JUDGMENT OF THE COURT (Sixth Chamber)
7 December 2000 *

In Case C-324/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesvergabeamt, Austria, for a preliminary ruling in the proceedings pending before that court between

Telaustria Verlags GmbH,
Telefonadress GmbH

and

Telekom Austria AG, formerly Post & Telekom Austria AG,

joined party:

Herold Business Data AG,

on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and of Council Directive 93/38/EEC of 14 June 1993 coordinating

* Language of the case: German.

the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84),

THE COURT (Sixth Chamber),

composed of: V. Skouris (Rapporteur), President of the Second Chamber, acting as President of the Sixth Chamber, J.-P. Puissochet and F. Macken, Judges,

Advocate General: N. Fennelly,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Telaustria Verlags GmbH, by F.J. Heidinger, Rechtsanwalt, Vienna,

— Telekom Austria AG, by C. Kerres and G. Diwok, Rechtsanwälte, Vienna,

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

— the Danish Government, by J. Molde, Head of Division in the Ministry of Foreign Affairs, acting as Agent,

— the French Government, by K. Rispal-Bellanger, Head of Subdirectorate at the Legal Affairs Directorate of the Ministry of Foreign Affairs, and A. Bréville-Viéville, Chargé de Mission in the same directorate, acting as Agents,

— the Netherlands Government, by M.A. Fierstra, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by M. Nolin and J. Schieferer, of its Legal Service, acting as Agents, assisted by R. Roniger, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Telaustria Verlags GmbH, represented by F.J. Heidinger; of Telekom Austria AG, represented by C. Kerres, P. Asenbauer, and M. Gregory, Director of Commercial Law in the office of the Legal Service of Telekom Austria AG, acting as Agent; of Herold Business Data AG, represented by T. Schirmer, Rechtsanwalt, Vienna; of the Austrian Government, represented by M. Fruhmann, of the Federal Chancellor's Office, acting as Agent; of the French Government, represented by S. Pailler, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; and of the Commission, represented by M. Nolin, assisted by R. Roniger, at the hearing on 23 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2000,

gives the following

Judgment

1 By order of 23 April 1998, received at the Court on 26 August 1998, the Bundesvergabeamt (Federal Procurement Office) referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) seven questions on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

2 Those questions have been raised in proceedings between Telaustria Verlags GmbH ('Telaustria') and Telefonadress GmbH ('Telefonadress'), on the one hand, and Telekom Austria AG ('Telekom Austria'), on the other, concerning the conclusion by Telekom Austria of a concession contract with Herold Business Data AG ('Herold') for the production and publication of printed and electronically accessible lists of telephone subscribers (telephone directories).

Legislative framework

Community legislation

Directive 92/50

3 Article 1 of Directive 92/50 states:

'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, to the exclusion of:

...'.

4 The eighth recital in the preamble to Directive 92/50 states:

'... the provision of services is covered by this directive only in so far as it is based on contracts; ... the provision of services on other bases, such as law or regulations, or employment contracts, is not covered'.

5 Furthermore, the 17th recital in the preamble to Directive 92/50 states:

'... the rules concerning service contracts as contained in Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [OJ 1990 L 297, p. 1] should remain unaffected by this directive'.

Directive 93/38

6 Under Article 45(3) of Directive 93/38, Directive 90/531 is to cease to have effect as from the date on which Directive 93/38 is applied. Article 45(4) states, moreover, that references to Directive 90/531 are to be construed as referring to Directive 93/38.

7 Under the 24th recital in the preamble to Directive 93/38:

'... the provision of services is covered by this directive only in so far as it is based on contracts;... the provision of services on other bases, such as law, regulations or administrative provisions or employment contracts, is not covered'.

8 Article 1(2) of Directive 93/38 defines 'public undertaking' as 'any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein,

or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

— hold the majority of the undertaking's subscribed capital ...'.

9 Article 1(4) of Directive 93/38 defines 'supply, works and service contracts' as 'contracts for pecuniary interest concluded in writing between one of the contracting entities referred to in Article 2, and a supplier, a contractor or a service provider, having as their object:

(a) in the case of supply contracts ...

