OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 17 November 2009[1]

1. The present case, arising from a number of questions referred by the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) for a preliminary ruling, allows the Court to address once again the problem of the distinction between public works contracts and public authorities' town planning activities.

2. To be more precise, the central point at issue in the case on which the referring court is required to rule is the sale of land by a public authority to a private person. Typically, a case of this kind may raise the question of possible State aid.[2] In the present case, however, that question does not seem to arise. On the contrary, the specific point at issue is the fact that the public authority decided to sell the land to the prospective buyer who, in the opinion of the local authorities responsible for town planning, presented the best and most interesting plans for the use of the land and the erection of buildings. The referring court asks whether the rules on public contracts and, more specifically, the rules on public works concessions apply in these circumstances.

I — Legislative context

3. The provisions on which the Court is asked to deliver a ruling are contained in Directive 2004/18/EC[3] (hereinafter also referred to as 'the Directive').

1 — Original language: Italian.

2 — Clearly, a form of State aid may exist where public property is sold at a price below the market value. See, in this connection, the Commission communication on State aid elements in sales of land and buildings by public authorities (OJ 1997 C 209, p. 3).

3 — Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

4. Article 1 of the Directive provides:

‘1. For the purposes of this Directive, the definitions set out in paragraphs 2 to 15 shall apply.

2. (a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) “Public works contracts” are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A “work” means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

…

3. “Public works concession” is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.

…’

II — The facts, the main proceedings, and the questions referred for a preliminary ruling

5. In October 2006, the Bundesanstalt für Immobilienaufgaben (the federal agency responsible for managing public property; ‘the Bundesanstalt’) published notices in the press and on the internet announcing its intention to sell land comprising approximately 24 hectares in the municipality of Wildeshausen. The land was occupied, inter alia, by barracks which were decommissioned early in 2007.

6. The notice published by the Bundesanstalt stated that the proposed use of the land must be agreed in advance with the municipality of Wildeshausen.

7. In May 2007, a survey commissioned by the Bundesanstalt estimated the value of the land to be EUR 2,33 million.

8. One company, Helmut Müller GmbH ('Helmut Müller'), made an offer in November 2006 to buy the land for EUR 4 million on condition that the building plans for the area were drawn up in accordance with its designs. That proposal was not pursued.

9. In January 2007, the Bundesanstalt asked interested parties to make offers for the land without any definite building plan. In that context, Helmut Müller made an offer to buy the land for EUR 1 million. Another company, Gut Spascher Sand Immobilien GmbH ('GSSI'), made an offer to buy the land for EUR 2,5 million.

10. The municipality of Wildeshausen subsequently asked the prospective buyers to submit their own plans for the use of the area. Those plans were then discussed with the municipal authorities in the presence of the Bundesanstalt. On 24 May 2007, the Wildeshausen town council expressed its own preference for the plan submitted by GSSI and said it was prepared to embark on the formal procedure of drawing up the building plans for the area on the basis of that plan. The town council explicitly stated in its decision that its preference was not to be regarded as binding with respect to local planning powers, which the town council reserved the right to exercise at its discretion.

11. On 6 June 2007, the Bundesanstalt sold the land to GSSI. The contract of sale does not mention the future use of the land.

12. Helmut Müller brought proceedings before the national courts, contesting the sale of the land and claiming in particular that the sale should have been conducted in accordance with the rules on public procurement.

13. The dispute is before the referring court, which has referred the following questions for a preliminary ruling:

'(1) Is it a requirement, in order for there to be a public works contract under Article 1(2)(b) of … Directive 2004/18/EC …,

that the works be physically carried out for the public contracting authority and bring it an immediate economic benefit?

(2) In so far as, according to the definition of a public works contract in Article 1(2)(b) of Directive 2004/18/EC, the element of procurement is indispensable, is procurement to be regarded as having taken place, in accordance with the second variant of the provision, if the intended works for the public contracting authority fulfil a particular public purpose (for example the development of part of a town) and the public contracting authority has the legal right under the contract to ensure that the public purpose is achieved and that the necessary works will be available?

(3) Does the concept of a public works contract in accordance with the first and second variants of Article 1(2)(b) of Directive 2004/18/EC require that the contractor be directly or indirectly obliged to provide the works. If so, must there be a legally enforceable obligation?

(4) Does the concept of a public works contract in accordance with the third variant of Article 1(2)(b) of Directive 2004/18/EC require that the contractor be obliged to carry out works, or that works form the subject-matter of the contract?

(5) Do contracts by which, through the requirements specified by the public contracting authority, it is intended to ensure that the works to be carried out for a particular public purpose be available, and by which (by contractual stipulation) the contracting body is given the legal power to ensure (in its own indirect interest) the availability of the works for the public purpose, fall within the third variant of Article 1(2)(b) of Directive 2004/18/EC?

(6) Is the concept of "requirements specified by the contracting authority" in Article 1(2)(b) of Directive 2004/18/EC fulfilled, if the works are to be carried out in accordance with plans examined and approved by the public contracting authority?

(7) Must there be held to be no public works concession under Article 1(3) of

Directive 2004/18/EC, if the concessionaire is or will become the owner of the land on which the works are to be carried out, or the concession is granted for an indeterminate period?

(8) Does Directive 2004/18/EC — with the legal consequence of an obligation on the public contracting authority to invite tenders — apply if a sale of land by a third party and the award of a public works contract take place at different times and on the conclusion of the land sale the public works contract has not yet been awarded, but at the last-mentioned time there was, on the part of the public authority, the intention to award such a contract?

(9) Are separate but related transactions concerning a sale of land and a public works contract to be regarded from the point of view of the law on the awarding of contracts as a unity, if at the time the land sale contract was entered into the award of a public works contract was intended and the participants deliberately created a close connection between the contracts from a substantive — and possibly also temporal — point of view (see Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705)?'

