OPINION OF ADVOCATE GENERAL MISCHO

delivered on 19 October 2000 [1]

1. Upon reading two French publications, the *Bulletin officiel des annonces des marchés publics* and the *Moniteur des travaux publics et du bâtiment*, the Commission found that three public works contract notices, two published by *offices publics d'aménagement et de construction* (public development and construction entities, or 'OPACs'), and one by a *société anonyme d'habitation à loyer modéré* (low-rent housing corporation), or 'SA HLM', had not been published in the *Official Journal of the European Communities*, S series. The Commission takes the view that Article 11 of Council Directive 93/37/EEC of 14 June 1993 on the coordination of procedures for the award of public works contracts ('the Directive') [2] required that those notices be published in the S series, having regard to both the value of the contracts and the nature of the awarding body.

2. In the Commission's view, both OPACs and SA HLMs are to be regarded as contracting authorities within the meaning of Article 1(b) of the Directive.

3. The Commission was not satisfied with the French Republic's reply to the formal notice addressed to it. After having found, as it maintains, numerous other contracts awarded by bodies of the same type, notice of which had not been published in the *Official Journal of the European Communities*, so that the practice appeared to be persistent, the Commission issued a reasoned opinion. Finally, still not satisfied by the explanations of the French authorities, the Commission brought the action with which I am here concerned.

4. It should, however, be noted at the outset that the scope of the dispute has changed in the course of the written procedure.

5. The French Republic has accepted from the time of filing its defence that in the light of the Court's case-law, in particular the judgments of 15 January 1998 [3] and 10 November 1998 [4], OPACs are contracting authorities within the meaning of Article 1(b) of the Directive, thereby acknowledging that such bodies are required to publish notices of contracts in the *Official Journal of the European Communities*, S series. In so far as concerns the OPACs, the Court can thus only declare

1 — Original language: French.

2 — OJ 1993 L 199, p. 54.

3 — Case C-44/96 *Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck* [1998] ECR I-73.

4 — Case C-360/96 *Arnhem and Reden v BFI Holding* [1998] ECR I-6821.

that the French Republic has failed to fulfil its obligations.

6. The dispute has also narrowed in respect of SA HLMs, inasmuch as the parties, whilst still in disagreement as to whether such bodies are to be regarded as contracting authorities for the purposes of the Directive, have established in the course of their written pleadings that their positions differ on only one very specific issue, the answer to which will determine the outcome of the dispute: namely whether the supervision which the public authorities exercise over SA HLMs corresponds exactly to the type of supervision referred to in the Directive when it sets out the criteria by which contracting authorities may be identified.

7. The Court has become familiar with the Directive, which it has interpreted in *Mannesmann Anlagenbau Austria* and *BFI Holding*, cited above. For that reason I do not consider that there is any need to decide the context in which it was adopted, its objectives and its general structure. I turn directly to Article 1, which, by means of a series of definitions, defines the scope of the Directive. Article 1 provides

'For the purpose of this Directive:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law [or] associations formed by one or several of such authorities or bodies governed by public law;

A "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.

The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35. To this end, Member States shall periodically notify the Commission of any changes of their lists of bodies and categories of bodies;

...'

8. In its application, the Commission sets out to demonstrate, relying principally on the *Code de la construction et de l'habitation* (Construction and Housing Code, hereafter 'the Code') published by the *Journal officiel de la République française*, that SA HLMs are to be regarded as public bodies and therefore as contracting authorities within the meaning of Article 1(b) of the Directive.

9. To this end, it points out, first, that the bodies in question were set up for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, namely to provide housing for persons and families of modest means, and that they have legal personality, so that the first two conditions of Article 1(b) necessary to meet the definition of a body governed by public law are fulfilled.

10. Turning to the third condition, the Commission points out, without being contradicted on that point, that of the three characteristics referred to in the Directive, namely that the body in question is financed for the most part by the public authorities, that it is subject to management supervision by the latter and that more than half of the members of the governing board are appointed by the public authorities, only one need be satisfied in order for a body to be deemed to fulfil that condition.

11. The Commission contends that a number of provisions of the Code, to which I shall in due course be turning my attention, make it clear that the supervision exercised by the State over SA HLMs matches precisely that which the Community legislature had in mind.