(b) in the case of works contracts ...

(c) in the case of service contracts, any object other than those referred to in (a) and (b) and to the exclusion of:

...'.

10 The last indent of Article 1(4) thereof states:

'Contracts which include the provision of services and supplies shall be regarded as supply contracts if the total value of supplies is greater than the value of the services covered by the contract.'

11 Furthermore, Article 1(15) of Directive 93/38 defines 'public telecommunications services' and 'telecommunications services' as follows:

'"public telecommunications services" shall mean telecommunications services the provision of which the Member States have specifically assigned notably to one or more telecommunications entities;

"telecommunications services" shall mean services the provision of which consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of radio-broadcasting and television'.

12 Article 2(1) and (2) of Directive 93/38 states:

'1. This directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

...

2. Relevant activities for the purposes of this directive shall be:

...

(d) the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.'

The national legislation

13 The Telekommunikationsgesetz (Telecommunications Law, BGBl. I No 100/1997), which entered into force on 1 August 1997, determines, in particular, the obligations of providers, concessionaires and operators of a voice telephony service.

14 Under Paragraph 19 of the Telekommunikationsgesetz, every provider of a public voice telephony service must maintain an up-to-date list of subscribers, maintain an information service about subscribers' numbers, provide for calls free of charge to emergency services, and make telephone directories available at least weekly in electronically readable form on request to the regulatory authority free

of charge and to other providers for an appropriate charge, for the purposes of giving information or publishing directories.

15 Under Paragraph 26(1) of the Telekommunikationsgesetz, the regulatory authority is to ensure that a comprehensive directory of all subscribers to public voice telephony services is available. Concessionaires who offer a public voice telephony service via a fixed or mobile network are obliged to transmit subscriber data to the regulatory authority, against payment, for that purpose.

16 Furthermore, under Paragraph 96(1) of that Law, the operator of a public telecommunications service must produce a directory of telephone subscribers. This may take the form of a printed document or a telephone information service, 'Bildschirmtext' (videotex system), electronic data support or any other technical form of communication. Paragraph 96 further regulates the minimum requirements for the data and the structure of those directories and the communication of subscriber data to the regulatory authority or to third parties.

The main proceedings and the questions referred for a preliminary ruling

17 Telekom Austria, founded under the Telekommunikationsgesetz, is a limited company in which the Republic of Austria holds all the shares. It is the successor to the former Post & Telegraphenverwaltung (Post and Telegraph Administration; 'the PTV') and carries out the former functions of the PTV, including the obligation to ensure that a directory of all subscribers to public voice telephony services is available.

18 Whereas until 1992 the PTV fulfilled by its own means its obligation to publish, in particular, an official telephone directory known as 'the White Pages', in 1992, because of the high cost of printing and distributing that directory, it decided to seek a partner and concluded a contract with a private undertaking for the publication of that directory.

19 Since that contract was to expire on 31 December 1997, on 15 May 1997, Telekom Austria, which had replaced the PTV, published in the *Amtsblatt zur Wiener Zeitung* (bulletin annexed to the Austrian Official Journal) an invitation 'to submit tenders for a public service concession for the production and publication of printed and electronically accessible lists of telephone subscribers (telephone directories) commencing with the 1998/99 edition and then for an indefinite period'.

20 Since Telaustria and Telefonadress took the view that the procedures prescribed by Community and national law for the award of public contracts should have been applied to the contract which would be concluded as a result of the abovementioned invitation to submit tenders, on 12 and 17 June 1997 respectively, they made applications to the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission) for an arbitration procedure to be initiated under Paragraph 109 of the Bundesvergabegesetz 1997 (Federal Procurement Law, BGBl. I No 56/1997; 'the BVergG').

21 After having joined those two applications, the Bundes-Vergabekontrollkommission issued a reasoned recommendation in favour of the applicants, concluding on 20 June 1997 that the provisions of the BVergG applied to the planned contract.