III — Preliminary observations

A — *The case-law of the referring court*

14. Some clarification is required in order to understand the questions raised by the referring court. In particular, it should be observed that the national court itself makes it clear in the order for reference that the current case-law of the referring court (the Oberlandesgericht Düsseldorf) differs in some respects from most of the case-law and the legal literature on the law relating to the award of public contracts.

15. In particular, the referring court's position is based on the assumption that the fact that a procedure is essentially a town planning procedure does not in principle preclude the application of the Community rules on public contracts. The national court refers in this connection to the Court's judgments in *Ordine degli Architetti and Others* [4] and *Commission* v *France*. [5]

16. Secondly, the referring court deduces from the judgment in *Auroux and Others* [6]

4 — Case C-399/98 [2001] ECR I-5409.
5 — Case C-264/03 [2005] ECR I-8831.
6 — Case C-220/05 [2007] ECR I-385.

the principle that the application of the Community rules on public contracts is completely independent of whether the contracting authority intends to become the owner of the works to be constructed, or to take possession and make use of them at all. In other words, the Community rules on public contracts may apply regardless of whether there is an element of procurement of property by the contracting authority. In particular, the benefit pursued by the contracting authority may also be immaterial, consisting for example, as in the present case, in achieving specific urban development aims in respect of municipal land. [7]

17. On the basis of that case-law, the situation that is the subject of the main proceedings is interpreted by the referring court in the following terms. In its view, GSSI was awarded a public works concession, [8] to which the relevant provisions of Community law were applicable. [9] The fact that GSSI acquired a right of ownership in the property in question is not, in its view, inconsistent with that interpretation, since the concept of a 'concession' as defined in the Directive does not exclude concessions of indefinite duration or recognition of the concessionaire's right to own the property that is the subject of the concession.

18. According to the referring court, the fact that the municipality of Wildeshausen, although it had expressed its own preference for the development scheme proposed by GSSI, was not formally bound to authorise that scheme does not call into question its interpretation of the events. In particular, the national court cites the Court's judgment in *Commission* v *Austria* ('*Mödling*') [10] to support the claim that even an event which occurred after the award may, if it was actually decisive for the purposes of the award, have to be taken into account for the purposes of a legal assessment of the facts. Any other

7 — The German legislation was altered, after the order for reference was made, by the Law of 20 April 2009 modernising the Law on contracts (Gesetz zur Modernisierung des Vergaberechts, BGBl. I, p. 790), which amended Paragraph 99 of the GWB (the Law on protecting competition), specifying inter alia that, in the case referred to in the third variant of the definition of a public works contract, the contracting authority must obtain a direct economic benefit. See also footnote 35 below.

8 — However, it is not entirely clear which body awarded the concession. The Commission itself, although inclined to accept the referring court's position on this point, was obliged to recognise at the hearing that both the Bundesanstalt and the municipality of Wildeshausen exhibited some of the typical characteristics associated with that role but that it was impossible to recognise either as bearing the main responsibility in this connection.

9 — On the basis of the order for reference, there is no doubt that the specified thresholds for the application of the Directive are amply exceeded in the present case. In fact, since the value of the land does not in itself exceed the thresholds, clearly the national court's arguments are to some extent hypothetical. On the other hand, in the light of the settled case-law, according to which it is for the national court to determine whether the questions are relevant for the purpose of ruling on the dispute, I consider that in the present case the Court should reply to the questions referred by the Oberlandesgericht Düsseldorf. See in this connection, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; Case C-355/97 *Beck and Bergdorf* [1999] ECR I-4977, paragraph 22; Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22; and Case C-500/06 *Corporación Dermoestética* [2008] ECR I-5785, paragraph 23.

10 — Case C-29/04 [2005] ECR I-9705.

course might well compromise the effectiveness of provisions of Community law.

19. However, as I pointed out earlier, the referring court itself recognises that its interpretation of Community law, in the parts that are applicable in the present case, is by no means unanimously accepted. By its questions, the Oberlandesgericht Düsseldorf is therefore essentially asking the Court to determine whether or not that interpretation is correct.

B — *The differences between the various language versions of Article 1 of the Directive*

20. In most of the languages,[11] Article 1 of the Directive identifies three different types of 'public works contract'. These are, in particular:

— the execution, possibly accompanied by the design, of building *works*[12] of the type specified in Annex I to the Directive (first variant);

— the execution, possibly accompanied by the design, of *a work*[13] (second variant);

— the realisation, by whatever means, of *a work*[14] corresponding to the requirements specified by the contracting authority (third variant).

21. The Directive adds that a 'work'[15] means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

22. It should be noted at once that there are some important differences between the language versions.

23. First, there are differences resulting from occasional inconsistencies in the terminology used in the three variants mentioned above:

11 — Not in all, however: for example, there is no equivalent for the second variant in the Portuguese version.

12 — German: 'von Bauvorhaben'; French: 'de travaux'; Spanish: 'de obras'; Dutch: 'van werken'; Portuguese: 'de trabalhos'; Greek: 'εργασιων'; Italian: 'di lavori'.

13 — German: 'eines Bauwerks'; French: 'd'un ouvrage'; Spanish: 'de una obra'; Dutch: 'van een werk'; Greek: 'ενός έργου'; Italian: 'di un'opera.

14 — German: 'einer Bauleistung'; French: 'd'un ouvrage'; Spanish: 'de una obra'; Dutch: 'van een werk'; Portuguese: 'de uma obra'; Greek: 'ενός έργου'; Italian: 'di un'opera.

15 — German: 'Bauwerk'; French: 'ouvrage'; Spanish: 'obra'; Dutch: 'werk'; Portuguese: 'obra'; Greek: 'έργο'; Italian: 'opera'.

this is clear, in particular, when one looks at the terms employed in some of the language versions as indicated in the footnotes on the variants in question.