12. In its defence, the French Republic sets out to demonstrate that the supervision to which these corporations are subject does not in any way correspond to that referred to in the Directive. The various types of supervision described by the Commission do not allow the public authorities to intervene in decisions concerning the proper functioning of SA HLMs. Such supervision is of an administrative nature, and must be distinguished from the management or investment controls with which, in its view, Article 1(b) is concerned.

13. In its reply, the Commission maintains that the distinction is irrelevant. It maintains that there is nothing in Article 1(b) to support the conclusion that only supervision which gives the public authorities power to intervene in the day-to-day management of the corporation is caught by that provision.

14. In its rejoinder, the French Republic, still arguing on the premiss that for there to be management supervision within the meaning of Article 1(b) there must be supervision involving an evaluation of the way in which funds are administered, endeavours to show that the various types of supervision highlighted by the Commission are administrative in nature and exclude any involvement with management.

15. In its statement in intervention, the United Kingdom supports the interpretation of the Directive on which the French Republic bases its defence.

16. It is therefore quite clear that the point at issue between the parties is when the management of a body is to be regarded as subject to supervision by another.

17. To my mind, the outcome depends not only on the meaning to be given to the term 'supervision' but also on what is to be understood by 'management', even if it is the interpretation of 'supervision' which is the bone of contention.

18. I shall therefore consider each of these terms in turn.

What is management? What is supervision?

19. According to the dictionary *Le Petit Robert*, the term *gestion* (management), which describes the action of managing, is allied to administration, leadership and organisation, all of which connote the exercise of some form of power.

20. That inclines me to the view that supervision not linked to the way in which those who hold power in a body influence

its activities cannot be described as management supervision of that body.

21. That interpretation of *gestion* does not conflict with the terms *gestión*, [5] *gestione* [6] and *gestáo* [7] used in the Spanish, Italian and Portuguese versions of the Directive respectively, or with the term *diakhirísi* used in the Greek version. [8]

22. It is even supported by the use of the terms *Leitung* [9] and 'management' [10] in the German and English versions, and by the joint use in Dutch of *activiteiten* and *beheer*. [11]

23. In the Danish version there is no equivalent of the term 'management'. Reference is made solely to *kontrol* [12].

24. As for the term 'supervision', semantic analysis unfortunately provides no means of deciding between the two opposing interpretations put forward by the Commission, on the one hand, and the French Republic and the United Kingdom, on the other.

25. Reference to *Le Petit Robert* shows that *contrôle* denotes a relationship of supervision and verification as much as one of domination and leadership.

26. Admittedly, the first meaning is stated there to have the advantage of long usage and the second to have emerged only in the twentieth century, so that the French term '*contrôle*' acquired the same meaning as the English word 'control'. However, that semantic development certainly does not make it possible to determine without hesitation the meaning of 'supervision' which the Community legislature had in mind in 1993.

27. Still on the semantic level, when describing a situation in which 'supervision' means 'domination', one speaks of an undertaking which controls another, and not of an undertaking which exercises supervision over another, but the opposite is not true, since the fact of being subject to supervision does not necessarily imply the

5 — '*todo organismo ... cuya gestión se halle sometida a un control por parte de estos últimos ...*'

6 — '*organismo ... oppure la cui gestione é soggetta al controllo di questi ...*'

7 — '*qualquer organismo ... cuja gestão esteja sujeita a um controlo por parte destes últimos ou ...*'

8 — '*κάθε οργανισμός ... είτε η διαχείριση υπόκειται σε έλεγχο από το κράτος ή τους οργανισμούς αυτούς ...*'

9 — '*jede Einrichtung ... die hinsichtlich ihrer Leitung der Aufsicht durch letztere unterliegt ...*'

10 — '*any body ... or subject to management supervision by those bodies ...*'

11 — '*iedere instelling ... waarvan of wel de activiteiten ... of wel het beheer is onderworpen aan toezicht door deze laatsten ...*'

12 — '*organ ... eller er underlagt disses kontrol ...*'

existence of a power to intervene in decision-making.

28. Since it is impossible to find a solution by analysing the French version of the Directive, upon which the Commission and the French Government base their reasoning, the rules of interpretation laid down by the Court require us to turn to the other linguistic versions.

29. The Spanish, Italian and Portuguese versions, which employ the terms *control*, *controllo* and *controlo* respectively, and the Greek version, which uses the term *elenkho*, are no more helpful than the French version.

