# JUDGMENT OF THE COURT (Grand Chamber)

13 April 2010 *

In Case C-91/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Landgericht Frankfurt am Main (Germany), made by decision of 28 January 2008, received at the Court on 28 February 2008, in the proceedings

**Wall AG**

v

**Stadt Frankfurt am Main,**

**Frankfurter Entsorgungs- und Service (FES) GmbH,**

* Language of the case: German.

intervener:

**Deutsche Städte Medien (DSM) GmbH,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues (Rapporteur), K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta and C. Toader, Presidents of Chambers, C.W.A. Timmermans, A. Rosas, K. Schiemann, J. Malenovský, A. Arabadjiev and J.-J. Kasel, Judges,

Advocate General: Y. Bot,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 9 June 2009,

after considering the observations submitted on behalf of:

— Wall AG, by H.-J. Otto, Rechtsanwalt, and C. Friese and R. von zur Mühlen, Justitiare,

— Stadt Frankfurt am Main, by L. Horn and J. Sommer, Rechtsanwälte, and B. Weiß, Justitiar,

— Frankfurter Entsorgungs- und Service (FES) GmbH, by H. Höfler, Rechtsanwalt,

— Deutsche Städte Medien (DSM) GmbH, by F. Hausmann and A. Mutschler-Siebert, Rechtsanwälte,

— the German Government, by M. Lumma and J. Möller, acting as Agents,

— the Danish Government, by B. Weis Fogh, acting as Agent,

— the Netherlands Government, by C. Wissels and Y. de Vries, acting as Agents,

— the Austrian Government, by M. Fruhmann, acting as Agent,

— the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

— the United Kingdom Government, by S. Ossowski, acting as Agent, and J. Coppel, Barrister,

— the Commission of the European Communities, by D. Kukovec, B. Schima and C. Zadra, acting as Agents,

— the EFTA Surveillance Authority, by N. Fenger, B. Alterskjær and L. Armati, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 October 2009,

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 43 EC and 49 EC, the principles of equal treatment and non-discrimination on grounds of nationality, and the consequent requirement of transparency, in connection with the award of service concessions.

2 The reference was made in the course of proceedings between Wall AG ('Wall') and Stadt Frankfurt am Main ('the City of Frankfurt') concerning the award of a service concession for the operation and maintenance of certain public lavatories in that city.

## Legal context

3 Article 2 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ 1980 L 195, p. 35), as amended by Commission Directive 2000/52/EC of 26 July 2000 (OJ 2000 L 193, p. 75) ('Directive 80/723'), provides:

'1. For the purpose of this Directive:

…

(b) "public undertakings" means 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;

…

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

(a) hold the major part of the undertaking's subscribed capital; or

(b) control the majority of the votes attaching to shares issued by the undertaking; or

(c) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.'

4 Under Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1) ('Directive 92/50'):

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

*Body governed by public law* means any body:

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

and

— having legal personality

and

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

…'

5 Article 17 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 (OJ 2004 L 134, p. 114) provides:

'Without prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4).'

6 The first subparagraph of Article 80(1) of Directive 2004/18 provides:

'The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 January 2006. They shall forthwith inform the Commission thereof.'

7 According to the first paragraph of Article 82 of that directive:

'Directive 92/50/EEC, except for Article 41 thereof, and Directives 93/36/EEC and 93/37/EEC shall be repealed with effect from the date shown in Article 80, without prejudice to the obligations of the Member States concerning the deadlines for transposition and application set out in Annex XI.'

**The main proceedings and the questions referred for a preliminary ruling**

8 Wall markets advertising in public streets and open spaces, and for that purpose carries out inter alia the production, installation, maintenance and cleaning of public lavatories.