24. In addition, the German version exhibits two other significant differences. First, the third variant specifies that the activity in question is to be executed 'by third parties' (durch Dritte): that provision does not appear in the other language versions. [16] Secondly, the activity referred to in the third variant is not described as 'a work' (Bauwerk) but as 'building activity' (Bauleistung), with the result that the subsequent definition of 'a work' appears, in the German version, to apply only to the second variant and not to the third. [17]

16 — I note however that, as the Austrian Government in particular pointed out at the hearing, the additional detail contained in the German text, although divergent, in fact simply makes it 'more specific' than the other language versions. In view of the structure of the provision in question, it is hardly possible, even with reference to the other language versions, to identify a case falling within the third variant in which the works are not carried out by a 'third party'. In any event, it should be noted that it is settled case-law that the wording used in one language version of a Community provision cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions in that regard. See in this connection, inter alia, Case C-372/88 *Cricket St Thomas* [1990] ECR I-1345, paragraph 18, and Case C-455/05 *Velvet & Steel Immobilien* [2007] ECR I-3225, paragraph 19.

17 — That specific feature of the German version is based on Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of the procedures for the award of public works contracts (OJ 1989 L 210, p. 1). Directive 89/440 introduced the current 'threefold' definition of public works contracts into the Community legal order for the first time.

25. The existence of these textual problems is a strong incentive for not attempting to find the 'correct' interpretation of provisions through a strictly literal analysis of the provisions in question, especially if that analysis is confined to a single language version. In fact, the only possible guides in seeking the meaning to be attributed to the provisions are systematic interpretation and teleological interpretation, combined with a good sense of interpretation.

IV — Legal analysis

A — *Introduction: the concept of a public works contract*

26. In order to give the fullest possible reply to the questions raised by the referring court, it is necessary, first, to identify the essential characteristics of a works contract.

27. It should be noted, first of all, that the concept is peculiar to Community law and the classification of a specific contract in

the national law of a Member State is consequently irrelevant in this connection. [18]

28. As to the object of the contract, as we saw earlier, Directive 2004/18 identifies three basic types of contract. To summarise, it may be said that, under Article 1 of that Directive, the concept of a public works contract includes, on the one hand, the execution of specific works of the types listed in Annex I to the Directive and, on the other, the realisation of a work. In other words, the concept includes both construction activities, regardless of whether the outcome of the works constitutes a definite and/or finished property, and activities connected with the realisation, possibly by third parties, of specific 'complete' properties. Such a property, the 'complete' nature of which is identified by the Directive in the statement that it fulfils 'an economic or technical function', is normally defined as 'a work'.

29. As regards the particular situations to be assessed, the question whether or not they fall within the ambit of Directive 2004/18 will naturally have to be examined case by case. However, I think that, generally speaking, the problem of whether the objective requirements for the application of the Directive are satisfied can be solved in most cases by adopting a flexible approach, based not on the threefold definition reflected in most language versions of Article 1 but rather on a twofold definition of works as expounded in the preceding point.

30. Regardless of the approach that is adopted, it must not however be forgotten that a characteristic element of all public works contracts is the element of construction. In other words, the activities in question must include the production of property. Indeed, the mere sale of existing property is explicitly excluded from the ambit of the Directive. [19]

31. Article 1 of the Directive explicitly defines other essential characteristics of a works contract. It is established that a works contract is *a contract* concluded *in writing* and *for pecuniary interest*. This entails a service provided by the contractor for the public authority for

18 — See *Auroux and Others*, cited in footnote 6 above, paragraph 40.

19 — See Article 16 of the Directive.

consideration, not necessarily in cash but certainly in terms of economic value. [20]

32. However, as we know, the Directive itself provides for an alternative to the 'typical' model in which the public authority pays (in the broad sense of the term, as we have seen) the builder for a work. In that alternative model, the public works concession model, 'the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment'. According to the referring court, the provisions on the award of public works concessions are applicable in the present case, since the public authority simply allows the person who is to carry out certain building works to enjoy the full benefit of the outcome of the building activity, in accordance with the provisions on the right of ownership. That problem will be discussed in detail later, notably in connection with the analysis of the seventh question.

33. A further observation is also required concerning the aim pursued by the public authorities in the works and/or work which they intend to execute. As the Court has had occasion to rule, the aim is irrelevant for the purposes of the applicability of the provisions of the Directive. [21] Thus, the only thing that matters is whether the objective requirements specified in the measure are satisfied.

34. Clearly, the reason why the Community rules pay no attention to the aims pursued by the public authorities in specific individual cases is that, as the recitals in the preamble to the Directive suggest, the principal objective of the Community rules on public contracts is to abolish restrictions on fundamental freedoms and to encourage genuine competition. [22] Thus, the point of view is that of the persons who may be interested in carrying out the works and, for those persons, the aim that the public authority intends to pursue is irrelevant.

35. These broad and ambitious aims must be borne in mind when interpreting the Directive but it should not be assumed that, by appealing to the purpose of the measure, its

20 — For example, in addition to paying a sum in cash, the public authority may exempt a person from payment of certain taxes (see *Ordine degli Architetti and Others*, cited in footnote 4 above, paragraphs 76 to 86).

21 — Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraph 32. See also Case C-126/03 *Commission* v *Germany* [2004] ECR I-11197, paragraph 18, and Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 26.

22 — See, in particular, recital 2 in the preamble to Directive 2004/18 and, earlier, the 2nd and 10th recitals in the preamble to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), now repealed. See also, on this point, *Ordine degli Architetti and Others*, cited in footnote 4 above, paragraph 52, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 51 and the case-law cited therein.

scope can be extended indefinitely. In particular, it should be noted that certain specific sectors in which it does not apply are mentioned in the Directive itself, notably in Articles 10 to 16. A purely 'functional' interpretation, based exclusively on the fundamental objectives of the Directive, is therefore not permissible.

36. A 'functional' interpretation, which the Commission in particular appears to support, raises the crucial problem of identifying the parameters on the basis of which the Directive is to apply. However, the Commission itself has stated that its principal concern is that certain persons may acquire a benefit without first being placed on an equal footing with other persons who may be interested in acquiring the benefit in question. In cases such as the present one, the benefit consists in the increase in the value of land resulting from the fact that the public authority has given permission for certain building activities to be carried out on it. So, on the Commission's interpretation, any 'increase in value' of immovable property that is attributable to an activity of the public authorities should be subject to the provisions of the Directive. It is therefore clear that, if one takes that position, one may have to accept the hypothesis, however absurd, that *all town planning activities* are subject to the Directive since, by definition, provisions on the possible execution of building works substantially alter the value of the land in question.

