OPINION OF ADVOCATE GENERAL MISCHO

delivered on 13 December 2001 [1]

1. The Korkein hallinto-oikeus (Supreme Administrative Court), Finland (hereinafter the 'national court'), refers three questions concerning the interpretation of Article 2(1), (2) and (4) and Article 34(1) 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, [2] as also Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts. [3]

I — Legal framework

Community law

Directive 92/50

2. Article 1 of the Directive provides that:

'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:

...

(ii) contracts awarded in the fields referred to in Articles 2, 7, 8 and 9 of Directive 90/531/EEC or fulfilling the conditions in Article 6(2) of the same Directive;

...'

1 — Original language: French.
2 — OJ 1993 L 199, p. 84.
3 — OJ 1992 L 209, p. 1.

3. Article 36 of Directive 92/50, which is headed 'Criteria for the award of contracts', is worded as follows:

'1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting authority shall base the award of contracts may be:

(a) where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price; or

(b) the lowest price only.

2. When the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance.'

Directive 93/38

4. Article 2 of Directive 93/38 provides that:

'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;

(b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

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

...

(c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;

...

4. The provision of bus transport services to the public shall not be considered to be a relevant activity within the meaning of paragraph 2(c) where other entities are free to provide those services, either in general or in a particular geographical area, under the same conditions as the contracting entities.

...'

5. Article 34 of Directive 93/38 states that:

'1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting entities shall base the award of contracts shall be:

(a) the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or

(b) the lowest price only.

2. In the case referred to in paragraph 1(a), contracting entities shall state in the contract documents or in the tender notice

all the criteria which they intend to apply to the award, where possible in descending order of importance.

...'

6. Article 45(3) and (4) of Directive 93/38 provides that:

'3. Directive 90/531/EEC shall cease to have effect as from the date on which this Directive is applied by the Member States and this shall be without prejudice to the obligations of the Member States concerning the deadlines laid down in Article 37 of that Directive.

4. References to Directive 90/531/EEC shall be construed as referring to this Directive.'

The national law

7. Directives 92/50 and 93/38 were transposed into Finnish law by the Laki julkisista hankinnoista 1505/1992 (Law on public procurement) as amended by Laws 1523/1994 and 725/1995 (hereinafter 'Law 1505/1992') and by Regulations 243/1995 on supply, service and works contracts exceeding the threshold values and 567/1994 on contracts of entities operating in the water, energy, transport and telecommunications sectors exceeding the threshold value, as amended by Regulation 244/1995 (hereinafter 'Regulation 567/1994').

8. Under Paragraph 4(1) of Regulation 243/1995, that regulation does not concern contracts to which Regulation 567/1994 applies. Under Paragraph 1(10) of Regulation 567/1994, that regulation does not concern contracts to which Regulation 243/1995 applies.

9. Paragraph 43 of Regulation 243/1995 provides that:

'1. The contracting entity must approve either the tender which is economically the most advantageous overall according to the assessment criteria for the contract or the tender which is lowest in price. Criteria for assessment of overall economic advantage may be, for example, the price, delivery period, completion date, costs of use, quality, life cycle costs, aesthetic or func-

tional characteristics, technical merit, maintenance service, reliability of delivery, technical assistance and environmental questions.

...'

10. Paragraph 21(1) of Regulation 567/1994 correspondingly lays down that the contracting entity must approve the tender which is economically the most advantageous overall according to the assessment criteria for the supply, service or works, or the tender which is lowest in price. Criteria for assessment of overall economic advantage may be, for example, the price, delivery period, costs of use, life cycle costs, quality, environmental effects, aesthetic and functional characteristics, technical merit, maintenance services and technical assistance.

II — The main proceedings

The organisation of bus transport within the city of Helsinki

11. The order for reference states that Helsinki City Council decided on 27 August 1997 that tendering would gradually be introduced for the entire bus transport network within the city of Helsinki, with the first route being put out to tender starting from the autumn 1998 timetable.

12. Under the regulations on public transport in the city of Helsinki, the Joukkoliikennelautakunta (public transport committee) and subordinate thereto the Helsingin kaupungin liikennelaitos (transport department of the city of Helsinki, hereinafter 'the transport department') are responsible for the planning, development, implementation and other organisation and supervision of public transport in the city of Helsinki, unless provided otherwise.

13. The same regulations provide that the commercial service committee of the city of Helsinki is responsible for decisions on awarding urban public transport services in accordance with the objectives adopted by the Helsinki city council and the public transport committee. In addition, the purchasing unit of the city of Helsinki is responsible for tasks relating to contracts for urban public transport services.

14. The transport department is a commercial undertaking of the municipality which

is divided operationally and economically into production units for the different modes of transport (buses, trams, metro, and tracks and property). The production unit for buses is HKL-Bussiliikenne (hereinafter 'HKL'). The transport department also comprises a head unit, consisting of a planning unit and an administrative and economic unit. The planning unit functions as an order-placing office which prepares proposals for the public transport committee as to which routes are to be tendered for and what level of service is to be required. The production units are economically distinct from the rest of that department and have separate accounting and balance sheets.

The tender procedure

15. By a letter of 1 September 1997 and a tender notice published in the public procurement section of the Official Journal on 4 September 1997, the purchasing unit called for tenders for operating the urban bus network within the city of Helsinki, according to routes and timetables described in more detail in a document in seven lots. The main proceedings relate to lot 6 of the invitation to tender, relating to route 62.

16. The file shows that the tender notice stated that the tender would be awarded to the undertaking whose tender was most economically advantageous overall to the city. In assessing overall economic advantage account would be taken of three types of criteria, namely the overall price of operation, the quality of the (bus) fleet and the operator's quality and environment management.

17. As regards, first of all, the overall price of operation, the most favourable tender would receive 86 points and the number of points of the other tenders would be calculated as follows: Number of points = amount of the annual operating payment of the most favourable tender divided by the amount of the tender in question and multiplied by 86.

18. Next, as regards the quality of the vehicle fleet, additional points would be awarded, in particular for the use of buses having nitrogen oxide emissions below 4g/kWh (+2.5 points/bus) or below 2g/kWh (+3.5 points/bus) and external noise below 77 dB(A) (+ 1 point/bus).

19. Lastly, in relation to the operator's quality and environment programme, additional points would be awarded for a body of certified qualitative criteria and for a certified environment programme.

20. The purchasing unit received eight tenders for lot 6, among them tenders from HKL and Swebus Finland Oy Ab (later renamed Stagecoach Finland Oy Ab and then Concordia Bus Finland Oy Ab (hereinafter 'Concordia')). The tender from Swebus Finland Oy Ab contained two variants, tenders A and B.