9 Frankfurter Entsorgungs- und Service GmbH ('FES'), a limited liability company, is a legal person governed by private law, whose objects in accordance with its statutes are waste disposal, waste management, urban cleansing and traffic safety, on behalf of public authorities and private persons. The City of Frankfurt holds 51% of the shares in FES, the remaining 49% being held by a private undertaking. Decisions of the shareholders' meeting of FES require a three-quarters majority. Of the 16 members of the supervisory board of FES, half are appointed by the shareholders. The workers appoint eight members and each of the two shareholders four members. The City of Frankfurt has the right to propose the chairman of the supervisory board, who has a casting vote if the votes are equal. FES employs approximately 1 400 employees, about 800 of whom carry out work concerning the City of Frankfurt.

10 FES achieves a net turnover of EUR 92 million with the City of Frankfurt and EUR 52 million with other persons governed by private and public law. Of the net

turnover achieved by FES with the City of Frankfurt in 2005, EUR 51,3 million related to waste disposal and EUR 36,2 million to urban cleansing.

11 On 18 December 2002 the City of Frankfurt called by a 'voluntary EU-wide notice' in the city's official gazette for applications to take part in a competition for the conclusion of a service concession contract relating to the operation, maintenance, servicing and cleaning of 11 municipal public lavatories for a period of 16 years. Two of those 11 public lavatories, namely those at Rödelheim station and Galluswarte, were to be newly built. The consideration for those services was solely the right to charge a fee for the use of the installations and to make use, during the period of the contract, of advertising spaces on and in the lavatories and in other public spaces in the city of Frankfurt.

12 On 4 July 2003 the City of Frankfurt invited interested undertakings to submit tenders. A draft service concession contract was annexed to the invitation, clauses 18(2) and 30(4) of which stated that a change of subcontractor was permitted only with the consent of the city.

13 Tenders were submitted by Wall, FES and three other undertakings also established in Germany.

14 According to the order for reference, FES gave the following description of the concepts relating to its offer: 'Introduction – … The call for tenders by the City of Frankfurt gives FES … an opportunity, together with an efficient and experienced partner such as [Wall], both to renew the buildings and the network of the public lavatories and to present a realistic refinancing scheme which takes account of its responsibility towards employees. … Galluswarte – … In consultation with the authorities, a fully automated City-WC from [Wall] will be integrated beneath the suburban railway bridge. … Bahnhof Rödelheim – Since the lavatories at Rödelheim station will be demolished in the course of redeveloping the open space, in accordance with current plans a fully automated City-WC from [Wall] will be integrated. … Safety concept

– … the City-WCs have a fully automated self-cleaning system. Concepts for advertising – … Marketing of the advertising surfaces will be carried out by FES's partner [Wall] as an experienced advertising specialist operating worldwide … Advertising media used – The modern and aesthetic products of [Wall] will be used.'

15 Wall holds several patents relating to the method of functioning of the City-WCs.

16 On 18 March 2004 Wall was excluded from the award procedure and its tender was rejected.

17 On 9 June 2004 the concession was awarded to FES. A corresponding contract was concluded between FES and the City of Frankfurt on 20 and 22 July 2004, valid until 31 December 2019 ('the concession contract'). According to the order for reference, FES's concepts, as they resulted from the negotiations, were agreed as components of the contract. However, in its written observations, the City of Frankfurt asserts that the points mentioned in the FES concept were not incorporated in the concession contract. Only the designation of Wall as one of FES's subcontractors was incorporated.

18 An examination of the wording of the concession contract, submitted with the national court's case-file, shows that Wall was designated as a subcontractor with no further details of its products or services being included in the contract.

19 Clause 18(2) of the concession contract provided that FES was to carry out the construction work for the public lavatories using its own means and/or by means of subcontractors, including Wall. That clause stated that a change of subcontractor was allowed only with the written consent of the City of Frankfurt.

20 Clause 30(4) of the contract stated that Wall was the subcontractor of FES for the advertising services covered by the concession. That clause provided that a change of subcontractor was allowed only with the written consent of the City of Frankfurt.