37. In fact, no one actually takes that extreme position. However, it must be noted that it is the logical consequence of a purely functional interpretation of the Directive.

38. It is true, as we know, that in some areas the Court has adopted an openly 'functional' interpretation of the provisions of Community law. It has done so, in particular, in the context of the law on the award of public contracts, in connection with the concepts of a 'contracting authority' and a 'body governed by public law'. [23] However, it should be noted in this connection, first, that on those occasions the functional interpretation was used to clarify the meaning of a specific concept, not to determine the general scope of the entire body of legislation on public contracts. Moreover, in the cases cited, the purpose of adopting the functional interpretation was essentially to avoid creating enormous gaps that would have provided wide scope for abuse: I refer, for example, to a case where

23 — See, for example, *Universale-Bau and Others*, cited in footnote 22 above, paragraph 53; Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173, paragraph 37; and Case C-393/06 *Ing. Aigner* [2008] ECR I-2339, paragraph 37.

the typical function of a body governed by public law was subsequently incorporated in the establishment of a company without affecting its status, [24] or where a public service (a broadcasting body, in this case) was not financed directly out of public resources but through fees payable by persons who possessed a receiver. [25]

39. I therefore consider that, on the contrary, the scope of the Directive should be identified by reference, first, to the objective requirements specified in the Directive itself. That does not, of course, mean that all 'functional' considerations are to be avoided. In fact, the objectives pursued by the Directive are clearly among the principal points of reference for the purposes of interpretation. [26] They cannot however constitute the only reference parameter, nor can they escape the legislature's desire to define the scope of the measure.

40. I shall now proceed to examine the questions. In view of the logical connections between them, I shall start with the first, second, fifth and sixth questions.

24 — *Universale-Bau and Others*, cited in footnote 22 above.

25 — *Bayerischer Rundfunk and Others*, cited in footnote 23 above. See also, in connection with a similar situation, Case C-300/07 *Hans & Christophorus Oymanns* [2009] ECR I-4779, paragraph 57.

26 — See, for example, Case 292/82 *Merck* [1983] ECR 3781, paragraph 12; Case C-223/98 *Adidas* [1999] ECR I-7081, paragraph 23; and Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 41.

B — *The first and second questions*

41. By the first two questions, which can be taken together, the referring court asks the Court whether, in general, in order for there to be a public works contract within the meaning of Directive 2004/18, it is necessary that the object of the contract constitute property procured by the public authority, which is of immediate economic benefit to that authority. If the answer is in the affirmative, that is to say, if, in the words of the referring court, 'the element of procurement is indispensable', it seeks to ascertain whether or not that element can be discerned in the general pursuit of a public purpose alone, for example in a specific scheme for the urban development of municipal land.

1. The positions of the parties

42. The positions taken by the parties which submitted observations in the present proceedings cover a fairly wide spectrum.

43. On the one hand, the German Government, supported on this point by the

Bundesanstalt and to a large extent by the Austrian Government, firmly maintains that the presence of the element of procurement is essential to a public works contract. Indeed, it affirms that the procurement need not necessarily be material and that an economic benefit to the public authority may suffice. In its view, however, the general pursuit of a public purpose, as in the present case, is not in itself sufficient. As to the Court's judgment in *Auroux and Others* which, as we have seen, is a cornerstone of the position the national court is inclined to favour, the German Government observes that, in the case in which that decision was delivered, the question of immediate economic benefit to the public authority did not arise, so the Court did not consider it necessary to concentrate its attention on that point. However, in the German Government's view, that should certainly not be interpreted as meaning that the economic benefit requirement is unnecessary: that requirement, although not explicitly stated, is implicit in the general system of the Directive. As to the arguments based on the need to ensure that the Directive is effective and to prevent the risk of abuse, according to the German Government, those considerations cannot justify applying the Directive covertly in areas other than those to which it normally applies. The need to prevent abuses in areas other than public contracts should be addressed by employing other legislative instruments, not Directive 2004/18.

44. The position adopted by the Commission, on the other hand, is diametrically opposed to that of the German Government. In particular, according to the Commission, the only decisive element for the purpose of the answer to be given to the referring court is the fact that the wording of the Directive does not require the public authority to procure anything from any other person in order for there to be a public works contract. In its view, therefore, to insist on the presence of the element of procurement would mean introducing a condition that is not required by the wording of the measure in question.

45. Lastly, the position taken by the Netherlands Government is midway between the two. In its view, although it is not essential — even in the light of the Court's case-law — that the public authority procure the work, it must nevertheless have a direct economic interest in order for there to be a public works contract. In particular, that direct economic interest may, depending on the case, consist either in an economic benefit to the public authority or in what the Netherlands Government describes as a 'risk of loss' borne by that authority. In the Netherlands Government's view, there is no such economic interest in the case submitted to the referring court for examination, or at least no interest that can be detected on the basis of the information supplied by the national court.

2. Assessment

46. In my view, the correct interpretation of Directive 2004/18 is midway between the two 'extreme' positions taken by the German Government and the Commission respectively. On the other hand, I do not fully share the Netherlands Government's position, which seems to me to rely excessively on an economic element for the purpose of defining the concept of a public works contract.

47. It is important, in my view, for the purpose of replying to the question referred to the Court, to consider first the way in which the judgment in *Auroux and Others* should be interpreted. [27] As we know, in the case in which that decision was delivered, a municipal authority, without issuing an invitation to tender, had entrusted a second contracting authority with the execution of an urban development project. In that context, the second contracting authority, using funds provided in part by the municipality, was required to execute various building works, some of which were to be sold to third parties and some transferred to the municipal authority. The Court held that that transaction constituted a public works contract, regardless of whether or not it was anticipated that the first contracting authority, that is to say, the municipality, was or would become the owner of all or part of that work. [28]

48. It is true that, as the German Government observes, in that case there was no doubt that at least some of the works to be executed were of direct benefit to the municipal authority. However, it is also true that the somewhat broad wording that the Court chose to employ means, in my view, that there is no need to regard direct procurement for a public authority as a condition of a public works contract.