21. The commercial service committee decided on 12 February 1998 to choose HKL as transport operator for lot 6, as its tender was considered to be economically most advantageous overall. The order for reference shows that Concordia had submitted the lowest price tender, receiving 81.44 points for its A tender and 86 points for its B tender. HKL had received 85.75 points. As regards vehicle fleet, HKL had obtained the most points, 2.94 points, with Concordia obtaining 0.77 points for its A tender and -1.44 points for its B tender. The 2.94 points obtained by HKL under this head included the maximum awards for nitrogen oxide emissions below 2g/kWh as well as for an external noise level below 77 dB. Concordia had obtained no additional points in respect of nitrogen oxide emissions or noise level. HKL and Concordia had both obtained maximum points for quality and environment certification. The greatest total number of points, 92.69 points, was thus obtained by HKL. Concordia was placed second, having obtained 86.21 points for its A tender and 88.56 points for its B tender.

The procedure before the national courts

22. Concordia applied to the Kilpailuneuvosto (Competition Council, Finland) for an order setting aside the decision of the commercial service committee, founding its claims in particular on the argument that the awarding of extra points for a fleet below a certain nitrogen oxide emission limit and below a certain noise level was unfair and discriminatory. According to Concordia, extra points were allotted for the use of a type of bus which only one tenderer, namely HKL, was able in practice to offer.

23. The Kilpailuneuvosto dismissed the application. It held that the contracting entity is entitled to determine what sort of fleet it wants. Setting the criteria and determining their weight must, however, take place objectively, with the needs of the contracting entity and the quality of service being taken into account. The contracting entity must be able if necessary to give reasons for the appropriateness of the choice and the application of the selection criteria.

24. The Kilpailuneuvosto held that the city of Helsinki's decision to favour low-emission buses was an environment policy decision aimed at reducing the harm caused to the environment by bus traffic. That did not fall to be regarded as a procedural error. If a tenderer had been treated unfairly with regard to that criterion, inter-

vention was possible. It held, however, that all tenderers had had the opportunity, if they so wished, of acquiring gas-driven buses. It therefore found that it had not been shown that the criterion in question discriminated against the applicant.

25. Concordia brought appeal proceedings, seeking for the decision of the Kilpailuneuvosto to be quashed. It submitted that the extra points awarded for buses with low gas and noise emissions favoured HKL, which was the only tenderer able in practice to use a fleet which could obtain such extra points. It further submitted that environmental factors which were not directly linked to the object of the tender should not be taken into account in assessing the overall advantage.

26. In its order for reference the national court states first that in order to decide whether the provisions of Regulation 243/1995 or Regulation 567/1994 are applicable in the case, it is necessary to ask whether the contract at issue in the main proceedings falls within the scope of Directive 92/50 or Directive 93/38. It notes in that regard that Annex VII to Directive 93/38 mentions, for Finland, both the public or private entities which operate bus transport in accordance with the Laki luvanvaraisesta henkilöliikenteestä tiellä (Law on licensed public transport by road) and the transport department of the city of Helsinki which operates the metro and tram network.

27. The national court then states that consideration of the case also requires the interpretation of provisions of Community legislation in order to establish whether a city, when awarding a contract of the kind at issue in the main proceedings, may take into account environmental considerations connected with the bus fleet tendered. If the claims put forward by Concordia as regards points given for environmental elements and other points were accepted, this would mean that the number of points obtained by its B tender exceeded the number of points obtained by HKL.

28. The national court observes in that connection that Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38 do not mention environmental questions in the list of criteria for establishing the economically most advantageous tender. It says that in its judgments in *Beentjes* and *Evans Medical and Macfarlan Smith* [4] the Court ruled that in selecting the most economically advantageous tender it

4 — Case 31/87 [1988] ECR 4635 and Case C-324/93 [1995] ECR I-563.

is for the contracting authorities to choose which criteria they wish to use in awarding the contract. However, this choice could only relate to criteria designed to identify the most economically advantageous tender.

29. Lastly, the national court refers to the Commission's communication of 11 March 1998 'Public Procurement in the European Communities' (COM(1998) 143 final), in which it states that environmental considerations may be taken into account for determining the economically most advantageous tender overall, if the contracting entity itself benefits directly from the ecological qualities of the product.

III — Questions submitted for a preliminary ruling

30. The national court accordingly decided to stay proceedings and to ask the Court for a preliminary ruling on the following questions:

'(1) Are the provisions on the scope 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), in particular Article 2(1)(a), (2)(c) and (4), to be interpreted as meaning that that directive applies to a procedure of a city which is a contracting entity for the award of a contract concerning the operation of bus transport within the city, if

— the city is responsible for the planning, development, implementation and other organisation and supervision of public transport in its area,

— for the above functions the city has a pubic transport committee and a city transport department subordinate thereto,

— within the city transport department there is a planning unit which acts as an ordering unit which prepares proposals for the public transport committee on which routes should be put out to tender and what level of quality of services should be required, and

— within the city transport department there are production units, economically distinct from the rest of the transport department, including a unit which provides bus transport services and takes part in tender procedures relating thereto?

(2) Are the European Community provisions on public procurement, in particular Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) or the equivalent Article 34(1) of Directive 93/38/EEC, to be interpreted as meaning that, when organising a tender procedure concerning the operation of bus transport within the city, a city which is a contracting entity may, among the criteria for awarding the contract on the basis of the economically most advantageous tender, take into account, in addition to the tender price and the quality and environment programme of the transport operator and various other characteristics of the bus fleet, the low nitrogen oxide emissions and low noise level of the bus fleet offered by a tendering undertaking, in a manner announced beforehand in the tender notice, such that if the nitrogen oxide emissions or noise level of the individual buses are below a certain level, extra points for the fleet may be taken into account in the comparison?

(3) If the response to the above question is affirmative, are the Community provisions on public procurement to be interpreted as meaning that the awarding of extra points for the abovementioned characteristics relating to nitrogen oxide emissions and noise level of the fleet is, however, not permitted if it is known beforehand that the department operating bus transport belonging to the city which is the contracting entity is able to offer a bus fleet possessing the above characteristics, which in the circumstances only a few undertakings in the sector are otherwise able to offer?'

IV — Analysis

The first question

31. In the first question, the national court is essentially seeking to ascertain whether Directive 93/38 should be interpreted as applying to a factual matrix of the kind described in the order for reference. The answer to this question will enable the national court to decide whether Directive 93/38 or Directive 92/50 applies in the context of the main proceedings.

Preliminary observation

32. Without going so far as to claim that the first question is inadmissible, certain parties, including Concordia and the Netherlands Government, submit that it has no bearing on the answer to the second and third questions. They say that the provisions in relation to which issues are referred to the Court in the second and third questions are effectively identical in both directives. It follows that it is not necessary to determine in advance which of the two directives applies.

33. It should be remembered that in principle it is solely for the national court to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. A refusal to rule on a question referred for a preliminary ruling by a national court is possible only when it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [5]

5 — Case C-379/98 *PreussenElektra* v *Schleswag* [2001] ECR I-2099, paragraphs 38 and 39.