22 Since Telekom Austria had continued negotiations on the conclusion of that contract, on 24 June 1997, Telaustria made an application to the Bundesvergabeamt for a re-examination procedure to be initiated, combined with an application for an interim order. By application of 4 July 1997, Telefonadress applied to be joined in those proceedings. On 8 July 1997, Herold, which is the company with which Telekom Austria was negotiating, also joined in the proceedings as a third party in support of the forms of order sought by Telekom Austria.

23 Before the Bundesvergabeamt, Telekom Austria submitted that the contract to be concluded fell outside the scope of the directives on the award of public service contracts on the grounds, first, that the contract was not for pecuniary interest and, second, that the case concerned a 'public service concession' excluded from the scope of Directives 92/50 and 93/38.

24 Having first adopted an interim order in favour of the applicants, on 10 July 1997, the Bundesvergabeamt replaced that order with a new order giving provisional permission for the conclusion of the contract between Telekom Austria and Herold, on condition that provision be made for the possibility for that contract to be terminated in order to resume a proper procurement procedure if it transpired that the planned contract fell within the scope of the Community and national rules on public procurement.

25 On 1 December 1997, Herold, to which the concession was to be granted shortly thereafter, passed into the ownership of the undertaking GTE which, on 3 December 1997, ceded to Telekom Austria a holding of 26% in the capital of Herold, which thus became a joint subsidiary of GTE and Telekom Austria. On 15 December 1997, the contract at issue in the main proceedings was formally concluded between Herold and its minority shareholder, namely Telekom Austria.

26 In the grounds of its order for reference, the Bundesvergabeamt observes that that contract, consisting of several, partly interlocking contracts, concerns the production of printed telephone directories and provides, in particular, for the provision of the following services on the part of Herold: collecting, processing and arranging subscriber data, production of telephone directories and certain advertising services. As regards the payment of the other contracting party, the contract stipulates that Herold is not to be directly remunerated for providing the services, but that it may exploit them commercially.

27 In view of all those facts, and in particular of the method by which the service provider is to be remunerated, such as to result in the classification of that contract as one of 'service concession', and in view of its own considerations, the Bundesvergabeamt, being uncertain as to the interpretation of Directives 92/50 and 93/38, decided to stay proceedings and to refer the following questions to the Court of Justice.

'Principal question:

Can it be inferred from the legislative history of Directive 92/50/EEC, in particular the proposal of the Commission (COM (90) 372 final, OJ 1991 C 23, p. 1), or from the definition of the term "public service contract" in Article 1(a) of Directive 92/50/EEC, that certain categories of contracts concluded by contracting authorities subject to that directive with undertakings which provide services are to be excluded a priori from the scope of the directive, solely on the basis of certain common characteristics as specified in that proposal of the Commission, without the need to rely on Article 1(a)(i) to (viii) or Articles 4 to 6 of Directive 92/50/EEC?

If the principal question is answered in the affirmative:

Do such categories of contracts also exist, having regard in particular to the 24th recital in the preamble to Directive 93/38/EEC, within the scope of Directive 93/38/EEC?

If the second question is answered in the affirmative:

May those categories of contracts excluded from the scope of Directive 93/38/EEC be adequately described, by analogy with Commission Proposal COM (90) 372 final, as having as their essential feature that a contracting entity which falls within the scope *ratione personae* of Directive 93/38/EEC cedes a service for which it is responsible to an undertaking of its choice in return for the right to operate the service concerned for financial gain?

Supplementary to the first three questions:

Is a contracting entity which falls within the scope *ratione personae* of Directive 93/38/EEC obliged, where a contract concluded by it contains elements of a service contract within the meaning of Article 1(4)(a) of Directive 93/38/EEC together with elements of a different contractual nature which are not within the scope of that directive, to sever the part of the overall contract which is subject to Directive 93/38/EEC, in so far as that is technically possible and economically reasonable, and make that part the subject of a procurement procedure under Article 1(7) of that directive, as the Court of Justice held in Case C-3/88 before

the entry into force of Directive 92/50/EEC with respect to a contract which was not subject as a whole to Directive 77/62/EEC?