49. On the other hand, however, attention must be drawn to another feature of the facts at issue in that case: on that occasion, the municipal authority had paid a substantial sum of money and had been directly involved with the second contracting authority in securing the execution of the required works.

50. However necessary it may be to interpret the concept of a public works contract broadly in order to prevent possible abuses, the scope of that concept cannot, as I observed earlier, be extended indefinitely. [29] A 'functional' interpretation of this kind cannot completely disregard the limits to the scope of the Directive. While it is certainly true that the principal objective of the Directive on the award of public contracts is to encourage competition between undertakings and to open markets, it is also true that, in areas

27 — Cited in footnote 6 above.

28 — *Ibidem*, paragraph 47.

29 — See point 35 et seq. above.

that are not within the scope of the Directive, that objective must be pursued by employing other appropriate legislative instruments, not by unduly extending the scope of the provisions on the award of public contracts.

51. It is therefore necessary to identify with some precision the limits to the scope of those provisions, which must represent absolute limits for the purpose of applying the provisions of the Directive.

52. In my view, it is possible from a full examination of the measure, bearing in mind the meaning that the Court has so far attributed to it, to deduce the fundamental principle that for a given activity to fall within the ambit of the law on public works contracts there must be a strong and *direct link* between the public authority and the work or works to be executed. That link normally follows from the fact that the work or works are executed on the public authority's initiative.

53. Contrary to the view taken by the referring court, non-material and indirect benefit alone is not sufficient. Nor is the mere fact that the activity to be assessed is, generally, in the public interest sufficient. It should be noted that, in cases where a permit for the activity has to be issued by a public authority (which is normally the case with all building activities), the activity must obviously be in the public interest in order to obtain a permit, since the public interest is the reference parameter on which the public authorities grant permission. Unless the scope of the Directive is extended indefinitely, the general existence of a public interest which justifies permission to pursue the activity cannot therefore constitute the decisive criterion for determining which cases are to fall within it. In particular, it must be borne in mind that a building permit, that is to say, the typical expression of the authorities' powers in the *objective* area of town planning, is usually confined to removing restrictions on a private initiative, not a public initiative.

54. I therefore take the view that by requiring that there be a direct link between the public authority and the work or works to be executed it is possible to reconcile the potential contradiction between the need to prevent abuses on the one hand and the need to avoid extending the scope of the Directive

indefinitely on the other. In particular, that formula is completely consistent with the Court's finding in *Auroux and Others* that the procurement of the works by the authority is not a necessary condition for the application of the provisions on public contracts. That judgment cannot however be used to justify an approach that dispenses altogether with a strong connection between the public authorities and the works to be executed: the very criterion of a direct link may, in my view, constitute an appropriate expression of that necessary connection.

55. That direct link is clearly discernible, first, in situations where the public authority immediately acquires ownership of the property to be produced. This is obviously the most typical case and most of the cases in which the Directive is applicable are covered by this reference model. There are also situations, similar to that typical situation, where the property to be produced is not procured by the public authority but is nevertheless of *immediate economic benefit* to that authority. This may be the case, for example, where the public authorities acquire a right in building property which, although not a right of ownership, nevertheless enables them to make use of the property, at least to some extent.

56. A second example of a direct link between the public authority and the work or works to be executed may, in my view, be identified in cases where the public authority employs public resources for the execution of the work and/or works. In most cases, these situations are clearly covered by the first example mentioned in the preceding point since, in the classic model of the use of public resources for the execution of work or works, that is to say, the contract model, the public authorities pay in order to acquire ownership of the property to be produced. Moreover, as we have seen, public resources may be used in the concession model too, though not to cover the whole value of the work or works to be executed.

57. However, the second example also covers situations where the public authority disburses money or other public resources but does not acquire ownership of the property to be produced. As the Court held in *Auroux and Others*, ownership is not an essential element. Moreover, it appears to be perfectly consistent with the requirements of equity and compliance with the fundamental principles of the Directive that, when the public authorities intend to employ public resources, the selection of the persons who are to receive

those resources should be accompanied by the guarantees provided by the Directive.

58. It goes without saying that that example also includes situations where the public resources that are employed are not of a pecuniary nature: I am thinking, for example, of cases where, for the purpose of carrying out the work or works, public land is made available to the contractor or concessionaire free of charge or at a price below the market price.

59. A third and last example of a direct link between the public authority and the work or works to be carried out concerns cases where the work and/or works, whether or not they are examples of the first or second kind, are in any case the result of an initiative taken by the authority in question. This is the case, in particular, where the public authorities start, on their own initiative, a procedure which leads to the execution or realisation of the work or works. An example of this kind of situation is the situation assessed by the Court in *Auroux and Others*. [30]

60. However, the third and last example calls for clarification in an important respect. The activity pursued by the public authority in that context must extend beyond mere exercise of the general powers vested in that authority with respect to town planning. That is the only way to draw a clear line between activities which fall within the scope of the Directive and 'normal' town planning activities which, as such, do not. To be precise, the type of activity pursued by the public authority in specific individual cases must be assessed by the national court on a case-by-case basis.

61. Within that framework, the possibility cannot be ruled out that the realisation of a certain scheme for the development of land may be the subject of a contract that falls within the scope of the Directive. Such a possibility requires, however, that there be a direct link, in the sense indicated in the preceding points, between the public authority and the work or works to be carried out. The mere pursuit of the public interest through recourse to ordinary town planning powers is not sufficient cause to apply the Community rules on contracts and concessions.