34. Such exceptional circumstances do not exist in the present case. On the contrary, the national court clearly establishes the connection between its first question and the main action when it says that '[i]n order to decide whether the provisions of Regulation 243/1995 or 567/1994 are applicable in the case, it is necessary also to seek a preliminary ruling on whether an award of the kind at issue here falls within the scope of Directive 92/50 or 93/38....' I therefore consider that the national court's first question should be answered.

Position of the parties

35. The *city of Helsinki*, the *Finnish Government*, the *Greek Government* and the *Austrian Government* consider that Directive 93/38 applies. In essence, their position is that the transport department is part of the 'system' of the city of Helsinki. The city of Helsinki, including its transport department, being the 'public authority' referred to in Article 2(1)(a) of Directive 93/38, which exercises an activity referred to in Article 2(2)(c), it is that directive which is applicable.

36. They add that the terms of Article 2(4) of Directive 93/38 are not inconsistent with this point of view. They submit that that provision does not apply, as it is not to be

inferred from the order for reference that other entities could freely provide the bus transport service under the same conditions as the contracting entity.

37. Both *Concordia* and the *Commission*, on the other hand, consider that Directive 92/50 is applicable. The Commission states that it appears from the order for reference that neither the city of Helsinki, its committees nor its purchasing unit operated a network providing a transport service to the public, but that it was the production units of the transport department which operated networks providing a transport service to the public. These units, which are separate from the remainder of the transport department, are not contracting entities in the contract at issue in the main action.

38. The *Netherlands Government* and the *Swedish Government* express no views on the first question.

39. The *United Kingdom Government* considers that it is for the national court to decide which of the two directives is applicable, having regard to Article 2 of Directive 93/38.

Appraisal

40. To answer the first question it is necessary to consider the scope of Directive 93/38.

41. Article 2(1)(a) of Directive 93/38 provides that it applies to contracting entities which 'are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2'.

42. In the present case, it is to be inferred from the order for reference that it is the commercial service committee of the city of Helsinki which was responsible for regulating the procurement of urban public transport services. The contracting entity in the main action is therefore unquestionably a 'public authority' within the meaning of Article 2(1)(a) of Directive 93/38.

43. For Directive 93/38 to apply, it is also necessary that the public authority exercises 'one of the activities referred to in paragraph 2'. The relevant activity in the present case is that referred to in Article 2(2)(c), namely 'the operation of networks providing a service to the public in the field of transport by... bus...'. The

second indent of that provision goes on to state that 'As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service'.

44. It follows in my opinion that Directive 93/38 applies to a public authority which operates a network and which intends to conclude a contract relevant to that network. On the other hand, I am of the view that Directive 93/38 does not apply where a contracting entity organises a tender procedure whose purpose is that the operation itself of the network is to be carried on by other parties.

45. The Austrian Government, in submitting that Directive 93/38 applies because '[t]he operation of a public bus network is undoubtedly the provision of a service in the field of transport within the meaning of Article 2(2)(c) of Directive 93/38' and in stating that '[a]ccording to the order for reference... it is the operation of such a network which was the purpose of the tender procedure', appears to me to be suggesting that Directive 93/38 applies because the operation of the network was the subject of the tender procedure at issue.

46. I am however of the view that such an interpretation of the scope of Directive 93/38 cannot be justified having regard to the text of the Directive.

47. It follows from Article 2(1) of the directive that it applies only where the contracting entity *exercises an activity*, in this case that of 'the operation of networks providing a service to the public in the field of transport by... bus...'. It also follows from Article 2(4) that this activity is equivalent (in the present case) to '[t]he provision of bus transport services to the public'.

48. The terms 'operation' and 'provision' indicate that it is the contracting entity itself which should be making the bus service available. It is therefore not sufficient, for a contracting entity to be regarded as operating a network, that it lays down, for example, rules as to the route to be served or the frequency of the service. It follows from the second indent of Article 2(2)(c) that the laying down of conditions on the routes to be served etc. does not amount to the operation of a network, but only to constituting or defining it. In other words, to *operate* a network means to run it oneself, generally using one's own workforce and buses.

49. It therefore follows that the directive applies if the contracting entity itself oper-

ates a bus network and, in the course of exercising this activity, initiates a tender procedure, for example in relation to bus purchases.[6] On the other hand, where a contracting entity initiates a tender procedure whose purpose is to *pass responsibility for the operation of a network to a third party*, it is not exercising an activity which consists in the operation of a network.

50. This interpretation is confirmed not just by Article 2 of Directive 93/38 but also by the list of services which may be the subject of a tender procedure under that directive. Articles 15 and 16 of the directive refer to Annexes XVI A and XVI B. The services which are specified there in a detailed manner are services which are clearly intended to provide support to the activity exercised by the contracting entity as defined by Article 2(2) of the directive. One would look there in vain for a service such as the service which is the object of the invitation to tender in the present case, namely the actual operation of a bus network.

51. Furthermore, it is not in my view correct to interpret Directive 93/38 in such a wide manner that its scope includes a tender procedure whose object is the activity described in Article 2(2)(c) of the directive.

52. Directive 93/38 is an exception to the general rules, which are laid down for service contracts by Directive 92/50. This is confirmed by the judgment in *Telaustria and Telefonadress*,[7] where the Court held at paragraph 33 that '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'.

53. The Court has consistently held that exceptions must be strictly interpreted.[8] It follows in the present case that the scope of Directive 93/38 should not be widely interpreted.

54. A tender procedure whose object is the taking over by a third party of the operation of a bus network is therefore not covered by Directive 93/38. It is however covered by Directive 92/50 if all its conditions apply.

6 — See Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043. In this case, the Wallonia Regional Transport Company, as a public authority operating a network providing a service to the public in the field of transport by bus, initiated a tender procedure under Directive 90/531, subsequently replaced by Directive 93/38, for the award of a contract for the supply of 307 standard vehicles.

7 — Case C-324/98 [2000] ECR I-10745.

8 — *Evans Medical and Macfarlan Smith*, paragraph 48.

55. However, this conclusion does not yet provide the answer to the first question put by the national court. As indicated above, several parties refer not to the object of the tender procedure, but to the fact that the transport department (which includes HKL) is part of the 'system' of the city of Helsinki. They take from that that, where a route is awarded to HKL, the city of Helsinki is exercising an activity comprising the operation of a bus network within the meaning of Article 2(2)(c) of Directive 93/38, so that that directive is applicable.

56. This argument is also incorrect.

57. It should first be recorded that the question asked by the national court relates to the directive applicable to a specific public service contract. The question therefore clearly assumes that a public service is in issue, and it would be inappropriate to question this assumption.

