step and shoot) IMRT treatments. That is fundamental to the issues that are raised in the present case.

[8] In the present case the pursuer did not tender for the contract. There was only one tenderer, Varian, and it was successful. The defender proposes to enter into a contract with Varian. From an early stage the pursuer has complained about the terms of the tender document, complaining that it effectively excluded it and others from bidding. That complaint was made in correspondence as early as mid December 2010. At the beginning of February 2011 the pursuer commenced these proceedings complaining that the defender was in breach of fundamental treaty obligations and of the regulations, essentially on the ground that it

failed to treat all potential bidders equally and that by the terms of the tender it had, in practical terms, excluded it from bidding.

[9] In terms of reg.47(10) , the effect of the pursuer commencing these proceedings is that the defender, as contracting authority, “shall not enter into the contract”, i.e. the contract with Varian, “unless (a) the proceedings are determined, discontinued or disposed of or (b) the Court by interim order brings to an end that prohibition”. The defender has lodged defences disputing the allegations made against it. It has applied by motion for an order, in terms of reg.47(10) , bringing the prohibition on contracting with Varian to an end.

[10] At one point it was suggested that the issues raised could sensibly be considered at debate but in the course of the hearing both parties recognised that that was unnecessary and, perhaps, premature since the pleadings had not been fully adjusted. Accordingly neither party invited me to sustain or repel any pleas in law and, in those circumstances, the hearing took the form of a hearing only on the defender's motion for an order in terms of reg.47(10) . The factors to be taken [into] account in considering whether to make such an order are set out in reg.47(a)(2) . I shall come back to consider those later.

[11] The pursuer has two principal complaints about the tender process. The first is that by making it a requirement of the tender that the linear accelerators to be supplied must be compatible with the defender's existing Varian “ARIA” RMS, the invitation to tender makes it impossible for anyone other than Varian to tender successfully. That is so because it is a mandatory requirement of the invitation to tender, or at least a requirement which weighs heavily in the scoring system so as to make it practically impossible to succeed unless the tender complies with it, that the equipment supplied will be able to deliver dynamic and dynamic arc IMRT. Although the pursuer's own linear accelerator can deliver the whole range of IMRT including dynamic and dynamic arc, it cannot do so when linked to the “ARIA” RMS system, because the “ARIA” system is a closed system not, or not yet, compatible with linear accelerators produced by suppliers other than Varian. Some of this may be in issue, so I make no concluded findings on whether or not it is correct, but I proceed on the basis that the pursuer can show that this is so. So the complaint, as the solicitor advocate who appeared on behalf of the pursuer was anxious to stress, is not just that the pursuer was unable to bid but that everyone other than Varian was excluded from the bidding process.

[12] The question in relation to this issue is essentially whether the requirement that the equipment to be supplied under the tender must be compatible with Varian “ARIA” RMS was in breach of the regulations or other fundamental principles of European law. Guidance is to be found in the European case law, in particular in Concordia Bus Finland Oy Ab v Helsingen Kaupunki and EVN AG v Austria .

[13] Concordia Bus was concerned with a tender process in terms of which the contracting authority, the Helsinki City Council Transport Department, invited tenders for the supply of buses. It stipulated in the tender documentation that account would have to be taken of environmental considerations, extra points being awarded for a type of gas powered bus which, according to Concordia, only one tenderer was in practice able to offer (to do not so much with the ability of Concordia to buy such buses but its ability to run them due to difficulties of refuelling). The Advocate General approached the question on the basis that the terms of the invitation to tender and the criteria adopted in the tender documentation meant in fact that there was only one tenderer capable of succeeding. I do not propose to quote in full from the Advocate General's opinion but I was referred to passages at [2003] 3 C.M.L.R., pp.609–610 and 612, paras 94–98