62. In this case, it is naturally for the referring court to determine whether or not that direct link exists. I should point out however that, on the basis of the information supplied to the Court by the national court, it seems

30 — Cited in footnote 6 above, paragraph 42.

to me difficult to maintain that the direct link exists. On the one hand, it appears to be common ground that the public authority will not acquire any property in this case and will not obtain any immediate economic benefit. Nor does this appear to be an instance of any of the other situations in which a direct link could be detected, since the municipality of Wildeshausen did not take a specific initiative in connection with the execution of the works, confining itself on the contrary to assessing the various projects that were submitted to it, nor did it have to meet any expenses in connection with the construction work. No connections of this kind appear to be discernible in the case of the Bundesanstalt either.

C — *The fifth and sixth questions*

63. The fifth and sixth questions relate only to the third 'variant' of the concept of a public works contract [31] and to some extent they restate, with reference to that variant, the problems raised in connection with the first two questions, particularly the second question.

64. To be precise, by the fifth question the referring court seeks to ascertain whether the 'requirements specified by the public contracting authority' referred to in the said variant consist simply in the fact that the public authority has the power to ensure that the works to be executed correspond to a public interest.

65. By the sixth question, on the other hand, the Court is asked to determine whether the said 'requirements specified by the contracting authority' may in fact consist in the power vested in the public authority to examine and approve building plans.

1. Arguments of the parties

66. With the sole and obvious exception of Helmut Müller, all the parties which submitted observations agree in principle that, in a situation such as that at issue in the main proceedings, the conditions required for there to be a public works contract within the meaning of the third variant are not met.

67. To be precise, the Commission and the Netherlands and French Governments stress the need to distinguish between an 'active' role, in which the public authorities take the initiative or exercise a decisive influence on

31 — See point 20 above.

the execution of the work, and a purely 'passive' role, in which they confine themselves to the functions of approving and monitoring projects promoted by private persons. This, it is suggested, does not constitute a public contract but represents at the very most a case of the public authorities exercising their normal functions of planning, approval, monitoring, and so forth.

68. The German Government, for its part, takes a position based on the view that the conditions which it considers to be essential in the case of both the first two variants of the concept of a public works contract, including in particular the requirement of an immediate economic benefit for the public authority, are also essential in the case of the third variant of that concept.

2. Assessment

69. The referring court's decision, when framing the questions to be put to the Court, to separate the issues connected with the first two variants of the concept of a public works contract, which are the subject of the second question in particular, from the issues connected with the third variant, which are at the centre of the fifth and sixth questions, is based, in my view, on the wish to infer from the wording of the third variant that the scope of the Directive is very wide.

70. There is no doubt, as the Commission has emphasised in its observations, that the third variant of the concept of a public works contract was in fact designed to prevent avoidance of the application of the legislation by including in the concept cases of various kinds which could not be exhaustively identified in advance.

71. However, as I observed earlier, the wording of the measure cannot be used to extend its scope indefinitely. In particular, if the 'requirements specified by the contracting authority' were to include all the public authorities' approval and planning functions in the area of urban development, the scope of the Directive would be unduly extended.

72. In fact, the considerations which I advanced earlier in connection with the first two questions also apply to the third variant. There is no reason to suppose, with reference

to the third variant, that it is possible to dispense with the requirement, for the purposes of Directive 2004/18, of a direct link between the public authority and the works to be executed.

D — *Partial conclusions*

73. Concluding my analysis of the first, second, fifth and sixth questions, I therefore suggest that the Court's answer to these questions should be that, in order for there to be a public works contract or a public works concession within the meaning of Directive 2004/18, there must be a direct link between the public contracting authority and the work or works to be carried out. That direct link may consist, in particular, in the fact that the works are to be carried out for the public contracting authority or that they bring it an immediate economic benefit, or in the fact that the public contracting authority has taken the initiative for the execution of the works or bears at least some of the costs in that connection.

E — *The third and fourth questions*

74. By the third and fourth questions, the Oberlandesgericht Düsseldorf essentially asks whether the concept of a public works contract necessarily implies that the contractor is obliged to carry out the work or works. The reason for these apparently singular questions is that, in the case at issue before the national court, it is common ground that the purchaser of the land was not under any obligation to build on it.

75. Almost all the parties which have submitted observations are generally agreed that the answer to these questions should be in the affirmative, and there appear to be no substantial differences between their respective positions. Only Helmut Müller, the plaintiff in the main proceedings, suggests for obvious reasons that, on the contrary, the Court should accept the referring court's approach, according to which the obligation in question is not essential.

76. In my view, however, it is clear that the answer to the questions should be in the affirmative and that the obligation to carry out the work and/or works constitutes an essential element in order for there to be a public works contract or a public works concession.

77. This follows, first and foremost, from the provisions of Directive 2004/18 itself which,

as we have seen, defines public works contracts as contracts for pecuniary interest. The concept is therefore based on the idea of an exchange of services between the contracting authority, which pays a price (or, alternatively, grants a right of use), and the contractor, who is required to execute a work or works. Thus, public contracts are clearly mutually binding. It would obviously be inconsistent with that characteristic to accept that, after being awarded a contract, a contractor could, without any repercussions, simply decide unilaterally not to carry out the specified work. Otherwise, it would mean that contractors were entitled to exercise discretion with regard to the requirements and needs of the contracting authority.

78. A different and conceptually separate question that is also raised by the referring court is whether or not, in order for there to be a public works contract, any obligation assumed by the contractor vis-à-vis the public authority must be legally enforceable. That is to say, the national court is asking whether, if the work is not done, the contracting authority can institute legal proceedings to oblige the contractor to do it.

79. If, by putting the question in this form, the referring court's intention is to ask the Court whether, in connection with works contracts within the meaning of Directive 2004/18, the national legal order must necessarily provide mechanisms to oblige contractors to carry out the work or works specified in the contract, I consider that the answer should be in the negative, since it is impossible to find any indication to that effect in the Directive.