58. It is essential to the concept of a public service contract, whether it be regulated by Directive 92/50 or Directive 93/38, that it consists in a contract for pecuniary interest concluded in writing between a contracting entity (or a contracting authority), on the one hand, and a service provider, on the other. [9]

59. It follows that unless this essential characteristic of a service contract is to be disregarded, HKL must be regarded as a separate entity from the city of Helsinki. It would be contrary to the notion of a public contract to treat the city of Helsinki as being at one and the same time the contracting entity and the service provider.

60. It follows from that that if the city of Helsinki is, through its commercial service committee, the contracting entity, HKL can by definition not be the contracting entity. Similarly, if HKL is the service provider operating the bus network, the city of Helsinki cannot by definition do the same. As the city of Helsinki is not exercising an activity which consists in the operation of a bus network, as Article 2(2)(c) of Directive 93/38 requires, the conclusion must be that that directive does not apply.

61. I therefore propose that the answer given to the first question be that the provisions concerning the scope of Directive 93/38, in particular Article 2(1)(a),

9 — See Article 1(a) of Directive 92/50 and Article 1(4) of Directive 93/38.

(2)(c) and (4), are not to be interpreted as meaning that that directive applies to the procedure of a municipality which is a contracting entity for the award of a contract concerning the operation of an urban bus transport service, if

— the municipality is responsible for the planning, development, implementation and other organisation and supervision of public transport in its area,

— for the above functions the municipality has a public transport committee and a city transport department subordinate thereto,

— within the municipal transport department there is a planning unit which acts as an ordering unit which prepares proposals for the public transport committee on which routes should be put out to tender and what level of quality of services should be required, and

— within the municipal transport department there are production units, economically distinct from the rest of the transport department, including a unit which provides bus transport services and takes part in tender procedures relating thereto.

The second question

62. By its second question the national court is essentially seeking to ascertain whether Article 36(1) of Directive 92/50 or Article 34(1) of Directive 93/38 allow there to be included among the criteria for awarding a contract on the basis of the economically most advantageous tender, the reduction of nitrogen oxide emissions or of noise levels in a manner such that if the nitrogen oxide emissions or noise level of certain buses are below a certain level, extra points may be taken into account in the comparison.

Position of the parties

63. *Concordia* submits that in a public contract tender procedure the criteria on which the award is based must always be economic in nature, in accordance with the text of Directive 92/50. If the aim of the

contracting authority were to satisfy environmental or other considerations, it would be necessary to utilise other procedures than those relating to the public tender procedure.

64. By contrast, *all the other parties* submit that it is permissible to include environmental criteria in the criteria for the award of a contract. They refer in particular to the fact that Article 36(1) of Directive 92/50 and Article 34(1) of Directive 93/38 only list by way of example certain matters which the contracting entity may take into account when awarding a contract, to Article 6 EC which requires the integration of environmental protection policy into the other Community policies, and to the Court's judgments in *Beentjes* and *Evans Medical and Macfarlan Smith* referred to above, which allow a contracting entity to select the criteria to be taken into account when considering the tenders submitted to it.

65. The different submissions do not however all found on the same considerations.

66. The *city of Helsinki,* supported by the *Finnish Government,* maintains that it is in its interests and those of its inhabitants that noxious emissions are limited as much as possible. The city of Helsinki, which is responsible for the protection of the environment within its area, would benefit from direct savings, particularly in the medico-social sector, representing approximately 50% of its total budget. Factors which contribute, even in a minor way, to the improvement of the overall state of health of the population would allow a rapid reduction of costs to a significant extent.

67. The *Greek Government* adds that the discretion given to the national authorities in the choice of criteria for the award of public contracts presupposes that this choice is not arbitrary and that the criteria taken into account are not contrary to the provisions of the Treaty, in particular its fundamental principles such as the right of establishment, the freedom to provide services and the prohibition of discrimination on grounds of nationality.

68. The *Netherlands Government* maintains that the criteria for award operated by the contracting authority must always have an economic dimension. It considers however that this requirement is met in the present case, as the city of Helsinki is both the contracting authority and the organisation having financial responsibility for environmental policy.

69. The *Austrian Government* maintains that the directives relating to public pro-

curement procedures impose two essential restrictions on the selection of award criteria. First, the criteria chosen by the contracting entity must relate to the contract to be tendered and allow the offer which is economically most advantageous for the contracting entity to be ascertained. Secondly, the identified criteria must be capable of providing an objective basis for the discretion given to the contracting entity and must not include matters which would result in any choice being arbitrary.

70. The Austrian Government also submits that the criteria for award must relate directly to the subject of the contract, have objectively measurable effects and be economically quantifiable.

71. Similarly, the *Swedish Government* maintains that the choice available to the contracting entity is limited to the extent that the criteria for award must relate to the contract to be awarded and be appropriate to identify the economically most advantageous tender. It adds that these criteria must also comply with the provisions of the Treaty on the free movement of goods and services.

72. According to the *United Kingdom Government,* the provisions of Article 36(1) of Directive 92/50 and Article 34(1) of Directive 93/38 should be interpreted to mean that in the conduct of a tender procedure for the operation of bus transport services, a contracting authority or a contracting entity may, among other criteria for the award of the contract, take into account environmental criteria in assessing the economically most advantageous tender, provided that those criteria permit a comparison to be made between all tenders, relate to the services required and have been published in advance.

73. Lastly, the *Commission* submits that the criteria for award that may be taken into account in identifying the economically most advantageous tender must meet four conditions. The criteria must

— be objective,

— be applicable to all tenders,

— relate strictly to the purpose of the contract, and

— entail an economic advantage to the direct benefit of the contracting authority.

Appraisal

74. In order to answer the second question, the text of Directive 92/50, which in my opinion is applicable in the present case, should first be considered.

75. Article 36(1)(a) of Directive 92/50 provides that '... the criteria on which the contracting authority shall base the award of contracts may be... where the award is made to the economically most advantageous tender, various criteria relating to the contract: *for example*, [10] quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date or period of completion, price'.

76. The city of Helsinki submits that the criteria relating to nitrogen oxide emissions and noise levels fall within the categories of 'quality' and 'technical merit' referred to expressly in the abovementioned provisions. In the text of its proposed answer to the second question, the Commission refers to 'certain characteristics of the fleet.'

10 — My emphasis.

77. In my opinion, such an interpretation is entirely correct. The emissions criteria are irretrievably linked to the configuration of the fleet with which the city of Helsinki wishes to see the bus service operated. A contracting authority cannot be prohibited from requiring the use of a fleet having 'state of the art' characteristics, even if it gives prime importance to one of the qualities of such a fleet, namely its characteristics in relation to gas emissions and engine noise.

78. More generally speaking, it may be observed that if the city of Helsinki had specifically stated in the call for tenders that the network should be operated exclusively by gas-driven buses, this would have been a 'technical specification' relating to the 'characteristics of the services which are covered by the contract' within the meaning of the Commission's Green Paper of 1996, referred to by the Commission in its submissions. [11]

79. The Commission also refers to its Communication 'Public Procurement in the European Union', [12] where it states that:

'In general, any administration which so wishes can, in defining the goods or

11 — Public Procurement in the European Union: Exploring the Way Forward, COM (96) 583 final, 27 November 1996, paragraph 5.49.