If that question is answered in the affirmative,

Is the contractual concession of the exclusive right to operate a service for financial gain, which will give the service provider an income which cannot be determined but which in the light of general experience will not be inconsiderable and may be expected to exceed the costs of providing the service, to be regarded as payment for the provision of the service, as the Court of Justice held in Case C-272/91 in connection with a supply contract and a right ceded by the public authorities in lieu of payment?

Supplementary to the above questions:

Are the provisions of Article 1(4)(a) and (c) of Directive 93/38/EEC to be interpreted as meaning that a contract which provides for the provision of services within the meaning of Annex XVI A, category 15, loses the nature of a service contract and becomes a supply contract if the result of the service is the production of a large number of identical tangible objects which have an economic value and thus constitute goods within the meaning of Articles 9 and 30 of the EC Treaty?

If that question is answered in the affirmative,

Is the judgment of the Court of Justice in Case C-3/88 to be interpreted as meaning that such a supply contract is to be severed from the other components of the service contract and made the subject of a procurement procedure under Article 1(7) of Directive 93/38/EEC, in so far as this is technically possible and economically reasonable?'

The first and second questions

28 By the first and second questions, which can be examined together, the national court raises essentially two issues.

29 The first is whether a contract for pecuniary interest is covered, by reason of the contracting parties and its specific object, by Directives 92/50 or 93/38 where under that contract, which was concluded in writing between, on the one hand, an undertaking which is specifically responsible under the legislation of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories).

30 By the second issue raised, the national court seeks essentially to ascertain whether such a contract, whose specific object is the services mentioned in the preceding paragraph, although it is covered by one of those directives, is excluded, as Community law stands at present, from the scope of the directive which covers it, because, in particular, the consideration provided by the first

undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

31 In order to deal with the first issue raised, it should be noted at the outset that, as is clear from the 17th recital in the preamble to Directive 92/50, the provisions of that directive must not affect those of Directive 90/531 which, since it preceded Directive 93/38, also applied, like that directive, to procurement procedures in the water, energy, transport and telecommunications sectors.

32 Since Directive 90/531 was replaced by Directive 93/38, as is clear from Article 45(3) of that directive, and since the references to Directive 90/531 are to be construed, according to Article 45(4) of Directive 93/38, as referring to Directive 93/38, it must be concluded, as under the regime applicable when the sectoral Directive 90/531 was in force, that the provisions of Directive 92/50 must not affect those of Directive 93/38.

33 Consequently, where a contract is covered by Directive 93/38 governing a specific sector of services, the provisions of Directive 92/50, which are intended to apply to services in general, are not applicable.

34 In those circumstances, it is necessary only to examine whether the contract at issue in the main proceedings can be covered, by reason of the contracting parties and its specific object, by Directive 93/38.

35 In this respect, it is necessary to determine, first, whether an undertaking, such as Telekom Austria, falls within the scope *ratione personae* of Directive 93/38 and, second, whether a contract, whose object is the services mentioned in paragraph 26 above, comes within the material scope of that directive.

36 As regards the scope *ratione personae* of Directive 93/38, it is common ground, as is clear from the order for reference, that Telekom Austria, whose capital belongs entirely to the Austrian public authorities, constitutes a public undertaking over which those authorities may, by virtue of the fact that the Republic of Austria holds the entire capital, exercise a dominant influence. It follows that Telekom Austria must be regarded as a public undertaking for the purpose of Article 1(2) of that directive.

37 Furthermore, it is common ground that, under the Telekommunikationsgesetz under which it was founded, that public undertaking carries on the activity which consists in the provision of public telecommunications services. It follows that Telekom Austria constitutes a contracting entity for the purpose of Article 2(1)(a) of Directive 93/38 in conjunction with Article 2(2)(d) thereof.

38 Moreover, since it is also common ground that the aforementioned contract provides for the performance of services which are Telekom Austria's responsibility under the Telekommunikationsgesetz and consist in the provision of public telecommunications services, it is sufficient, in order to determine whether the contract at issue in the main proceedings comes within the material scope of Directive 93/38, to determine whether the specific object of that contract is covered by the provisions of Directive 93/38.