80. However, that does not mean that the contractor's failure to fulfil obligations is irrelevant. It should not be forgotten that, as I pointed out earlier, a public works contract is to all intents and purposes a contract, that is to say, a legal document which, in all the variety of national legal systems, is by nature binding at all times and in all circumstances. As the German Government rightly points out in its observations, in order for there to be a public works contract, the contractor must be under a contractual obligation to provide the specified service. However, the consequences of any failure to fulfil obligations are a matter of national law: for example, in the event of a contractor failing to fulfil obligations, there is nothing to prevent the national law of a State from providing that the contract is to be terminated, that it is to be awarded to another contractor, and that the public authority is entitled simply to require the first contractor to compensate for any loss or damage.

81. I therefore propose that the Court's answer to the third and fourth questions should

be that the concepts of a public works contract and a public works concession within the meaning of Directive 2004/18 presuppose that the contractor is under a contractual obligation to the public authority to provide the agreed service. It is for national law to determine the consequences of any failure by the contractor to fulfil obligations.

F — *The seventh question*

82. By the seventh question, the referring court ask whether there can be a public works concession within the meaning of Directive 2004/18 if the 'concessionaire' holds a right of ownership which by definition confers the right to use the property that is the object of the concession. [32] More generally, the question concerns the admissibility under Community law of a concession of unlimited duration.

1. The positions of the parties

83. The clearest position on the problem is that of the German Government, which generally rules out the possibility of the institution of concessions being compatible with the existence of a right of ownership. The reason for this is that a concession implies, by definition, that the grantor owns the rights which are transferred to the concessionaire.

84. The Netherlands and Austrian Governments, for their part, while not absolutely excluding the possibility of concessions being compatible with a right of ownership, consider that in the present case the public authority's role is too limited for there to be a concession. For there to be a concession, the public authorities would, in their view, have at the very least to give the concessionaire precise instructions concerning the work and/or works to be carried out.

85. The Commission is the only party to take a more open position. In particular, on the ground that the characteristic element of a works concession is the fact that the concessionaire bears the economic risk connected with the execution of the work or works, the Commission considers that the economic risk in the present case is to be detected in the concessionaire's uncertainty as to whether the public authority would accept

32 — To be precise, in the formulation of the question, the referring court actually speaks of ownership of *the land* on which the works are to be carried out. However, as the court observes in the grounds for the reference, under German law, the right to use a building is a direct consequence of the right of ownership with respect to the land on which the building is erected. Thus, the real problem underlying this question is precisely the problem of the relationship between a concession and the right of ownership.

the building plans, for which the land had to be purchased in advance.

88. By its very definition, a concession is a way of allowing a person to exploit property to which that person could not otherwise claim any right.

2. Assessment

89. Directive 2004/18, for its part, simply speaks in the definition of public works concessions of 'the right to exploit the work' by way of consideration for the person responsible for constructing it.

86. The seventh question is in some ways the most difficult, at least in one important respect. The problem of compatibility between public works concessions and the right of ownership has significant theoretical and practical implications.

90. However, in so far as the 'right to exploit' may be interpreted broadly, one possibility which I consider ought to be excluded, in view of the meaning and the general system of the measure in question, is the possibility of a public works concession in which the concessionaire has a right of ownership in the finished works.

87. There are various reasons why a public authority may opt for a public works concession. In some cases, the decision may be prompted by a desire to take advantage of specific experience available in the private sector or to construct building works more efficiently. However, there is no doubt that, in most cases, the choice of a concession meets financial requirements. By employing that arrangement, it is possible to carry out works of public interest without placing a burden on the public purse. [33]

91. In the first place, as the German Government in particular has observed, the fact that the Directive speaks of the concessionaire's right to exploit the works would logically

33 — On this *ratio legis*, see the Commission interpretative communication on concessions under Community law (OJ 2000 C 121, p. 2, paragraph 1.2) and the more recent communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on public-private partnerships and Community law on public procurement and concessions of 15 November 2005 (COM(2005) 569 final, paragraph 1).

seem to imply that the concessionaire cannot have a more extensive right, such as the right of ownership, in the property.

92. Moreover, apart from being difficult to reconcile with the wording of the provision concerned, such a situation would deprive the public authorities of what seems to me to be one of the essential characteristics of public works concessions: the opportunity for the public authority eventually to take possession of the finished works, even if only to reassign the right to exploit them.

93. In other words, the problem arises not so much from the objective characteristics of the right of ownership in connection with the possibility of exploiting the property, as from the potentially unlimited duration of that right. Consequently, the exploitation entrusted to the concessionaire can never be granted for an unlimited period of time, regardless of the legal title by virtue of which it may be exercised.

94. It must also be borne in mind that, in the typical model of concessions under Community law, the crucial distinctive element which serves in particular to distinguish concessions from public contracts is that there is an economic risk to be borne by the concessionaire in the case of concessions whereas there is no such risk in the case of public contracts. [34] In the present case, in order to determine that there is a risk of this kind, the Commission has to attribute it to the fact that, after the persons concerned have purchased the land, the public authorities in the exercise of their town planning functions may refuse to grant building permits for the proposed works. However, the 'chance' of that happening appears to be not so much a risk associated with the economic exploitation of the works as the normal uncertainty attendant on any private person who depends on a decision to be taken by the public authority at its discretion.

95. Moreover, the economic risk that is a characteristic of the public works concessions covered by the Directive is clearly a direct consequence of the limited duration of concessions. A right of unlimited duration in the property to be constructed, on the contrary, would in principle always exclude the possibility of there being any economic risk

34 — See Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 40, and the judgment of 13 November 2008 in Case C-437/07 *Commission* v *Italy*, paragraphs 29 to 31. The risk need not necessarily be very great, as there are activities in which the risk is intrinsically limited: but it must represent all or at least a significant share of the risk to which the public authority would be exposed if it were to carry out the activities directly (Case C-206/08 *Eurawasser* [2009] ECR I-8377, paragraphs 69 to 77).

because any difficulties that may occur in the exploitation of the property can always be remedied in the course of time.