21 On 5 January 2005 Wolf was requested by FES to submit an offer for the advertising services which were the subject of the concession awarded to FES. FES also invited Deutsche Städte Medien GmbH ('DSM') to submit such an offer.

22 By letter of 15 June 2005, FES then asked the City of Frankfurt to give its consent, as regards the use of the advertising spaces, to a change of subcontractor to DSM. On 21 June 2005 the city agreed to the change of subcontractor.

23 FES awarded those services to DSM, and on 21 June 2005 concluded a contract with DSM which provided for the payment by DSM to FES of an annual remuneration of EUR 786 206.

24 On 28 July 2005 FES invited offers for the supply of two Wall City-WCs. Wall made an offer, but on 7 September 2005 it was informed by FES that FES had received a more competitive offer, and consequently could not take Wall's offer into consideration.

25 By letter of 10 October 2005, FES asked the City of Frankfurt for consent to a change of subcontractor, in accordance with the concession contract, so that those public lavatories could be supplied not by Wall but by other companies.

26 On 19 December 2005 the City of Frankfurt replied to FES that it did not have to deal with the question of a change of subcontractor for the public lavatories, since it understood that FES now wished to carry out the work itself under its own responsibility. The city stated on this occasion that it understood that the standards set out in the contractual documents would be complied with.

27 Wall brought an action before the referring court, asking it to order FES to refrain from performing the contract relating to the advertising services concluded with DSM and from concluding and/or performing any contract with a third party for the construction of the two public lavatories which were to be newly built. Wall also sought for the City of Frankfurt to be ordered to refrain from consenting to the conclusion of a contract between FES and anyone other than Wall for the construction of those two public lavatories. In the alternative, it asked for the City of Frankfurt and FES to be ordered jointly and severally to pay it EUR 1 038 682,18 plus interest.

28 In those circumstances, the Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘1. Are the principle of equal treatment expressed inter alia in Articles 12 EC, 43 EC and 49 EC and the prohibition in Community law of discrimination on grounds of nationality to be interpreted as meaning that the consequent duties of transparency for public authorities, namely to use an appropriate degree of advertising to enable the award of service concessions to be opened up to competition and the impartiality of the procurement procedure to be reviewed (see the judgments of the Court of Justice in Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 to 62; Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 17 to 22; Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraphs 46 to 50; Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 21; and Case C-260/04 *Commission* v *Italy* [2007] ECR I-7083, paragraph 24), require national law to provide an unsuccessful tenderer with a claim to an order restraining an imminent breach of those duties and/or prohibiting the continuation of such a breach of duty?

2. If Question 1 is answered in the negative: Do those duties of transparency form part of the customary law of the European Communities, in the sense that they are already applied continually and constantly, equally and generally, and are recognised as a binding rule by those concerned?

3. Do the duties of transparency mentioned in Question 1 require, in the case also of an intended amendment to a service concession contract – including the substitution of a subcontractor whose identity was emphasised in the tender – that the negotiations on this point are again opened up to competition with an appropriate degree of advertising, and what would be the criteria for requiring such an opening up?

4. Are the principles and duties of transparency mentioned in Question 1 to be interpreted as meaning that in the case of service concessions, in the event of a breach of duty, a contract concluded as a result of the breach and intended to create or amend a continuing obligation must be terminated?

5. Are the principles and duties of transparency mentioned in Question 1 and Article 86(1) EC, referring also if necessary to Article 2(1)(b) and (2) of [Directive 80/723] and Article 1(9) of [Directive 2004/18], to be interpreted as meaning that an undertaking is subject to those duties of transparency, as a public undertaking or contracting authority, if

   — it was set up by a regional or local authority for the purpose of waste disposal and street cleaning but also operates in the free market,

— it belongs to that regional or local authority to the extent of a 51% holding, but decisions of shareholders can be taken only by a three-quarters majority,

— the regional or local authority appoints only a quarter of the members of the supervisory board of the undertaking, including the chairman, and

— it achieves more than half its turnover from bilateral contracts for waste disposal and street cleaning in the territory of that regional or local authority, which reimburses itself by means of municipal taxes on its residents?'

**Consideration of the questions referred**

*Preliminary observation*

29 The main proceedings concern, first, the decision of FES to change its subcontractor for the advertising services that were the subject of the concession awarded to FES by the City of Frankfurt, the contract embodying that change having been concluded with the consent of the city on 21 June 2005, and, second, the intention of FES to award the construction of two public lavatories to an operator other than Wall. That intention was expressed in a letter of 10 October 2005, in which FES asked the City of Frankfurt to agree to a change of subcontractor for that work. By letter of 19 December 2005, the city replied to FES that it did not have to deal with the question of a change of subcontractor for the public lavatories, since it understood that FES now wished to carry out the work itself under its own responsibility. That reply is interpreted in the order for reference as meaning that the City of Frankfurt gave its

consent to the change of subcontractor for the supply of the two public lavatories. In view of that interpretation, 19 December 2005, the date of the letter by which the City of Frankfurt is taken to have consented to the change of subcontractor requested by FES, should be taken as the reference date for considering the reference for a preliminary ruling.

*Question 3*

30 By its third question, which should be considered first, the referring court asks whether the principles of equal treatment and non-discrimination on grounds of nationality enshrined in Articles 12 EC, 43 EC and 49 EC and the consequent obligation of transparency require, where an amendment to a service concession contract – including the case where the amendment is intended to replace a specific subcontractor on whom weight was laid during the procedure – is envisaged, the reopening up to competition of the relevant negotiations by ensuring an adequate degree of advertising and, if so, how such an opening up to competition should be done.

31 That question concerns the application of those provisions and principles in a situation in which, in connection with the performance of a service concession contract, it is intended to replace one of the subcontractors of the holder of the concession.

32 Since Articles 43 EC and 49 EC are specific applications of the general prohibition of discrimination on grounds of nationality laid down in Article 12 EC, there is no need to refer to Article 12 EC in order to answer the question (see, to that effect, Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraphs 38 and 39, and Case C-105/07 *Lammers & Van Cleeff* [2008] ECR I-173, paragraph 14).

33 As European Union law now stands, service concession contracts are not governed by any of the directives by which the legislature has regulated the field of public procurement (see *Coname*, paragraph 16, and Case C-347/06 *ASM Brescia* [2008] ECR I-5641, paragraph 57). However, the public authorities concluding them are bound to comply with the fundamental rules of the EC Treaty, including Articles 43 EC and 49 EC, and with the consequent obligation of transparency (see, to that effect, *Telaustria and Telefonadress*, paragraphs 60 to 62; *Coname*, paragraphs 16 to 19; and *Parking Brixen*, paragraphs 46 to 49).

34 That obligation of transparency applies where the service concession in question may be of interest to an undertaking located in a Member State other that in which the concession is awarded (see, to that effect, *Coname*, paragraph 17; see also, by analogy, Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 29, and Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraph 66).

35 That the service concession at issue in the main proceedings may be of interest to undertakings located in a Member State other than the Federal Republic of Germany follows from the order for reference, in that the referring court states that the call for applications was announced in the official gazette of the City of Frankfurt at 'EU-wide' level, and that it considers that a breach of the obligation of transparency could constitute discrimination, at least potentially, against undertakings in other Member States.

36 The obligation of transparency to be complied with by public authorities concluding service concession contracts consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to allow the service concession to be opened up to competition and the impartiality of the award procedures to be reviewed (see *Telaustria and Telefonadress*, paragraphs 60 to 62; *Parking Brixen*, paragraphs 46 to 49; and *ANAV*, paragraph 21).

37 In order to ensure transparency of procedures and equal treatment of tenderers, substantial amendments to essential provisions of a service concession contract could in certain cases require the award of a new concession contract, if they are materially different in character from the original contract and are therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, by analogy with public contracts, Case C-337/98 *Commission* v *France* [2000] ECR I-8377, paragraphs 44 and 46, and Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 34).

38 An amendment to a service concession contract during its currency may be regarded as substantial if it introduces conditions which, if they had been part of the original award procedure, would have allowed for the admission of tenderers other than those originally admitted or would have allowed for the acceptance of an offer other than that originally accepted (see, by analogy, *pressetext Nachrichtenagentur*, paragraph 35).

39 A change of subcontractor, even if the possibility of a change is provided for in the contract, may in exceptional cases constitute such an amendment to one of the essential provisions of a concession contract where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract, which is in any event for the referring court to ascertain.

40 The referring court observes that in the concept annexed to the offer submitted to the City of Frankfurt by FES, FES stated that it would use City-WCs from Wall. According to the referring court, it is likely that in that case the concession was awarded to FES because of the identity of the subcontractor it had introduced.

41 It is for the national court to establish whether the situations described in paragraphs 37 to 39 above are present.

42 If, in making that assessment, the referring court were to conclude that an essential element of the concession contract was being altered, all necessary measures would have to be taken, in accordance with the national legal system of the Member State concerned, to restore the transparency of the procedure, which might extend to a new award procedure. If need be, a new award procedure would have to be organised in a manner appropriate to the specific features of the service concession involved, and would have to ensure that an undertaking located in another Member State had access to sufficient information on that concession before it was awarded.

43 The answer to Question 3 is therefore that, where amendments to the provisions of a service concession contract are materially different in character from those on the basis of which the original concession contract was awarded, and are therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, all necessary measures must be taken, in accordance with the national legal system of the Member State concerned, to restore the transparency of the procedure, which may extend to a new award procedure. If need be, a new award procedure should be organised in a manner appropriate to the specific features of the service concession involved, and should ensure that an undertaking located in another Member State has access to sufficient information on that concession before it is awarded.

*Question 5*

44 By its fifth question, which should be taken second, the referring court asks essentially whether, in the light of Article 86(1) EC, in conjunction if necessary with Article 2(1)(b) and (2) of Directive 80/723 and Article 1(9) of Directive 2004/18, an undertaking with characteristics such as those of FES which is the holder of a concession is bound by the obligation of transparency flowing from Articles 43 EC and 49 EC and by the principles of equal treatment and non-discrimination on grounds of nationality, when concluding a contract relating to services within the scope of the concession granted to it by the public authority.

45 More precisely, the referring court wishes to know whether Article 86(1) EC is relevant for defining the scope of that obligation of transparency.

46 As to Article 86(1) EC, it suffices to note that that provision is addressed solely to the Member States, not directly to undertakings.

47 To establish whether an entity with characteristics such as those of FES may be equated to a public authority bound by the obligation of transparency, some aspects of the definition of 'contracting authority' in Article 1(b) of Directive 92/50 on public service contracts should be taken as guidance, to the extent that they correspond to the requirements produced by the application to service concessions of the obligation of transparency flowing from Articles 43 EC and 49 EC.

48 Those articles and the principles of equal treatment and non-discrimination on grounds of nationality, and the consequent obligation of transparency, pursue the same objectives as Directive 92/50, in particular the free movement of services and their opening up to undistorted competition in the Member States.

49 It must accordingly be ascertained whether two conditions are satisfied: first, that the undertaking in question is effectively controlled by the State or another public authority, and, second, that it does not compete in the market.

50 As regards the former condition, the order for reference states that, although the City of Frankfurt holds 51% of the capital of FES, that holding does not enable it effectively

to control the management of that company. A majority of three quarters of the votes is needed for a decision of a general meeting of shareholders.

51 Moreover, the other 49% of the capital of FES is held not by one or more other public authorities but by a private undertaking which, as such, follows considerations proper to private interests and pursues objectives other than the public interest (see, to that effect, Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 50).

52 In addition, on the supervisory board of FES, the City of Frankfurt has only a quarter of the votes. The fact that it has the right to put forward a candidate for the post of chairman of the supervisory board, who has a casting vote if the votes are equal, is not enough to allow it to exercise a decisive influence over FES.

53 In those circumstances, the condition of effective control by the State or another public undertaking is not satisfied.

54 As regards the second condition mentioned in paragraph 49 above, the referring court observes that more than half of FES's turnover derives from bilateral contracts for waste disposal and street cleaning in the city of Frankfurt.

55 Such a relationship is analogous to that which exists in normal commercial relations formed by bilateral contracts freely negotiated between the contracting parties (see, to that effect, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 25).

56 It may be concluded, moreover, from the order for reference that FES operates competitively in the market, as follows from the fact that it derives a large part of its income from activities carried out with public authorities other than the City of Frankfurt and with private undertakings operating in the market, and from the fact that it competed with other undertakings to obtain the concession at issue in the main proceedings.

57 In those circumstances, the second condition for equating an undertaking with a public authority is not satisfied either.

58 The referring court also asks the Court about the possible application of Directive 80/723.

59 In that it relates to the transparency of financial relationships between the Member States and public undertakings, that directive does not apply as such to the subject-matter of Question 5.

60 The answer to Question 5 is therefore that, where an undertaking which is the holder of a concession concludes a contract for services within the scope of a concession it has been awarded by a regional or local authority, the obligation of transparency deriving from Articles 43 EC and 49 EC and from the principles of equal treatment and non-discrimination on grounds of nationality does not apply if that undertaking

— was set up by the regional or local authority for the purpose of waste disposal and street cleaning but also operates in the market,

— belongs to that regional or local authority to the extent of a 51% holding, but decisions of shareholders can be taken only by a three-quarters majority of votes at a general meeting of the company,

— has only a quarter of the members of its supervisory board, including the chairman, appointed by the regional or local authority, and

— obtains more than half its turnover from bilateral contracts for waste disposal and street cleaning in the territory of that regional or local authority, which reimburses itself by means of municipal taxes on its residents.

*Questions 1, 2 and 4*

61 By its first, second and fourth questions, which should be examined together, the referring court essentially asks whether the principles of equal treatment and non-discrimination on grounds of nationality enshrined by Articles 43 EC and 49 EC and the consequent obligation of transparency require the national authorities to terminate a contract entered into in breach of that obligation and the national courts to give a tenderer whose offer has not been accepted the right to a restraining order to prevent an imminent breach or to put an end to an existing breach of that obligation. The referring court also asks whether that obligation may be regarded as part of the customary law of the European Union.

62 As noted in paragraph 33 above, service concession contracts are not governed, in the present state of European Union law, by any of the directives regulating the field of public procurement.

63 According to the Court's case-law, in the absence of European Union rules, it is for the domestic legal system of each Member State to regulate the legal procedures for safeguarding rights which individuals derive from European Union law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 39 and the case-law cited).

64 Such procedures must be no less favourable than similar domestic procedures (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by the law of the European Union (principle of effectiveness) (see, to that effect, *Unibet*, paragraph 43 and the case-law cited).

65 It follows that the principles of equal treatment and non-discrimination on grounds of nationality enshrined in Articles 43 EC and 49 EC and the consequent obligation of transparency do not require the national authorities to terminate a contract or the national courts to grant a restraining order in every case of an alleged breach of that obligation in connection with the award of service concessions. It is for the domestic legal system to regulate the legal procedures for safeguarding the rights which individuals derive from that obligation in such a way that those procedures are no less favourable than similar domestic procedures and do not make the exercise of those rights practically impossible or excessively difficult.

66 The referring court raises, finally, one further question. It considers that a purely judge-made development of the law cannot constitute a protective law giving rise to liability under the German Bürgerliches Gesetzbuch (Civil Code). Only customary law constitutes a rule of law within the meaning of that code. Citing the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), the referring court states that the recognition of customary law requires prolonged usage that is permanent and consistent, equal and general, and is accepted as a binding rule of law by the individuals concerned.

67 In the national court's opinion, however, the obligation of transparency defined in the case-law of the Court is so recent that it cannot be regarded as having the status of customary law, as defined in the preceding paragraph.

68 It must be observed here that the obligation of transparency derives from the law of the European Union, in particular Articles 43 EC and 49 EC (see, to that effect, *Coname*, paragraphs 17 to 19). Those provisions, whose observance the Court ensures, have direct effect in the domestic legal systems of the Member States and take precedence over any contrary provision of national law.

69 By virtue in particular of Article 4(3) TEU, all the authorities of the Member States must ensure the observance of the rules of European Union law within the sphere of their competence (see, to that effect, Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 34 and the case-law cited).

70 It is for the national court to interpret the national law which it has to apply, as far as is at all possible, in a manner which accords with the requirements of European Union law and, in particular, ensures that the obligation of transparency is observed (see, to that effect, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 63 and the case-law cited).

71 In the light of the foregoing, the answer to Questions 1, 2 and 4 is that the principles of equal treatment and non-discrimination on grounds of nationality enshrined in Articles 43 EC and 49 EC and the consequent obligation of transparency do not require the national authorities to terminate a contract or the national courts to make a restraining order in every case of an alleged breach of that obligation in connection with the award of service concessions. It is for the domestic legal system to regulate the legal procedures for safeguarding the rights which individuals derive from that obligation in such a way that those procedures are no less favourable that similar domestic procedures and do not make the exercise of those rights practically impossible or excessively difficult. The obligation of transparency flows directly from Articles 43

EC and 49 EC, which have direct effect in the domestic legal systems of the Member States and take precedence over any contrary provision of national law.

## Costs

72 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Where amendments to the provisions of a service concession contract are materially different in character from those on the basis of which the original concession contract was awarded, and are therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, all necessary measures must be taken, in accordance with the national legal system of the Member State concerned, to restore the transparency of the procedure, which may extend to a new award procedure. If need be, a new award procedure should be organised in a manner appropriate to the specific features of the service concession involved, and should ensure that an undertaking located in another Member State has access to sufficient information on that concession before it is awarded.**

2. **Where an undertaking which is the holder of a concession concludes a contract for services within the scope of a concession it has been awarded by a regional or local authority, the obligation of transparency deriving from**

**Articles 43 EC and 49 EC and from the principles of equal treatment and non-discrimination on grounds of nationality does not apply if that undertaking**

— **was set up by the regional or local authority for the purpose of waste disposal and street cleaning but also operates in the market,**

— **belongs to that regional or local authority to the extent of a 51% holding, but decisions of shareholders can be taken only by a three-quarters majority of votes at a general meeting of the company,**

— **has only a quarter of the members of its supervisory board, including the chairman, appointed by the regional or local authority, and**

— **obtains more than half its turnover from bilateral contracts for waste disposal and street cleaning in the territory of that regional or local authority, which reimburses itself by means of municipal taxes on its residents.**

3. **The principles of equal treatment and non-discrimination on grounds of nationality enshrined in Articles 43 EC and 49 EC and the consequent obligation of transparency do not require the national authorities to terminate a contract or the national courts to make a restraining order in every case of an alleged breach of that obligation in connection with the award of service concessions. It is for the domestic legal system to regulate the legal procedures for safeguarding the rights which individuals derive from that obligation in such a way that those procedures are no less favourable that similar domestic procedures and do not make the exercise of those rights**

**practically impossible or excessively difficult. The obligation of transparency flows directly from Articles 43 EC and 49 EC, which have direct effect in the domestic legal systems of the Member States and take precedence over any contrary provision of national law.**

[Signatures]