12 — COM (98) 143 final, 11 March 1998.

services which it intends to purchase, choose the products and services which correspond with its pre-occupations for the protection of the environment. The measures taken must, of course comply with the rules and principles of the Treaty, particularly that of non-discrimination.'

80. The greater includes the lesser. If the contracting authority may, in the context of award criteria, require on its own initiative that buses must be gas-driven, it may also give a certain number of points to undertakings able to operate the service using buses which meet particularly strict pollution requirements, and which only buses of this type are capable of complying with.

81. It is my opinion that the issue may be answered on the basis of the foregoing points alone.

82. If, however, the Court considers that the criteria at issue in the present case should be considered in an abstract manner, that is to say independently of their technical foundations, it is my opinion that it may be inferred from Article 36(1)(a) of Directive 92/50, and in particular from the list of examples provided in it, that the directives do not necessarily prohibit the use of an environmental criterion, such as the criterion in the present case, in awarding a public contract. In order to determine the extent to which it is permissible to take such a criterion into account, it is none the less useful to consider, as an alternative approach, the Court's case-law relating to these and similar provisions.

83. The two judgments most often referred to are those in *Beentjes* and *Evans Medical and Macfarlan Smith* referred to above.

84. In the *Beentjes* judgment, when analysing Council Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts, [13] the Court had to rule on the exclusion of a tenderer on the grounds that the tenderer was not in a position to employ long-term unemployed persons. It found first of all that 'such a condition has no relation to the checking of contractors' suitability on the basis of their economic and financial standing and their technical knowledge and ability or to the criteria for the award of contracts referred to in Article 29 of the directive'. [14]

85. Nevertheless, the Court did not find the condition incompatible with Directive

13 — OJ, English Special Edition 1971 (II), p. 682.
14 — *Beentjes*, paragraph 28.

71/305. It continued by saying that '[i]t follows from the judgment of 9 July 1987 [*CEI and Bellini*] [15] that in order to be compatible with the directive such a condition must comply with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services'. [16]

86. The Court further stated that '[e]ven if the criteria considered above are not in themselves incompatible with the directive, they must be applied in conformity with all the procedural rules laid down in the directive, in particular the rules on advertising'. [17]

87. Next, in its judgment in the *Evans Medical and Macfarlan Smith* case, the Court, referring to the *Beentjes* judgment, held that 'in selecting the most economically advantageous tender contracting authorities may choose the criteria which they intend to apply, but their choice may relate only to criteria designed to identify the most economically advantageous tender'. [18] In the Court's opinion it followed that 'reliability of supplies is one of the criteria which may be taken into account under Article 25 of [Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, [19] as amended by Council Directive 88/295/EEC of 22 March 1988] [20] in order to determine the most economically advantageous tender...'. [21]

88. As well as these two judgments, it is worth recalling in the context of this analysis the recent judgment of 26 September 2000 in the case of *Commission* v *France*. [22] In this judgment, the Court held that:

'Under Article 30(1) of Directive 93/37, the criteria on which the contracting authorities are to base the award of contracts are either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability, technical merit.

None the less, that provision does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemploy-

15 — Joined Cases 27/86 to 29/86 [1987] ECR 3347.
16 — *Beentjes*, paragraph 29.
17 — *Beentjes*, paragraph 31.
18 — *Evans Medical and Macfarlan Smith*, paragraph 42.
19 — OJ 1977 L 13, p. 1.
20 — OJ 1988 L 127, p. 1.
21 — *Evans Medical and Macfarlan Smith*, paragraph 44.
22 — Case C-225/98 [2000] ECR I-7445.

ment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services (see, to that effect, *Beentjes*, paragraph 29).

Furthermore, even if such a criterion is not in itself incompatible with Directive 93/37, it must be applied in conformity with all the procedural rules laid down in that directive, in particular the rules on advertising (see, to that effect, on Directive 71/305, *Beentjes*, paragraph 31). It follows that an award criterion linked to the campaign against unemployment must be expressly mentioned in the contract notice so that contractors may become aware of its existence (see, to that effect, *Beentjes*, paragraph 36).' [23]

89. Even though these judgments concern the directives relating to public works contracts (*Beentjes* and *Commission* v *France*) and public supply contracts (*Evans Medical and Macfarlan Smith*), the Court's reasoning is undoubtedly applicable to the directives relating to public service contracts.

90. As the Court had already held in its judgment in *Evans Medical and Macfarlan Smith*, '[the *Beentjes* judgment], which concerns public works contracts, also applies to public service contracts in so far as there is no difference in this respect between the two types of contract'. [24] The same absence of difference clearly exists for public service contracts.

91. As regards the application of this case-law to the present matter, I am of the view that it may unquestionably be inferred from the abovementioned judgments that an environmental criterion may be included in the criteria for the award of a public service contract. The point common to the *Beentjes* and *Commission* v *France* judgments is that the Court recognised in each that it was permissible to include a criterion whose purpose was to serve the public interest among the criteria for the award of a public contract. In the *Beentjes* judgment the criterion in question was the obligation of a tenderer to employ long-term unemployed persons, and in *Commission* v *France* a condition linked to a local campaign against unemployment.

92. It is beyond dispute that the protection of the environment is likewise a criterion in the public interest. Reference need only be had to Article 6 EC, which states '[e]nvi-

23 — *Commission* v *France*, paragraphs 49 to 51.

24 — *Evans Medical and Macfarlan Smith*, paragraph 43.

ronmental protection must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development'.

93. The notion that criteria which exist for the public benefit may be included in the criteria for the award of a public contract also seems to be one that is logical, indeed clearly logical. As public authorities have by definition a duty to serve the public interest, that interest must be able to guide them when they enter into a public contract.

94. That said, there are of course limits on the extent to which a criterion of public interest, such as one relating to the environment, may be included in the criteria for the award of a contract.

95. I infer two limits from the *Beentjes* and *Commission* v *France* judgments.

96. First, the criterion must be consistent with all the fundamental principles of Community law, and in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services. [25]

97. Secondly, the criterion must be applied in conformity with all the procedural rules laid down in the relevant directive, in particular the rules on advertising. [26] It follows that, as the Court held in its judgments in the *Beentjes* [27] and *Commission* v *France* [28] cases, the award criterion must be expressly mentioned in the contract notice so that contractors may become aware of its existence.

98. In my opinion, these two requirements are equally as applicable to the inclusion of an environmental criterion among the criteria for the award of a contract. The necessity for these restrictions is unquestionable in that the first prevents there being any failure to comply with the fundamental principles of Community law in the guise of serving the public interest, and the second ensures equality of treatment between all tenderers, a matter which lies at the heart of the rules relating to public contracts. [29] Subject to these two points, in my opinion there is nothing

25 — *Beentjes*, paragraph 29, and *Commission* v *France*, paragraph 50.

26 — *Beentjes*, paragraph 31, and *Commission* v *France*, paragraph 51.

27 — Paragraph 36.

28 — Paragraph 51.

29 — Case C-243/89 *Commission* v *Denmark* ('*Storebaelt*') [1993] ECR I-3353, paragraph 33, and *Commission* v *Belgium*, cited above, paragraph 51.

which prohibits the taking into account of a criterion which serves the general interest, such as an environmental criterion.

99. However, several parties have specified further conditions which they suggest require to be met in order for an environmental criterion to be included in the award criteria for a public contract.

100. Some parties have stressed that the environmental criterion must be economic in nature. The Netherlands Government submits that in order to be valid the criterion must have an economic aspect. The Austrian Government claims that the criterion must demonstrate economic benefits that can be measured objectively. The Commission submits that the criterion must have a direct economic benefit for the contracting authority.

101. While I can agree with the proposition supported by several parties that in the present case the environmental criterion offered an economic benefit for the city of Helsinki, it is my opinion that an environmental criterion may be included in the award criteria without it being necessary to prove that it is economic in nature or offers an economic benefit, direct or indirect, for the contracting authority.

102. Admittedly, in its judgment in the *Evans Medical and Macfarlan Smith* case, the Court held that 'in selecting the most economically advantageous tender contracting authorities may choose the criteria which they intend to apply, but their choice may relate only to criteria designed to identify the most *economically*[30] advantageous tender'.[31]

103. In my opinion, it does not follow from the fact that the contracting entity requires to identify the most *economically* advantageous tender that every criterion must of necessity be economic in nature or have an economic aspect.

104. If one refers to Article 36(1) of Directive 92/50, it will be seen that the contracting authority may, for example, include criteria relating to the 'aesthetic characteristics' of a product. Unless the word 'economic' were to be interpreted extremely widely, I am of the view that it is difficult to treat an aesthetic criterion as being economic in nature. It is even harder to see how it could have an economic benefit for a contracting authority.

105. Furthermore, at the very latest since the discussions on the Kyoto protocol,

30 — My emphasis.
31 — Paragraph 42.

everyone is aware that the protection of the environment is a matter of considerable importance which concerns all the planet. I therefore do not consider it justifiable to permit an environmental criterion only where it offers an economic benefit for the relevant contracting entity. A criterion of this kind may be equally justifiable if it offers a benefit to other parties than the contracting entity or to the environment in general.

106. Lastly, the inappropriateness of such a requirement, as proposed in particular by the Commission, is in my opinion also confirmed by an answer given by the latter at the hearing. When asked how the fact that, as in the present case, extra points had been given to tenderers who were able to offer a service using low-floor buses conferred a direct economic benefit on the city of Helsinki, the Commission answered that this would increase the contracting entity's receipts as disabled and elderly people would be able to use buses more easily.

107. Putting aside the point that such a benefit would be at best indirect, it appears to me to be to be more appropriate to consider the encouraging of the use of low-floor buses as representing a service provided to certain sections of society rather than as a means of increasing the contracting entity's receipts.

108. The Austrian and Swedish Governments, as well as the Commission, also submit that the criterion must be linked to the subject-matter of the contract. For the Austrian Government, that means that the criterion must relate to the service to be provided or the manner in which it is to be carried out. The Commission goes so far as to say that the criterion must be strictly linked to the subject-matter of the contract.

109. In the present case, this criterion is clearly met.

110. One may however question whether it is necessary to impose such a requirement. In its judgment in the *Commission* v *France* case referred to above, the Court held that an award criterion relating to employment, linked to a local campaign against unemployment, was a valid criterion, subject to the two limitations referred to above. The same applied in the *Beentjes* judgment, where the Court held that a condition relating to long-term unemployed was acceptable.

111. Both these cases involved a works contract. These works could equally well have been carried out by persons who were not unemployed. The relevant requirement was therefore not linked to the subject of the contract, that is to say to the nature of the works to be carried out.

112. I conclude from that that it cannot be required that an environmental criterion must, unlike an employment-related criterion, be linked, or strictly linked, to the subject of the contract.

113. Lastly, the Commission states that the criterion must be objective and apply to all tenders.

114. Although it may be questioned how a criterion which relates to the aesthetic characteristics of a tender, which Article 36 of Directive 92/50 permits, may be objectively defined, it is necessary only to observe that in the present case the criteria relating to nitrogen oxide emissions and to noise levels clearly meet this requirement.

115. They are quantifiable or measurable and leave no room for a subjective margin of appreciation on the part of the contracting authority.

116. As regards the requirement that the criterion must apply to all tenders, this is indissociable from the Court's first requirement, according to which the award criterion must be consistent with all the fundamental principles of Community law, *in particular the principle of non-discrimination* flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services. [32]

117. It follows from all the above that a criterion linked to the protection of the environment may be included in the award criteria for a contract, provided that the criterion is consistent with the fundamental principles of Community law, in particular the principle of non-discrimination and the four freedoms, and that it is applied in conformity with all the procedural rules laid down in the directive, in particular the rules on advertising.

118. Before concluding my discussion of this question, it is worth briefly considering an analysis common to the Netherlands and Austrian Governments and the Commission which relates to the question of whether criteria touching on the 'quality and environment programmes' of the contractors may be taken into account in the evaluation of the economically most advantageous tender.

119. In my opinion, this question goes beyond the terms of the reference for a preliminary ruling in this case.

32 — *Beentjes*, paragraph 29, and *Commission* v *France*, paragraph 50.

120. Reference should be made in this regard to the question as put by the national court. It asks whether the city of Helsinki '... may, among the criteria for awarding the contract on the basis of the economically most advantageous tender, take into account, *in addition to*[33] the tender price and the quality and environment programme of the transport operator and various other characteristics of the bus fleet, [*also*[34]] the low nitrogen oxide emissions and low noise level...'.

121. It is therefore clear that the national court is not asking the Court about the acceptability as award criteria of 'the tender price and the quality and environment programme of the transport operator and various other characteristics of the bus fleet' but only about the acceptability of the criterion relating to 'the low nitrogen oxide emissions and low noise level'.

122. Furthermore, the national court states that HKL and Concordia were awarded an equal number of points for the criterion relating to the 'quality and environment programme'. Whether this requirement is permissible is thus not relevant to the outcome of the main action and I therefore do not propose to address it.

33 — My emphasis.
34 — My emphasis.

123. In light of these conclusions, I propose that the national court's question be answered by saying that the Community legislation on public procurement, in particular Article 36(1) of Directive 92/50, is to be interpreted as meaning that a municipality which organises, as the contracting entity, a tender procedure concerning the operation of an urban bus transport service may include, among the criteria for awarding the contract on the basis of the economically most advantageous tender, a criterion such as the one in the present case, relating to low nitrogen oxide emissions and low noise levels. That criterion must be applied in conformity with the fundamental principles of Community law, in particular the principle of non-discrimination and the four freedoms, and with all the procedural rules laid down in the relevant directive, in particular the rules on advertising.

The third question

124. By its third question the national court asks whether the criterion relating to the environment is none the less not permitted if it is known beforehand that the department operating bus transport belonging to the city which is the contracting entity is able to offer a bus fleet possessing the required characteristics, which in the circumstances only a few undertakings in the sector are otherwise able to offer.

Position of the parties

125. *Concordia* submits that the possibility of using buses powered by natural gas, which were in practice the only ones capable of meeting the additional criteria relating to low nitrogen oxide emissions and low noise levels, was a very limited one. At the time of the tender procedure, there was in all Finland only one service station which supplied natural gas. The capacity of the service station, which was not permanently installed, allowed for the refuelling of approximately 15 gas-driven buses. Just before the tender procedure in this case, HKL had ordered 11 new gas-driven buses. This meant that the service station's capacity was fully utilised and that no other vehicles could be supplied. Furthermore, the only existing service station was not permanently installed. According to Concordia, it would have been absurd to suppose that operators would invest millions in purchasing new vehicles which they could not use, or at least whose use would have been very uncertain.

126. From that, Concordia concludes that HKL was the only tenderer able in practice to offer gas-driven buses. It suggests that in setting more rigorous standards than those laid down by Euro 2, the true purpose of the tender procedure was to favour the production unit belonging to the contracting entity. Concordia therefore proposes that the third question be answered by stating that the awarding of points for low nitrogen oxide emissions and a reduction in noise levels cannot be allowed, at least where not all operators in the sector in question are able, even in theory, to offer services capable of meeting this award criterion.

127. The *city of Helsinki* first observes that it was under no obligation to put its bus transport operations out to tender, either under Community or Finnish law. Given that a tender procedure inevitably generates additional work and costs, there would have been no reason for it to instigate this procedure if it had known that only one undertaking, owned by it, was able to offer a fleet which met the relevant conditions or if it had truly wished to retain the operation of these services for itself.

128. The city of Helsinki further submits that it is HKL which currently is the greatest loser of awards and that it is Concordia which has expanded its market share in Helsinki the most. The city of Helsinki also states that in spring 1999

Concordia won the tender relating to bus service number 15, which required the use of gas-driven buses. This was conformed by Concordia at the hearing. The latter by its own admission confirmed that all the tenderers were able at any time, should they wished, to acquire gas-driven buses.

129. The *Finnish Government* considers that the evaluation of the objectivity of the criteria laid down in the tender procedure in this case is ultimately a question for the national court.

130. The *Greek Government* submits that the third question should be answered in the affirmative.

131. The *Netherlands Government* states that it is clear from the Court's case-law [35] that the award criteria must be objective and that there may be no discrimination between the tenderers.

132. However, at paragraphs 32 and 33 of its judgment in the *Fracasso and Leitschutz* case, the Court held that where at the conclusion of a tender procedure there is only one tender remaining, the contracting authority is not required to award the contract to the only tenderer judged to be suitable. It does not therefore follow that if the application of the award criteria results in there being only one remaining tenderer, those criteria are invalid.

133. According to the Netherlands Government, it is for the national court to determine whether effective competition was jeopardised in the main proceedings.

134. The *Austrian Government* submits that the use of the award criteria at issue in the main proceedings does not, in principle, give rise to any problem, even where, as in the present case, only a relatively limited number of tenderers are able to meet them.

135. However, the Austrian Government draws attention to the 10th recital of European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and pub-

35 — Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697, paragraphs 30 and 31, and *Commission* v *Denmark*.

lic works contracts respectively, [36] in terms of which contracting authorities may seek or accept advice which may be used in the preparation of specifications for a specific procurement, provided that such advice does not have the effect of precluding competition.

136. According to the Austrian Government, it may be inferred from this recital, as also from the principles underlying the directives relating to public procurement, that undertakings which are directly or indirectly involved in the preparation of a tender procedure, and undertakings connected with them where there is a relationship of control between them, must be excluded from the process in so far as their participation would prevent competition.

137. The protection of the principle of free and fair competition and of equality of treatment for all applicants and tenderers within the meaning of the directives relating to public procurement could be compromised if there was an involvement, direct or indirect, of a competitor in the tender process in its preparation.

138. The Austrian Government concludes from that that in the main proceedings, if the organisational links between the city of Helsinki and HKL have the result that the latter might have an influence, in whatever form, on the definition of the project underlying the tender procedure and to the extent that the involvement of HKL in the development of the tender process would prevent competition, HKL should be excluded from participating.

139. The *Swedish Government* submits that the taking into account of the emissions criterion in the manner in which this was done in the main proceedings had the result that the tenderer who had gas- or alcohol-driven buses available to it was rewarded. According to the Swedish Government, there was however nothing to prevent the other tenderers from acquiring such buses. These vehicles have been available in the market-place for a number of years.

140. The Swedish Government considers that the giving of extra points for low emissions of nitrogen oxide and low noise levels does not amount to direct discrimination, but applies without distinction. Furthermore, this enhancement does not appear indirectly discriminatory in the sense that it would necessarily have had the result of favouring HKL. The Swedish Government accordingly concludes that this enhancement is not an obstacle to the free movement of goods and services or to the freedom of establishment.

36 — OJ 1997 L 328, p. 1.

141. According to the *United Kingdom Government,* the directive does not prohibit the award of extra points in evaluating offers when it is known beforehand that there are potentially few undertakings able to obtain these extra points, where the contracting authority made it known at the tender notice stage that there was a possibility of obtaining these additional points.

142. The *Commission* notes that according to the Court's case-law, [37] compliance with the principle of equality of treatment lies at the heart of the directives relating to public contracts. This means that the conditions of competition between the tenderers must not be distorted.

143. Bearing in mind, however, the differences of view between the parties to the main action, the Commission feels that it is unable to determine whether the criteria applying in the present case contravene the principle of equality of treatment. It would therefore be a matter for the national court to rule on this question and to establish on the basis of objective, relevant and consistent evidence whether the said criteria were included exclusively for the purpose of selecting the undertaking to whom the contract was awarded or were determined for that purpose.

37 — See the judgments in *Commission* v *Belgium* and *Commission* v *Denmark*.

Appraisal

144. The national court asks whether the awarding of points for the characteristics relating to nitrogen oxide emissions and noise levels of the fleet is 'not permitted if it is known beforehand that the department operating bus transport belonging to the city which is the contracting entity is able to offer a bus fleet possessing the above characteristics, which in the circumstances only a few undertakings in the sector are otherwise able to offer'.