and 116, which emphasise that the award criteria must be consistent with all the fundamental principles of community law and especially the principle of non-discrimination. The relevant question, which was the third question in the case, is dealt with in the part of his opinion beginning at p.613, para.124. I refer in particular to p.616, paras 147–155. The Advocate General points out, at p.616, para.147 that the relevant criterion applied without distinction to all tenders. At p.616, para.148 he says that in order for it to be found that the criterion in question gave rise to indirect discrimination against Concordia, it would not be sufficient to find that it had been treated differently from the successful bidder ("HKL"), in the sense merely that the latter had been given points which had not been given to Concordia. At p.616, para.149 he observes that it is established in the case law that the principles of equality of treatment require that comparable situations are not treated differently and that different situations are not treated similarly, and that such a difference in treatment can be justified objectively. He then makes clear that his approach is on the basis that, of the two undertakings who wished to bid, one of them was able to offer the fleet requested and the other was not. At p.616, para.151 he says this: "Finally, the specification of the criterion which gives rise to the difference in the awarding of points could only be considered to reveal the existence of discriminatory tactics if it were to appear that this criterion could not be justified objectively having regard to the characteristics of the contract and the needs of the contracting authority."

He says in the next paragraph (p.616, para.152): "As was seen above a contracting authority cannot be prevented from requiring that the service in question be provided using a fleet which possesses the best available technical specifications."

Having then considered a point about whether the criteria should have regard to all potential tenderers, he says this at p.616, para.154: "Not only would such an approach result in a form of levelling down of the award criteria in eliminating all those which were truly selective, but equally strip all content from the right recognised by the court for the contracting authority to select the criteria for awarding the contract as it chooses."

His conclusion, given at p.617, para.155, is that the mere fact of including in a tender notice a criterion which can be met by only one tenderer did not contravene the principle of equality.

[14] A number of points seem to me to emerge from that. The first is that the contracting authority must be entitled to decide what it wants, what is the subject matter of the procurement which it seeks to obtain, the subject matter of the contract, or to put it another way it must be entitled to decide upon the functional requirements it wishes to satisfy. Second, the fact that the criteria included in the tender notice can only be met by one tenderer, or a limited range of tenderers, does not of itself contravene the principle of equality. And third, that the inclusion of these criteria can only be considered discriminatory if they cannot be justified objectively having regard to the characteristics of the contract and the needs of the contracting authority.

[15] The reasoning of the court in Concordia seems to me consistent with this approach. I do not propose to go into the details of the decision of the court except to refer to p.632, paras 85 and 86. At p.632, para.85 the court held that in its factual context — and it may be that it took a different view of the facts from the view taken by the Advocate General — the fact that one of the criteria adopted by the contracting entity to identify the economically most advantageous tender could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting entity, is not in itself such as to

constitute a breach of the principle of equal treatment. And at p.632, para.86 the court held that in those circumstances the answer to the third question must be that the principle of equal treatment does not preclude the taking into consideration of criteria connected with the protection of the environment such as those at issue in the main proceedings solely on the ground that the contracting entity's own transport undertaking was one of the few undertakings able to offer a bus fleet satisfying those criteria.

[16] The principles which emerged from Concordia were approved and summarised by the court in EVN at [2004] 1 C.M.L.R., p.772 , para.37 in this way. It is open to the contracting authority when choosing the most economically advantageous tender to choose the criteria on which it proposes to base the award of contract, provided that the purpose of those criteria is to identify the most economically advantageous tender and that they do not confer on the contracting authority an unrestricted freedom of choice as regards the award of contract to a tenderer. At p.772, para.39 it is made clear that it follows that, provided they comply with the requirements of community law, contracting authorities are free, not only to choose the criteria for awarding the contract, but also to determine the weighting of such criteria providing the weighting enables an overall evaluation be made of the criteria applied in order to identify the most economically advantageous tender.

[17] In the present case the defender wishes to procure the purchase of a range of radiotherapy equipment including, in particular, linear accelerators. These are for incorporation into an existing system or systems, a feature of which, in four of the five hospitals in question, is the use of a Varian RMS system with which the equipment to be purchased has to be compatible. Except in the case of Tayside, the defender does not want or need to purchase a new RMS system. In those circumstances, the adoption of criteria which recognise that the new equipment must be compatible with the existing equipment and, in particular, with the existing RMS system is to my mind self evidently justifiable and objectively so. On that basis, in line with the reasoning in the Concordia Bus case and EVN , those criteria which, as I say, essentially define what the defender wants to purchase, cannot be regarded as discriminatory, even if the application of those criteria results in there being only one tenderer.