39 In this respect, it should be noted, as in the order for reference, that the services which are Herold's responsibility include:

— collecting, processing and arranging of subscriber data, in order to make them technically accessible, operations which require data gathering, data processing and tabulation, and services of data banks, which are in category 7, entitled 'Computer and related services', of Annex XVI A to Directive 93/38;

— production of printed telephone directories, which comes under category 15 of Annex XVI A to that directive, a category covering 'Publishing and printing services on a fee or contract basis';

— advertising services, which come under category 13 of Annex XVI A to Directive 93/38.

40 Since those services are directly linked to an activity relating to the provision of public telecommunications services, it must be concluded that the contract at issue in the main proceedings, whose specific object is the services referred to in the preceding paragraph, is covered by Directive 93/38.

41 In answering the second issue raised by the national court, it must be noted at the outset that the court links its questions to Proposal 91/C 23/01 of 13 December 1990 for a Council Directive relating to the coordination of procedures on the

award of public service contracts (OJ 1991 C 23, p. 1; 'the proposal of 13 December 1990') and adopts the definition of public service concession proposed in that document by the Commission.

42 In that regard, it is necessary to state that the Court is in a position to deal with the second issue raised without its being necessary for it to adopt the definition of public service concession referred to in Article 1(h) of the proposal of 13 December 1990.

43 It should be noted at the outset that Article 1(4) of Directive 93/38 refers to contracts for pecuniary interest concluded in writing and, without making express reference to public service concessions, provides only indications about the contracting parties and about the object of the contract, defining them in particular in the light of the method of remunerating the service provider and without drawing any distinction between contracts in which the consideration is fixed and those in which the consideration consists in a right of exploitation.

44 Telaustria proposes that Directive 93/38 be interpreted as meaning that a contract under which the consideration consists in a right of exploitation also comes within its scope. In its submission, in order for Directive 93/38 to apply to such a contract, it is sufficient, in accordance with Article 1(4) of that directive, for the contract to be for pecuniary interest and concluded in writing. It would therefore be unjustified to infer that such contracts are excluded from the scope of Directive 93/38 simply because that directive is silent about the method by which the service provider is to be remunerated. Telaustria adds that the fact that the Commission did not propose to include provisions about that type of contract within the scope of the Directive indicates that it considered that the Directive covers any contract for the provision of services, regardless of the arrangements for remunerating the provider.

45 Since Telekom Austria, the Member States which have submitted observations and the Commission dispute that interpretation, it is necessary to assess its merits in the light of the history of the relevant directives, in particular in the field of public service contracts.

46 In that regard, it should be recalled that both in its proposal of 13 December 1990 and in its amended proposal 91/C 250/05 of 28 August 1991 for a Council Directive relating to the coordination of procedures on the award of public service contracts (OJ 1991 C 250, p. 4; 'the proposal of 28 August 1991'), which resulted in the adoption of Directive 92/50 which covers public service contracts in general, the Commission had expressly proposed that 'public service concessions' be included within the scope of that directive.

47 Since that inclusion was justified by the intention 'to ensure coherent award procedures', the Commission stated, in the 10th recital in the preamble to the proposal of 13 December 1990, that 'public service concessions should be covered by this directive in the same way as Directive 71/305/EEC applies to public works concessions'. Although the reference to Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) was withdrawn from the 10th recital in the preamble to the proposal of 28 August 1991, that proposal none the less expressly maintained the purpose of ensuring 'coherent award procedures' in that recital.

48 However, during the legislative process, the Council eliminated all references to public service concessions, in particular because of the differences between the Member States as regards the delegation of the management of public services and modes of delegation, which could create a situation of very great imbalance

in the opening-up of the public concession contracts (see point 6 of document No 4444/92 ADD 1 of 25 February 1992, entitled 'Statement of reasons of the Council' and annexed to the common position of the same date).

49 The outcome was the same for the Commission's position expressed in its amended proposal 89/C 264/02 of 18 July 1989 for a Council Directive on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1989 C 264, p. 22), which resulted in the adoption of Directive 90/531, which was the first directive in those sectors on the award of public contracts and preceded Directive 93/38, in which the Commission had also proposed for those sectors certain provisions designed to govern public service concessions.