145. This question effectively asks whether, in these circumstances, the principle of equality of treatment is contravened. I shall consider in turn whether this principle is contravened:

— where a single undertaking [38] is able to meet the criterion in the case in question;

— where, in addition, the relevant undertaking belongs to the contracting authority.

38 — A conclusion which relates to a single undertaking would apply *a fortiori* where 'few undertakings' were able to meet the criterion.

146. As far as the first point is concerned, I agree with the Swedish Government that in circumstances such as those arising in the main action there is neither direct nor indirect discrimination between the various potential tenderers.

147. The relevant criterion applied without distinction to all tenders and, it appears, was advertised in accordance with the requirements of the directive.

148. In order to decide that the criterion in question had given rise to indirect discrimination towards Concordia, it would not be sufficient to find that that company had been treated differently from HKL, in the sense that the latter had been given points which had not been given to Concordia.

149. It follows from settled case-law that the principle of equality of treatment requires that comparable situations are not treated differently and that different situations are not treated similarly, unless such a difference in treatment can be justified objectively. [39]

150. Without prejudice to the findings of the national court, it appears to me in the present case that the two undertakings were treated differently only because they were not in identical situations. One of them was able to offer the fleet requested and the other was not.

151. Finally, the specification of the criterion which gave rise to a difference in the awarding of points could only be considered to reveal the existence of discriminatory tactics if it were to appear that this criterion could not be justified objectively, having regard to the characteristics of the contract and the needs of the contracting authority.

152. As was seen above, a contracting authority cannot be prevented from requiring that the service in question be provided using a fleet which possesses the best available technical specifications.

153. To reach a contrary view would mean requiring the contracting authority to lay down the criteria having regard to the potential tenderers. As each call for tenders contains a whole series of criteria, [40] the contracting authority would then require to

39 — See, for example, Case 13/63 *Italy* v *Commission* [1963] ECR 165, III, 4(a), Case 106/83 *Sermide* v *Cassa Conguaglio Zucchero and Others* [1984] ECR 4209, paragraph 28, Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 25, and Case C-306/93 *SMW Winzersekt* v *Land Rheinland-Pfalz* [1994] ECR I-5555, paragraph 30.

40 — In the case in question extra points were also, for example, given to tenderers who offered buses with a low-floor front part or fully low-floor buses.

establish those which could be provided by only one tenderer and remove them from his draft call for tenders. It could be that one tenderer was unable to meet one criterion, while another tenderer could not meet a different one.

154. Not only would such an approach result in a form of 'levelling down' of the award criteria in eliminating all those which were truly selective, it would equally strip all content from the right recognised by the Court for the contracting authority to select the criteria for awarding the contract as it chooses. [41] I would observe on further consideration that laying down criteria having regard to the potential tenderers would in my view result in a denial of the principle of equality of treatment. If a contracting authority were to remove a criterion from the tender notice on the basis that one or more tenderers were unable to meet it, the authority would in so doing disadvantage a tenderer who was able to comply, by neutralising the advantage he could have made use of.

155. My conclusion on the first point is therefore that the mere fact of including in a tender notice a criterion which can be met by only one tenderer does not contravene the principle of equality.

156. Is the position different when this tenderer is, like HKL, an undertaking which belongs to the contracting authority?

157. In this case there are two alternatives:

— either, HKL does not have any decision-making power or powers of economic and financial management of its own in relation to the contracting authority; in which case, one would find oneself in a situation to which the directive did not apply as HKL would not be a third party with whom the city of Helsinki was capable of contracting,

— or, HKL is in fact independent of the city of Helsinki, as I have assumed it to be in my answer to the first question; in which case the fact that HKL was the 'department operating bus transport belonging to the city which is the contracting entity' would not in itself cause a difficulty in relation to the principle of equality of treatment, unless it could be shown that the inclusion of the criterion which is the subject of the dispute had no reason other than the favouring of HKL. [42]

41 — *Evans Medical and Macfarlan Smith*, paragraph 42.

42 — I assume of course that the contracting authority awarded the points in an objective and neutral manner.

158. This is a question of pure fact, to be decided by the national court.

159. In this regard it is worth pausing to consider the arguments of the Austrian Government relating to the participation of a tenderer in the preparation of a tender notice.

160. I must agree entirely with that Government's opinion that a participation of this kind would be illegal as it would wholly negate the principle of the equality of treatment of all tenderers. In this context, one might refer to the judgment in the case of *Ismeri Europa* v *Court of Auditors*,[43] where the Court treated 'the fact that a person who helps to evaluate and select bids for a public contract has this contract awarded to him' as a 'confusion of interests', adding that such a fact was 'indicative of a serious malfunction of the institution or body concerned' (paragraph 47).

161. From the point of view of the equality of treatment of all the tenderers, it seems to me that a real participation in the preparation of a tender notice by the tenderer to whom the contract is awarded is almost as serious as the contributing by that tenderer to the evaluation and selection of offers.

162. However, there is in the order for reference no indication that HKL had actually participated in the preparation of the tender notice in the case in question. The city of Helsinki stated at the hearing that such participation did not take place. Similarly, the national court asks no question in this regard. I am therefore of the view that it is not appropriate to give a formal answer on this point.

163. As a result, I propose answering the third question by saying that the right of a contracting entity to include in a tender notice, among the criteria for awarding a contract concerning the operation of an urban bus transport service, characteristics relating to nitrogen oxide emissions and noise levels of the fleet used, such as those at issue in the main proceedings, is not called into question by the fact that the entity's own transport undertaking is one of the few undertakings in the sector able to offer a bus fleet fulfilling those conditions, unless it is shown that this criterion was introduced with the sole aim of favouring that undertaking.

43 — Case C-315/99 P [2001] ECR I-5281.

V — Conclusion

164. For the foregoing reasons, I suggest that the Court answer the questions submitted by the national court as follows:

(1) The provisions concerning the scope 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, in particular Article 2(1)(a), (2)(c) and (4), are to be interpreted as meaning that that directive does not apply to a procedure such as that at issue in the main proceedings.

(2) The Community legislation on public procurement, in particular Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, is to be interpreted as meaning that a municipality which organises, as the contracting entity, a tender procedure concerning the operation of an urban bus transport service may include, among the criteria for awarding the contract on the basis of the economically most advantageous tender, a criterion such as the one in the present case relating to low nitrogen oxide emissions and low noise levels. That criterion must be applied in conformity with the fundamental principles of Community law, in particular the principle of non-discrimination and the four freedoms, and with all the procedural rules laid down in the relevant directive, in particular the rules on advertising.

(3) The right of a contracting entity to include in a tender notice, among the criteria for awarding a contract concerning the operation of an urban bus transport service, characteristics relating to nitrogen oxide emissions and noise levels of the fleet used, such as those at issue in the main proceedings, is not called into question by the fact that the entity's own transport undertaking is one of the few undertakings in the sector able to offer a bus fleet fulfilling these conditions, unless it is shown that this criterion was introduced with the sole aim of favouring that undertaking.