[18] The solicitor advocate for the pursuer sought to draw some support from the fact that the defender had chosen to adopt an open procedure under reg.15 rather than the negotiated procedure available under reg.14 in a case where there is in effect only one possible supplier. His argument appeared to be that the defender must have recognised that it should be opening the tender up to a range of suppliers; and, in that context, the inclusion of criteria which effectively meant that Varian was the only tenderer was discriminatory. If it chose to adopt the open procedure, it had a duty to frame the criteria in such a way as to enable a range of tenderers to bid. I do not accept that argument. The negotiated procedure is not compulsory. It may be (I do not decide this though the submissions of the solicitor advocate for the pursuer tended to point that way) that the defender could have used a negotiated procedure. But it does not follow from that that if it uses an open procedure it has to remove the criteria which it regards as essential to define its requirements or, to put it another way, to invite tenders for something it did not want.

[19] The solicitor advocate for the pursuer also argued that since the duty to observe equal treatment and not to discriminate was absolute, the contracting authority was under a “strict duty to define its functional requirements in a way which enabled effective competition to take place and did not effectively reserve the contract to one supplier”. He relied upon two cases in the European Court, Commission of the European

Communities v Netherlands and Vestergaard v Spottrup Boligselskab . Those cases say that the contracting authority cannot stipulate for goods of a specific brand or name but must allow for an equivalent to be offered in a tender. It is important to note in the present case that the defender did not specify that they required a Varian linear accelerator. Taking the matter at its strongest for the pursuer, they specified, in effect, that they required a linear accelerator which was compatible with Varian ARIA RMS; and it might be said that they thereby specified for something like "a Varian linear accelerator or equivalent". If that is the right construction to be placed on what they did, it seems to me that they have fulfilled their obligation in terms of those cases rather than acting in breach of them.

[20] In developing his submissions, the solicitor advocate for the pursuer argued that the defender had erred in making it part of the functionality requirement of the equipment which it sought to acquire that the equipment be compatible with Varian "ARIA" RMS. He argued that "the true functional requirement was to have linear accelerators integrated with an RMS system which could be 'ARIA' or some other system, which system also connects to or interfaces with other items of equipment whether existing or to be procured". He argued that the pursuer and others would have been able to bid against a properly defined functional requirement of this sort, albeit they would have had to have overcome the disadvantage that this would place them under as compared with Varian, of having to replace the ARIA RMS system throughout the hospitals. I reject this submission. I emphasise again that it is for the defender as the contracting authority to decide what it wants. It has an existing RMS system in four out of the five cancer units which will remain in place for some years, the precise length of time depending upon a rolling system of replacement which was shown in the documents put before the court. It does not presently wish to replace that system. There are no doubt many factors leading to its decisions in this regard, including the question of cost, disruption and teething problems likely to be encountered if one system is replaced by another which then has to interface it with other equipment which is already in operation. It cannot, in the interests of equal treatment, be compelled to seek tenders for something it does not want. I note, as senior counsel for the defender submitted, that there has been no attack on the present procurement exercise on the grounds that the criteria adopted by the defender are not objectively justifiable; and the solicitor advocate for the pursuer, in his oral argument, did not seek to argue that they were not objectively justifiable. I therefore proceed on the basis that they are. That being the case, no purpose would be served by requiring the defender to invite tenders for something other than what they in fact want.

[21] In pursuing the argument that would-be tenderers should have been allowed to tender on the basis that their tender might include an offer to replace the defender's ARIA RMS, the solicitor advocate for the pursuer accepted that the defender would have no obligation to accept such a tender. It seems to me that this demonstrates the impossibility of sustaining this argument. There is no realistic likelihood that the defender would accept a tender which involved replacing its existing ARIA RMS system when it is clear it was happy to retain it. Nor has the pursuer put forward in its pleadings or in productions any details of the sort of tender that they would have made had they been allowed to tender on that basis. It seems to me that if the court is to be persuaded to open up or to stop the present procurement exercise so as to require the pursuer to be allowed to tender on that basis, there requires to be put before the court material to show that the tender that they might have put forward had a realistic chance of success.

[22] The second complaint made by the pursuer is about the stipulation that there should be a single provider of the equipment. It complains that that was also discriminatory, since it imposed an obstacle to

the pursuer and others from bidding for the Tayside part of the procurement, which obstacle was irrelevant to that part of the procurement exercise since Tayside did not itself have an ARIA RMS system. I do not think there is anything in this point. For reasons I have given already it seems to me that it is up to the contracting authority to decide what its procurement requirements are and how to frame them. The decision that there should be a sole tenderer to provide the equipment across the board for the five hospitals was, it seems to me, a decision which the defender could properly take in the exercise of its judgment as the contracting authority. It was, as senior counsel for the defender suggests, a proportional decision or, as I would prefer to put it, it was objectivelyjustifiable for much the same reasons as I have held the other criteria to be objectively justifiable.

[23] The argument of the solicitor advocate for the pursuer put against this was to the effect that proportionality was not an answer to discrimination or unequal treatment. I agree, but that seems to me to put the cart before the horse. The question in the first place is whether the decision to tender by reference to these criteria, which include the decision to have one provider of equipment across the board, was objectively justifiable. That has not been put in issue. No attack has been made on the objective justifiability of the decisions made by the defender, nor for that matter has any attack been made on the basis that they were disproportionate in some way. That being the case, if the criteria were objectively justifiable, the fact that they lead to the exclusion of the pursuer and possibly all other potential tenderers does not make them discriminatory.

[24] I therefore conclude that the pursuer's attack on the bidding process has no reasonable prospect of success. I was not asked to dismiss the action but, as at present formulated, it seems to me that the pursuer's case is a very weak one.

[25] The conclusions that I have reached seem to me to cover compendiously the various heads of the particular regulations under which the procurement process was challenged. Those were regs 4(3), 9(4,)9(5)–(9), 9(12), 9(16),9(17) . I do not think it would be helpful to go through each one merely repeating the same analysis.

[26] I turn then to the question of discretion. The order sought is an order under reg.47(10) . In reg.47A(2) it is provided that in any interim proceedings under this part of the regulations the court may decide not to grant an interim order when the negative consequence of such an order are likely to outweigh the benefits, having regard to the following considerations. It then lists three matters to be taken into account. I was referred to a number of English cases — including Exel Europe Ltd v University Hospitals Coventry and Warwickshire NHS Trust ; Indigo Services (UK) Ltd v Colchester Institute Corp ; and Halo Trust v Secretary of State for International Development — on the question of how the discretion should be exercised in a case such as this. I was also referred to certain Scottish authority, albeit in a different context, in particular the decision of the Inner House in Scottish Power Generation Ltd v British Energy Generation UK Ltd at 2002 S.C., pp.524–525; 2002 S.L.T., pp.875–876 , para.21. It seems to me that what requires to be considered is the strength of the parties' cases, the balance of convenience having regard (but not overwhelming regard) to the question of whether the damages might be an adequate remedy, and the public interest.

[27] Those factors are identified in reg.47A(2) at subparas (a), (b) and (c). As regards subpara.(a) it provides that the court must have regard to the fact that decisions taken by a contracting authority should be reviewed effectively and as rapidly as possible. I take that into account. Effective review of decisions is the rationale for having a standstill period after the decision has been made on the award of the contract before the contract may be entered into. This is to allow an effective challenge to be made. In a proper case, the requirement that the challenge should [be] capable of being effective might require that the standstill period be extended until the end of the proceedings, as is the presumption unless an order is made bringing it to an end earlier. That will depend upon the assessment of the strength of the challenge.

[28] Item (c) in reg.47A(2) requires the court to have regard to the public interest. It seems to me that the public interest includes, but is not limited to, the requirement for effective review. It takes account of the requirement that a public procurement exercise which has been properly conducted is not unduly delayed by proceedings which have little prospect of success. In other words it takes account of the need for certainty. In the case of a body such as a health service, it must be in the public interest that, if the challenge has no reasonable chance of success, the procurement exercise should be allowed to go ahead without having to wait until the end of the challenge proceedings. So the strength of the challenge will to my mind often be a very important factor — as it is in this case. If I were satisfied that the pursuer had shown a reasonable prospect of success, then I might have been inclined to refuse the order, but that would depend on all the circumstances. I would have had to have regard, though not as a conclusive factor, to the adequacy of damages. I would also have had to consider questions of timing, for example if there were a prospect of this matter going to a full proof, and then possibly a reclaiming motion, before the proceedings were resolved. In addition, I think that there is some force in the points made by the defender, in the affidavits lodged on its behalf, that this is a procurement exercise which needs to be implemented straightaway. It is a rolling process of replacement, and although the period for delivery of all the goods stretches until 2014 it is clear that some of the replacement has to take place in the next few months.

[29] Consideration (b) in reg.47(2) requires the court to have regard to the probable consequences of an interim order for all interests likely to be harmed. Those interests are, on the one hand, the potential tenderers including the pursuer and, on the other hand, the defender and the health boards for whom they act. Where the case is weak or, as I perceive this case to be, very weak, then I consider that the consequences of allowing the standstill period to continue until the end of these proceedings would be so adverse to the legitimate interests of the health boards that that factor weighs strongly in favour of the grant of the order sought by the defender.

[30] For those reasons, I am persuaded that I should grant the order sought by the defender and will do so.

Representation

Solicitor Advocate for Pursuer, Cormack, Counsel for Pursuer, MacGregor; Solicitors, McGrigors

LLP — Counsel for Defender, Currie, QC, Ross ; Solicitors, RF McDonald .

PUBLIC CONTRACTS (SCOTLAND) REGULATIONS 2012/88 (SCOTTISH SI)

Part 2 Technical Specifications

9.— Technical specifications in the contract documents

(1) In this regulation—

"common technical specification" means a technical specification drawn up in accordance with a procedure recognised by the member States with a view to uniform application in all member States and which has been published in the Official Journal;

"European standard" means a standard adopted by a European standards organisation and made available to the general public;

"European technical approval" means an approval of the fitness for use of a product, issued by an approval body designated for the purpose by a member State, following a technical assessment of whether the product fulfils the essential requirements for building works, having regard to the inherent characteristics of the product and the defined conditions of application and use;

"international standard" means a standard adopted by an international standards organisation and made available to the general public;

"British standard" means a standard adopted by a British standards organisation and made available to the general public;

"recognised bodies" means test and calibration laboratories and certification and inspection bodies which comply with applicable European standards and *"recognised body"* is interpreted accordingly;

"standard" means a technical specification approved by a recognised standardisation body for repeated or continuous application, compliance with which is not compulsory and which is an international standard, a European standard, or a British standard;

"technical reference" means any product produced by European standardisation bodies, other than official standards, according to procedures adopted for the development of market needs; and

"technical specifications" means—

(a) in the case of a public services contract or a public supply contract, a specification in a document defining the required characteristics of materials, goods or services, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of a product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures; and

(b) in the case of a public works contract, the totality of the technical prescriptions contained, in particular, in the contract documents, defining the characteristics required of the work, works, materials or goods,

which permits the work, works, materials or goods to be described in a manner such that it fulfils the use for which it is intended by the contracting authority and these characteristics include—

(i) levels of environmental performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods;

(ii) rules relating to design and costing, the test, inspection and acceptance conditions for work or works and methods or techniques of construction; and

(iii) all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished work or works and to the materials or parts which they involve.

(2) Where a contracting authority wishes to lay down technical specifications which must be met by—

(a) the services to be provided under a public services contract and the materials and goods used in or for it;

(b) the goods to be purchased or hired under a public supply contract; or

(c) the work or works to be carried out under a public works contract and the materials and goods used in or for it;

it must specify those technical specifications in the contract documents.

(3) When laying down technical specifications in accordance with paragraph (2), a contracting authority must, wherever possible, take into account accessibility criteria for disabled persons or the suitability of the design for all users.

(4) A contracting authority must ensure that technical specifications afford equal access to economic operators and do not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

(5) Subject to technical requirements which are mandatory in the United Kingdom and to the extent that those requirements are compatible with EU obligations, a contracting authority must define the technical specifications required for a contract in accordance with paragraph (6), (7), (8) or (9).

(6) A contracting authority may define the technical specifications referred to in paragraph (5)—

(a) by reference to technical specifications in the following order of preference—

(i) British standards transposing European standards;

(ii) European technical approvals;

(iii) common technical specifications;

(iv) international standards; or

(v) other technical reference systems established by the European standardisation bodies; or

(b) in the absence of the technical specifications referred to in sub-paragraph (a), by reference to the following technical specifications—

(i) British standards;

(ii) British technical approvals; or

(iii) British technical specifications relating to the design, calculation and execution of the work or works and use of the product,

and each reference to a technical specification made in accordance with this paragraph must be accompanied by the words “or equivalent”.

(7) A contracting authority may define the technical specifications referred to in paragraph (5) in terms of performance or functional requirements (which may include environmental characteristics) provided that the requirements are sufficiently precise to allow an economic operator to determine the subject of the contract and a contracting authority to award the contract.

(8) A contracting authority may define the technical specifications referred to in paragraph (5) by defining performance and functional requirements as referred to in paragraph (7) with reference to the technical specifications referred to in paragraph (6) as a means of presuming conformity with such performance or functional requirements.

(9) A contracting authority may define the technical specifications referred to in paragraph (5) by reference to technical specifications referred to in paragraph (6) for certain characteristics and by reference to performance or functional requirements referred to in paragraph (7) for other characteristics.

(10) Where a contracting authority defines technical specifications as referred to in paragraph (6), it must not reject an offer on the basis that the materials, goods or services offered do not comply with those technical specifications if an economic operator proves to the satisfaction of the contracting authority by any appropriate means that the one or more solutions that that economic operator proposes in its tender satisfy the requirements of those technical specifications in an equivalent manner.

(11) Where a contracting authority defines technical specifications in terms of performance or functional requirements as referred to in paragraph (7), it must not reject an offer for materials, goods, services, work or works which complies with—

(a) a British standard transposing a European standard;

(b) a European technical approval;

(c) a common technical specification;

(d) an international standard; or

(e) a technical reference system established by a European standardisation body,

if those technical specifications address the performance or functional requirements referred to by the contracting authority and the economic operator proves in its tender to the satisfaction of the contracting authority by any appropriate means that the work, works, materials, goods or services meet the performance or functional requirements of the contracting authority.

(12) Where a contracting authority lays down environmental characteristics in terms of performance or functional requirements as referred to in paragraph (7), it may use the detailed technical specifications, or if necessary, parts thereof, as defined by European, national or multinational eco-labels or by any other eco-label, provided that—

(a) those technical specifications are appropriate to define the characteristics of the materials, goods or services that are the object of the contract;

(b) the eco-label requirements are drawn up on the basis of scientific information;

(c) the eco-label is adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, are able to participate; and

(d) the technical specifications are accessible to any party interested.

(13) A contracting authority may indicate in the contract documents that the materials, goods or services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents and must accept any other appropriate means of proof that the materials, goods or services comply with those technical specifications.

(14) The term *"appropriate means"* referred to in paragraphs (10), (11) and (13) includes a technical dossier of a manufacturer or a test report from a recognised body.

(15) A contracting authority must accept certificates from recognised bodies established in other member States when considering whether a tender for a contract conforms with the technical specifications laid down by the contracting authority in accordance with paragraph (2).

(16) Subject to paragraph (17), a contracting authority must not lay down technical specifications in the contract documents which refer to—

(a) materials or goods of a specific make or source or to a particular process; or

(b) trademarks, patents, types, origin or means of production;

which have the effect of favouring or eliminating particular economic operators.

(17) Notwithstanding paragraph (16), exceptionally, a contracting authority may incorporate the references referred to in paragraph (16) into the technical specifications in the contract documents provided that the references are accompanied by the words "or equivalent", where—

(a) the subject of the contract makes the use of such references indispensable; or

(b) the subject of the contract cannot otherwise be described by reference to technical specifications which are sufficiently precise and intelligible to all economic operators.