96. Lastly, there is another argument for the generally limited duration of concessions within the ambit of Community law. It has already been observed several times in this Opinion that the fundamental objective of the Community rules on public contracts is, generally, to encourage competition to the greatest possible extent by abolishing all restrictions on fundamental freedoms. In that context, to admit the possibility of concessions of unlimited duration would be to preclude, to the detriment of competition and efficiency, the possibility of the works being exploited in the future by other persons employing more efficient methods based on more effective criteria.

97. These considerations have two consequences. On the one hand, concessions of unlimited duration cannot generally be granted. [35] On the other hand, a person cannot be granted a concession for property of which that person is already the owner, except where, under national law, the public authority acquires a right of ownership or a similar right in the property after a certain period of time.

98. In conclusion, I propose that the Court's answer to the seventh question should be that a public works concession within the meaning of Directive 2004/18 can never provide for the concessionaire to have a right of unlimited duration in the property that is the object of the concession.

G — *The eighth and ninth questions*

99. The eighth and ninth questions can also be taken together, in view of their subject-matter. By the eighth question, the referring court seeks to ascertain whether the rules contained in Directive 2004/18 apply from the time when a public authority, although it has not yet formally decided to award a public contract, sells land with the intention of subsequently awarding a contract in that

35 — In my view, the new German law cited in footnote 7 above, which introduced inter alia a definition of public works concessions explicitly stating that the rights conferred on the concessionaire are of limited duration, is therefore correct and consistent with Community law.

connection. The ninth question, on the other hand, concerns the possibility of regarding the sale of the land and the subsequent award of the contract as one and the same from a legal point of view.

100. Both questions, as we see, concern the possibility of dealing with a possible abuse of rights for the purpose of evading the Community provisions on public contracts, by applying those provisions in a way that does not take into account the typical chronological order considered in the Directive.

101. It should be noted that, in view of the answers I propose to give to the preceding questions, particularly the seventh question, it is probably unnecessary to provide the referring court with an answer to the eighth and ninth questions, since the possibility that a public works contract or a public works concession within the meaning of Community law is compatible with the presumed contractor/concessionaire having a right of ownership in the property concerned must be excluded. However, for the sake of completeness and in the event of the Court not sharing my approach on the preceding questions, I shall offer some brief considerations on the matter.

102. Of the parties which submitted observations in the present case, only the Commission appeared to be willing to consider the approach favoured by the referring court. While noting that it is for the national courts to make the assessment in each specific case, the Commission admits that in a situation such as that at issue in the main proceedings Directive 2004/18 could in principle apply from the time when the authority decides to sell the land. All the other parties, albeit with various nuances, consider that the public authority's intention alone is irrelevant.

103. As the referring court points out, the answer to the eighth and ninth questions must undoubtedly take the Court's ruling in *Mödling* [36] into account. In that case, the Court was faced with a situation in which an Austrian municipality entrusted direct responsibility for the waste collection service to a company wholly controlled by the municipality and then proceeded, a few days later, to transfer 49% of the shares in that company to a private undertaking. The Court consequently held that where there is a clearly 'artificial construction,' [37] the result of which is essentially to prejudice the effectiveness of the Directive on the award of contracts, the

36 — Cited in footnote 10 above.
37 — *Ibidem*, paragraph 40.

legal assessment of the case may be made 'taking into account all those stages as well as their purpose and not on the basis of their strictly chronological order'. [38]

104. In my view, the Court's ruling in *Mödling* is clearly based on two principal grounds. The first, explicitly stated, is the need to maintain the effectiveness of the Directive. [39] The second, implicit but basically the other side of the same coin, is the wish to deal with an abuse of rights.

105. The Court's ruling in *Mödling* certainly applies generally and it can therefore be stated that, in order to avoid an abuse of rights and ensure the effectiveness of the Community rules on public contracts, two formally and chronologically separate acts may be regarded as contemporaneous or as constituting a single legal act.

106. The assessment is naturally a matter for the national court, which alone has all the necessary elements of fact and of law at its disposal. However, for obvious reasons connected with the need to ensure legal certainty, a number of strict conditions must be met. In particular, there must be a reasonably short space of time between the sale of the land and the award of the contract, and there must be convincing evidence that the authority already intended to award the contract when the land was sold. Except in cases of major abuse where the intention to evade the rules is quite clear from the outset, only *ex post facto* assessment can take due account of all these elements.

107. I therefore propose that, if necessary, the answer to the eighth and ninth questions should be that, in cases where there is clear evidence of an intention to evade the Community provisions on public contracts and concessions, the legal assessment may regard the two formally and chronologically separate acts of a sale of land and the award of a contract or a concession in that connection as constituting a single legal act. It is for the national court to determine, on the basis of all the circumstances in the case, whether there was an intention to evade the rules.

38 — *Ibidem*, paragraph 41.
39 — *Ibidem*, paragraph 42.

V — Conclusion

108. I therefore propose that the Court give the following answers to the questions submitted by the Oberlandesgericht Düsseldorf:

'In order for there to be a public works contract or a public works concession within the meaning of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, there must be a direct link between the public contracting authority and the work or works to be carried out. That direct link may consist, in particular, in the fact that the works are to be carried out for the public contracting authority or that they bring it an immediate economic benefit, or in the fact that the public contracting authority has taken the initiative for the execution of the works or bears at least some of the costs in that connection.

The concepts of a public works contract and a public works concession within the meaning of Directive 2004/18 presuppose that the contractor is under a contractual obligation to the public authority to provide the agreed service. It is for national law to determine the consequences of any failure by the contractor to fulfil obligations.

A public works concession within the meaning of Directive 2004/18 can never provide for the concessionaire to have a right of unlimited duration in the property that is the object of the concession.

In cases where there is clear evidence of an intention to evade the Community provisions on public contracts and concessions, the legal assessment may regard the two formally and chronologically separate acts of a sale of land and the award of a contract or a concession in that connection as constituting a single legal act. It is for the national court to determine, on the basis of all the circumstances in the case, whether there was an intention to evade the rules.'