30. At first sight, the use in the German version of the term *Aufsicht*, used in everyday language to mean 'surveillance', where the French version uses *contrôle*, might give the impression that the Community legislature did not specifically intend 'supervision' to imply a power of intervention.

31. It seems to me however to be difficult to draw definite conclusions from the use of the term *Aufsicht*, in so far as in German, in order to refer to the supervisory board of a company, that is to say the body which, together with the managerial board, holds power when the company does not follow the classic model of having a board of directors, the term used is *Aufsichtsrat*. In a company whose administration is structured along those lines, the *Aufsichtsrat* is by no means a mere supervisor of the managerial board, but is actively involved in the management of the company, since it participates in defining the company's objectives and determining its strategy.

32. The term *toezicht* in the Dutch version calls for the same observations, *mutatis mutandis*, as does *Aufsicht* in the German version.

33. The English version of the Directive sheds no more light on the topic, because 'management supervision' conveys nothing of the scope of the powers of the supervising authority, whether simple surveillance of management or the possibility of intervening in management decisions.

34. Having concluded this rapid foray into the linguistic pluralism peculiar to Community law, what conclusion may we draw?

35. Certainly not any definite conclusion as to the type of supervision envisaged by the

Community legislature, with which the supervision to which SA HLMs are subject might be compared.

36. To my mind, however, the exercise has not been fruitless since it has at least shown that it would not be contrary to the wording of the Directive to consider that control involving the exercise of supervision of the way in which the body in question is run, without involvement in its running, is enough for that body to be regarded as a body governed by public law within the meaning of Article 1(b) of the Directive.

37. The next step will therefore be to analyse the Court's case-law, not in the hope of finding a definition of supervision for the purposes of Article 1(b), since if such a definition existed the parties would clearly have referred to it and I should immediately have used it as the cornerstone of my reasoning, but in order to seek any factors which may clarify the approach to be adopted in identifying bodies governed by public law falling within the scope of the Directive.

38. The only judgment to date to deal with the problem of the meaning of 'body governed by public law' for the purposes of Directive 93/37 is *Mannesmann Anlagenbau Austria and Others*, cited above. [13]

39. It is true that the same concept, which also appears in Article 1(b) of another directive in the field of public procurement, Council Directive 92/50/EEC of 18 June 1992 on the coordination of procedures for the award of public service contracts, [14] was also considered in *BFI Holding*, cited above. The Court held in that judgment that, 'with a view to giving full effect to the principle of freedom of movement, the term "contracting authority" must be interpreted in functional terms (see, to that effect, Case 31/87 *Beentjes* v *Netherlands State* [1988] ECR 4635, paragraph 11). In view of that need, no distinction should be drawn by reference to the legal form of the provisions setting up the entity and specifying the needs which it is to meet' (paragraph 62). Essentially, however, that judgment is concerned with the definition of a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character. I shall therefore concentrate on *Mannesmann Anlagenbau Austria and Others*.

40. To my mind, and contrary to what the Commission suggests, the relevance of that

13 — The judgment in Case C-353/96 *Commission* v *Ireland* [1998] ECR I-8565 concerns Council Directive 77/62/EEC of 21 December 1976 on the coordination of procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), which preceded the Directive in issue here.

14 — OJ 1992 L 209, p. 1.

decision to the present case does not lie in the following statements made by the Court at paragraph 28 to show that the third condition was thereby fulfilled:

— the Österreichische Staatsdruckerei (Austrian State Printer, hereafter the ÖS) was established specifically for the purpose of meeting needs in the public interest, not having an industrial or commercial character, namely for the production of administrative documents subject in varying degrees to security measures, and has legal personality;

— the Director-General of the ÖS is appointed by a body consisting mainly of members appointed by the Federal Chancellery or various ministries;

— furthermore, it is subject to scrutiny by the Court of Auditors and a State control service is responsible for monitoring the printed matter which is subject to security measures;

— finally, according to the statements made at the hearing by SRG, the majority of the shares in the ÖS are still held by the Austrian State.

41. This is because the finding as regards the appointment of the managing board was sufficient, in itself, to satisfy the third condition. Consequently, the finding as to supervision exercised by the Court of Auditors and by a State control body, which the Court took care to put after the phrase 'furthermore', does not enable one to draw any conclusions as to the degree of supervision considered sufficient by the Court for the purposes of this condition.

42. To draw such conclusions in this case would be all the more hazardous in view of the fact, noted by Advocate General Léger in his Opinion in that case, that the definition of Austrian bodies coming within the scope of the Directive in Annex I, XI, E.1(b) of the Act of Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the amendments to the Treaties founding the European Union [15] brought in the factor of budgetary supervision by the Court of Auditors.

43. What the Court said in respect of the supervision exercised over the ÖS therefore comes down, in one sense, to stating that the latter is clearly subject to supervision accepted by the Republic of Austria, at the time of its accession, as being such as to meet the criterion of supervision by the

15 — OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1.

public authorities within the meaning of the Directive.

44. The real relevance of *Mannesmann Anlagenbau Austria and Others* for the issue here lies in the résumé of the conditions to be met for there to be a body governed by public law, highlighted in the process of establishing that those conditions were met in the case of the ÖS.

45. At paragraph 20 it reads:

'Under the second subparagraph of Article 1(b) of Directive 93/37, a body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is *closely dependent on the State* [16], regional or local authorities or other bodies governed by public law.'

46. It will be observed straightaway that whilst the Court states the first two conditions in terms borrowed directly from the Directive it presents the third, without pausing to consider the three alternative criteria which must be applied, as referring to a certain type of relationship with the public authorities, namely close dependence. We may thus conclude that the three criteria for the third condition in Article 1(b) of the Directive constitute three alternative means of establishing the same fact, namely a situation of close dependence on the public authorities.

47. Since they are alternatives which enable the establishment of the same fact, these criteria may be regarded as equally sensitive tests. It cannot be the case that one of them can be read in such a way as to bring within the category of bodies governed by public law, bodies in a situation of dependence on the public authorities which differs markedly from that of bodies placed in the same category by one or other of the other two criteria.

48. In practice, this means that only bodies whose dependence on the public authorities is as close as that which arises from being financed, for the most part, by public authorities, or from the appointment of more than half of the members of the management board by the same public

16 — Emphasis added.

authorities, may be regarded as bodies governed by public law by reason of the supervision exercised over their management.

49. This pragmatic approach adopted by the Court does not, admittedly, enable us to decide between the two positions of principle advanced by the Commission, on the one hand, and the French Republic, on the other — that is, whether mere surveillance of management is sufficient or whether it is necessary to establish the existence of supervision entailing the power to intervene in management. In fact, it goes further, and transcends, so to speak, the conflict, inviting us to focus not so much on the nature of the supervision exercised as on the particular situation to which the existence of this supervision gives rise. That approach is, I think, in perfect harmony with the aims of the Community provisions on public procurement as stated by Advocate General Léger in paragraph 47 of his Opinion in *Mannesmann Anlagenbau Austria and Others*:

'The Community public procurement legislation was developed to ensure, at Community level, respect for the principles of free competition, freedom of establishment and freedom to provide services, which had long been [undermined] by the widespread tendency to act in that way. Its purpose is to ensure that traders, of whatever origin, have equal access to contracts put out to tender by public authorities for the execution of their projects, whatever form those authorities may take.'

50. In a footnote the Advocate General referred to *Beentjes*, cited above. Subsequently, the Court has made it clear, in paragraph 62 of *BFI Holding*, and paragraph 36 of *Commission* v *Ireland* that not only the meaning of 'State' but also that of 'contracting authority' must be given a functional interpretation.

51. In applying this approach of the Court one has to ask, not whether each of the controls weighing on the SA HLMs and pointed to by the Commission, taken separately, is such as to put those companies in a situation of dependence on the public authorities, but whether, *having regard to the legislative and regulatory framework within which the SA HLMs operate*, the various controls to which they are subject in fact give rise to close dependence on the public authorities. This is because it is apparent that the same type of supervision may give rise to different conclusions according to the context in which it applies. One type may give rise to different effects according to whether, by operation of the provisions which govern its application, the body subject to it enjoys considerable freedom of management or,

on the contrary, the provisions strictly define its activity and determine the direction of management in advance.

52. For this reason I consider it necessary now to consider the status of SA HLMs and the legal context within which they operate.

The legal framework within which SA HLMs operate

53. SA HLMs are commercial companies and are therefore governed by the 1966 law on companies. They are, however, a specific type because their inclusion, by Article L. 411-2 of the Code, in the list of low-cost housing bodies has the effect of making them subject to a host of rules laid down by the Code. Some of these rules apply to all low-cost housing bodies, including in particular public ones and OPACs, whilst others apply specifically to SA HLMs.

54. Thus, under Article L. 422-2 of the Code their object is to perform, in the conditions determined by their statutes, principally with a view to leasing, the activities laid down by Article L. 411-1, which defines those activities in the following terms:

'The provisions of this chapter set out the rules applicable to the construction, purchase, development, rehabilitation, repair and management of individual or collective, urban or rural housing, meeting the technical characteristics and the cost price determined by administrative decision and intended to meet the needs of individuals or families of limited means ...'.

55. It will be noted not only that the type of client to which SA HLMs offer their services is fixed by law, but that the technical characteristics and the cost price of the housing they may deal with is set by administrative decision.

56. When an SA HLM is constituted its statutes must comply with the model statutes annexed to Article R. 422-1 of the Code. These are extremely detailed. One finds there, as to the objects of the company, a distinction between the primary object, the letting of housing at a rent fixed in accordance with the rules laid down by the Code, and the construction of such housing, and the secondary object, for which 17 types of activity are listed, each precisely defined.

57. The model statutes specify that the transfer of shares must take place at a price not exceeding a maximum, the means of calculation of which is specified, and that such transfer, unless it occurs within a family context, requires the consent of the board of directors or supervisory board, which need not disclose the reasons for its consent or refusal.

58. Members of the board of directors or supervisory board of an SA HLM serve without remuneration, save that a fixed allowance calculated in accordance with the provisions of the Code may be given to members who are in paid employment.

59. If a profit is made, the dividend payable may not exceed a fixed maximum.

60. According to paragraph 11 of the model statutes:

'In the month after that in which the company meets in ordinary general meeting in accordance with Article 157 of the Law of 24 July 1966 cited above, the company shall file its accounts and reports to shareholders, together with the minutes of the general meeting, with the representative of the State in the *département* where its head office is situated, at the Deposit and Consignment Office, and with the Minister of Housing.

Where the shareholders' meeting is postponed, the judicial decision granting an extension of time must be similarly filed.'

61. Adopting the model statutes is not sufficient, however, to enable an SA HLM to commence business because Article L. 422-5 of the Code requires approval to be given, by means of administrative decision, to be issued in accordance with Article R. 422-16 by the Minister for Housing and Construction, on advice from the housing committee of the *département*, and the regulatory body for low-cost housing.

62. It will be noted that the previous version of the model statutes,[17] annexed in error to the Commission's application, provided for a government commissioner, whose powers were defined as follows:

'When the company receives approval in accordance with Article R. 422-4 of the *Code de la construction et de l'habitation*, a

17 — Laid down by Decree No 91-385 of 23 April 1991, replaced by Decree No 93-749 of 27 March 1993.

government commissioner, appointed by decision of the Minister of Housing, shall have full powers of documentary and on-site investigation.

He shall be entitled to sit in on meetings of the board of directors, in an advisory capacity, and may, where necessary, call such a meeting. He shall receive, on the same terms as the members of the board of directors, notice of such meetings, agendas and any other documents prior to each meeting. He shall further be entitled to copies of the minutes of each meetings and of the decisions taken by the board.

He may also order, within 15 days of the date of adoption, a re-examination of all or part of any decision of the board of directors. This examination must take place within 15 days. Action on the decision in question shall be suspended pending the re-examination.

He shall file with the Minister for Housing an annual report on the activity of the company.

Remuneration of the government commissioner, which shall be borne by the company, shall be set by the decision appointing him in accordance with a scale fixed by interministerial decision.'

63. If that provision had not been revoked in 1993, even interpreting management supervision as including a power of intervention, as advocated by the French Republic and the United Kingdom, would lead to the conclusion that SA HLMs are public bodies within the meaning of Article 1(b) of the Directive.

64. However, the other provisions which I have just set out, and which their statutes must include, indicate that SA HLMs are very tightly constrained, in terms of both the activities which they may pursue and the means of pursuing them and the deployment of capital, and that the profile of a shareholder in such a company is clearly very different from that of a company which is governed only by the 1966 law.

65. This framework should not, of course, be confused with the supervision to which Article 1(b) of the Directive refers. The existence of rules, no matter how precise, which a body must observe is one thing, supervision over the management of that body is another. This follows from the fact that if monitoring compliance with such rules and sanctions for their breach could only be a matter for the courts one could not speak of supervision by the State, a public body or a body governed by public law.

66. Nonetheless this very strict framework cannot be ignored when it comes to con-

sidering whether SA HLMs are in a situation of close dependence on the public authorities.

67. This follows from the fact that if the rules of management are very detailed, the simple supervision of their observance will inevitably result in a degree of control by the public authorities which is hardly distinguishable from that arising from appointment by the latter of the majority of the members of the management body or from finance which is for the most part public, in the sense that management will be guided by the public authorities and supervision will be merely a means of furthering the domination provided for in the framework rules.

68. In other words, and to come back to the approach laid down in *Mannesmann Anlagenbau Austria and Others*, where there is a strict regulatory framework the type of supervision envisaged by the Commission in its interpretation of Article 1(b) of the Directive will, from the point of view of close dependence on the public authorities, have the same effect as would arise, in the absence of such a framework, from the type of supervision envisaged by the French Republic in its interpretation of that article.

The controls in question

69. I turn now to consider whether the different controls identified by the Commission are such as to place the SA HLMs in a situation of close dependence on the public authorities.

70. The first provision of the Code cited by the Commission to show that SA HLMs are subject to management supervision by the public authorities is Article L. 422-7. This provides as follows:

'In case of serious irregularity or serious fault of management or failure on the part of the board of directors or supervisory board of a low-cost housing company or *crédit immobilier* company, the Minister of Housing and Construction may, after hearing the company, or the latter having had the opportunity to be heard, order the winding up of the company and the appointment of a liquidator.'

71. This provision leads me to make three observations.

72. Firstly, I do not think that one can argue that the three situations envisaged all concern defects in accounting procedures, misappropriation of funds or corruption. These instances fall within the category of 'serious irregularity'.

73. On the other hand, 'serious fault of management' can only refer to decisions taken ill-advisedly by the body, such as non-observance of the company's objectives, or careless financial decisions.

74. Lastly, the question of 'failure' refers to wrongful abstention from action or a general lack of activity.

75. Clearly the last two categories fall within management policy and not supervision of compliance with the rules.

76. Secondly, I fail to see how the Minister responsible for Housing and Construction (hereafter 'the Minister') could find a 'serious fault of management' or a 'failure' without exercising management supervision, at least at regular intervals. This supervision is rendered possible by the obligation imposed on the company to file with the Minister, amongst others, its accounts and, above all, its reports to shareholders (see paragraph 11 of the model statutes, mentioned above).

77. Thirdly, it is undeniable that the powers conferred on the Minister by this article are far-reaching, since they allow the former to order the winding up of an SA HLM if it appears to him that its management is seriously wanting.

78. The following provision, Article L. 422-8, [18] also cited by the Commission, gives the Minister power to take action less drastic than winding up, namely to suspend the management bodies, but this comes with extensive powers over the management of the company, which can be placed in the hands of an interim administrator appointed by the Minister.

18 — In the circumstances referred to in Article L. 422-7, the Minister for Housing may suspend the board of directors or the supervisory body, or the latter only, by reasoned decision, and appoint an interim administrator to whom shall be transferred the full powers of the board of directors or the supervisory body for the continuation of current activities.
The role of the interim administrator ends either on the appointment of a new board of directors or supervisory board by the company in general meeting at the latest within one year, extendable once from the date of the ministerial decision, or, in the absence of such appointment, on the appointment of a liquidator by the Minister for Housing and Construction.
Within two years of the appointment of the interim administrator, he must be invited to and may attend all meetings of the board of directors or of the new supervisory board, and general shareholders' meetings.
If in the course of this period he determines that the necessary measures for the recovery of the company have not been adopted or implemented, he shall inform the Minister of Housing and Construction. The latter may, together with the Minister of the Economy and Finance, after having heard the company, either proceed to the winding up and liquidation of the body in question, or further suspend the board of directors or the supervisory board and appoint an interim administrator for a fixed term. This administrator must, before the expiry of his term, call a general meeting to appoint a new board of directors or supervisory board, failing which he will proceed to the winding up and liquidation of the body.

79. It is thus no longer even a question of being involved in management, but of the transfer of management powers to a person appointed by the public authorities.

80. Furthermore, the intervention of this person does not result in a return to the status quo ante, since the company must undergo a period of intensive supervision for two years. [19]

81. Still within the legislative ambit of the Code, the Commission refers to Articles L. 423-1 and L. 423-2, [20] which empower the Minister both to order the liquidation of an SA HLM whose activity falls below a minimum threshold and to order the transfer of a part of its estate to another low-cost housing body where its activity exceeds a certain upper limit.

82. Such measures undeniably enable the Minister to exercise a certain degree of management or, at least, either to inject a minimum of dynamism into the management or to prevent SA HLMs from becoming real property empires.

83. As the Commission points out, the Code does not confine ministerial intervention to remedying serious faults or deficiencies in management, or to ensuring compliance with the constraints within which SA HLMs must operate. Rather it establishes as a general principle, by Article L. 451-1, of 'administrative supervision' of low-cost housing bodies, and therefore of SA HLMs. Article R. 451-1 states that all low-cost housing bodies, regardless of their legal form and method of finance, 'are subject to the supervision of the Ministers of Finance and of Housing and Construction'. To ensure the effectiveness of this supervision, Article L. 451-2 [21] grants a power of scrutiny over documents held by

19 — The Commission could also have referred to Article L. 422-6, which provides for the power to suspend individual members of the management bodies, and to Article L. 422-9, which provides that:
'Where a low-cost housing or *crédit immobilier* company fails to file the administrative and accounting documents listed by decree provided for by Article L. 423-3 with the relevant administrative authority for two years, or if it is unable to appoint a board of directors, or to call a general shareholders' meeting, the administrative authority may order its winding up and appoint a liquidator, on terms provided for by decree, either upon application of the members holding the majority of the capital, or upon application of a representative of the State in the *département*, or on its own initiative.'

20 — Article L. 423-1:
'Any low-cost housing entity which manages less than 1 500 properties and which has built fewer than 500 properties or granted fewer than 300 loans in 10 years may be wound up and a liquidator appointed by decision of the Minister of Housing and Construction and, in the case of public low-cost housing and construction bodies, by joint decision of the said Minister and the Minister for the Home Office.
Any low-cost housing body managing more than 50 000 properties may be called on, by decision of the Minister of Housing and Construction, to transfer all or some of the properties exceeding this number to one or more designated bodies.'

21 — The government officials responsible for implementing the supervision provided for by the preceding article may, for the purposes of that implementation only, consult any accounts, correspondence, receipts or records of expenditure in the offices of architects and contractors who have dealt with bodies subject to this supervision.
Any refusal to enter into communication shall render the perpetrator liable to a fine of FRF 60 000.'

architects and contractors who have dealt with low-cost housing bodies, with refusal to comply on the part of the latter punishable by heavy fines.

84. It will be noted that Article L. 451-1 in no way limits the extent of the supervision which the public authorities may exercise over SA HLMs, for example by stating that this is simply supervision of their compliance with the rules.

85. In fact the public authorities have at their disposal, in addition to the measures described above, a whole range of powers enabling them to direct the management of SA HLMs. The Commission cites two examples.

86. Firstly, Article R. 423-72 of the Code, which makes a decision manifestly concerning company management, namely the revaluation of assets, to the prior agreement of the Minister.

87. Secondly, Decree No 93-236 of 22 February 1993, on the establishment of an interministerial committee for the inspection of public housing. Article 3 of the decree states:

'The purpose of the committee is the supervision of legal or natural persons operating in the field of public housing.

The committee shall supervise the construction, acquisition and improvement of public housing carried out with financing subsidised or regulated by the State, or the subject of an agreement with the State, or backed by tax-exempt funding.

...

The committee may be empowered by the Ministers to whom it reports to carry out supervisory work and surveys, in addition to studies, audits and evaluations in the field of public housing.

The committee shall formulate proposals concerning the action to be taken in respect of its inspection reports and to ensure the implementation by the supervised bodies of the measures taken by the Ministers to whom it reports.

The committee shall, upon request, provide assistance to the decentralised services of the Ministers of the Economy, of Finance, of the Budget and of Industry.'

88. Plainly, this body is not a mere observer. It may put forward to the Minister proposals concerning the management of the various low-cost housing bodies and, if the Minister adopts them, it is responsible for their implementation.

89. The French Republic does not, of course, dispute the existence of these various forms of supervision.

90. In response to the various forms of intervention by the Minister identified by the Commission, the French Republic points to the fact that they are confined to strictly defined situations which occur only very rarely in practice.

91. As to the general power of supervision vested in the Minister, the French Republic contends that:

'It should be stressed that these are exceptional powers which may only be exercised in limited circumstances. They consist of a power to verify the accounting procedures of the bodies. Government officials can call for evidence of funds or securities, and can inspect all documents. They can call for any information, subject only to the requirement that they do not interfere in operations. The end result of this supervision is a report in which the government inspectors confine themselves to recording misuse or misappropriation of funds to the Minister. In sum, this programme of inspection constitutes more a persistent threat hanging over the bodies concerned than management supervision in the strict sense, that is, in terms of decisions involving strategic or investment choices.'

92. I consider, however, that I have shown, in relation to Article L. 422-7 of the Code and the model statutes with which SA HLMs must comply, that the supervision of them exercised by the public authorities is wider than that, embracing as it does all documents available to the general meeting and the reports of the latter.

93. As to the interministerial committee for the inspection of public housing [MILOS], the French Republic submits in its rejoinder that:

'... the MILOS is not in a position to give orders or instructions to the bodies which it supervises. The inspections result, after the body concerned has been heard, in a report incorporating the observations of the body as to the strengths and weaknesses brought to light as a result of the inspection, and may include proposals or recommendations addressed as much to the body itself as to the supervisory power. The report is then

forwarded, as well as to the managing director of the supervised entity, to the local supervisory bodies (the Prefect and the Departmental Paymaster) and the national supervisory bodies (the Ministers of Finance and Housing respectively). By its nature, and in view of those to whom it is addressed, a MILOS report has the status of an act of administrative supervision with a diagnostic and advisory purpose. If the managing committee of the MILOS or its permanent commission oversees the action to be taken in the light of these observations, the MILOS does no more than make recommendations on a case by case basis resulting in negotiations with the body itself to cause it to move forward, particularly if its financial status becomes critical.'

94. Even there, however, the argument does not seem to me to be well founded, because these inspections are in addition to the other supervisory measures already described. It is interesting to note, however, that according to the French Republic itself, the said committee can enter into negotiations with the supervised body 'to cause it to move forward'.

95. In my opinion, if the approach laid down in *Mannesmann Anlagenbau Austria and Others* is adopted one can only agree with the Commission, since everything leads to the conclusion that in fact SA HLMs are, by reason of the supervision which the public authorities exercise over their management, in a situation of close dependence on the public authorities.

96. There is one final matter which arises from the way in which the Commission arrives at a finding of a failure to fulfil obligations. In its application, it asks the Court to declare that the French Republic has, in making various awards of public contracts concerning the construction of housing by OPACs and SA HLMs, failed to fulfil its obligations under Directive 93/37, and in particular under Article 11(2) thereof. In my opinion it is difficult to find for the Commission on these terms.

97. As the Commission has not asked the Court to declare that the French Republic has failed to fulfil its obligations under Directive 93/37 by reason of a failure to take the necessary steps to ensure that OPACs and SA HLMs publish in the *Official Journal of the European Communities*, S series, notice of contracts the value of which exceeds the threshold laid down by the Directive, which would have presented no difficulty, given that it is this point which has been at issue throughout the proceedings, it seems to me that the Court ought to confine itself to declaring a failure to fulfil obligations in the three concrete cases referred to by the Commission.

Conclusion

98. In the light of the foregoing, I suggest that the Court:

— declare that, by failing to adopt the necessary measures to ensure that the *Office public d'aménagement et de construction* for the Val-de-Marne, the Logirel *Société anonyme d'habitation à loyer modéré* of Lyon, and the Paris *Office public d'aménagement et de construction* published notice in the *Official Journal of the European Communities*, S series, of the contracts notice of which was published in the *Bulletin officiel des annonces des marchés publics* of 7 February 1995, the *Moniteur des travaux publics et du bâtiment* of 16 February 1995, and the *Bulletin officiel des annonces des marchés publics* of 16 February 1995 respectively, the French Republic has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 on the coordination of procedures for the award of public works contracts, and in particular Article 11(2) thereof;

— order the French Republic to pay the costs.