50 None the less, as is clear from point 10 of document No 5250/90 ADD 1 of 22 March 1990, entitled 'Statement of reasons of the Council' and annexed to the Council's common position of the same date on the amended proposal for a Council Directive on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, the Council did not act on that Commission proposal to include in Directive 90/531 rules on public service concessions, on the ground that such concessions existed in only one Member State and that it was inappropriate to proceed with their regulation in the absence of a detailed study of the various forms of public service concessions granted in the Member States in those sectors.

51 In view of those circumstances, the Commission did not propose the inclusion of public service concessions in its proposal 91/C 337/01 of 27 September 1991 for

a Council Directive amending Directive 90/531 (OJ 1991 C 337, p. 1), which subsequently resulted in the adoption of Directive 93/38.

52 That finding is also supported by the way in which the scope of the directives on public works contracts evolved.

53 Article 3(1) of Directive 71/305, which was the first directive on the subject, expressly excluded concession contracts from its scope.

54 None the less, Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305 (OJ 1989 L 210, p. 1) inserted in Directive 71/305 Article 1b which expressly addressed public works concessions by making the advertising rules laid down in Articles 12(3), (6), (7), (9) to (13) and 15a thereof applicable to them.

55 Subsequently, 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), which replaced Directive 71/305 as amended, expressly refers to public works concessions among the contracts within its scope.

56 On the other hand, Directive 93/38, adopted on the same day as Directive 93/37, provided for no rule on public service concessions. It follows that the Community

legislature decided not to include such concessions within the scope of Directive 93/38. If it had wished to, it would have done so expressly, as it did when adopting Directive 93/37.

57 Since public service concession contracts do not therefore come within the scope of Directive 93/38, it must be concluded that, contrary to the interpretation proposed by Telaustria, such contracts are not included in the concept of 'contracts for pecuniary interest concluded in writing' appearing in Article 1(4) of that directive.

58 The answers to the first and second questions must therefore be that:

— Directive 93/38 covers a contract for pecuniary interest concluded in writing between, on the one hand, an undertaking which is specifically responsible under the legislation of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, where under that contract the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories);

— although it is covered by Directive 93/38, such a contract is excluded, under Community law as it stands at present, from the scope of that directive by reason of the fact, in particular, that the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

59 However, the fact that such a contract does not fall within the scope of Directive 93/38 does not preclude the Court from helping the national court which has sent it a series of questions for a preliminary ruling. To that end, the Court may take into consideration other factors in making an interpretation which may assist the determination of the main proceedings.

60 In that regard, it should be borne in mind that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular.

61 As the Court held in Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31, that principle implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.

62 That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

63 It is for the national court to rule on the question whether that obligation was complied with in the case in the main proceedings and also to assess the materiality of the evidence produced to that effect.

The third and fifth questions

64 In view of the answers given to the first and second questions, it is not necessary to answer the third, since it was raised only in the event that the Court answered the second question in the affirmative.

65 Furthermore, since the fifth question was referred to the Court for the purpose of clarification on the third question, it is not necessary to answer that question either.

The fourth, sixth and seventh questions

66 In view of the answers given to the first and second questions, it is likewise unnecessary to answer the fourth, sixth or seventh questions, since they were raised only in the event that the Court declared that Directive 93/38 was applicable to the contract at issue in the main proceedings.

Costs

67 The costs incurred by the Austrian, Danish, French and Netherlands 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 23 April 1998, hereby rules:

1. — Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors covers a contract for pecuniary interest concluded in writing between, on the one hand, an undertaking which is specifically responsible under the legislation of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, where under that contract the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories);

— although it is covered by Directive 93/38, such a contract is excluded, under Community law as it stands at present, from the scope of that directive by reason of the fact, in particular, that the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

2. Notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting

entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular, that principle implying, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.

3. That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

4. It is for the national court to rule on the question whether that obligation was complied with in the case in the main proceedings and also to assess the materiality of the evidence produced to that effect.

Skouris Puissochet Macken

Delivered in open court in Luxembourg on 7 December 2000.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber