JUDGMENT OF THE COURT (Fifth Chamber)
14 November 2002 *

In Case C-411/00,

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

Felix Swoboda GmbH

and

Österreichische Nationalbank,

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

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans (Rapporteur), D.A.O. Edward, P. Jann and S. von Bahr, Judges,

Advocate General: J. Mischo,
Registrar: M.-F. Contet, Administrator,

after considering the written observations submitted on behalf of:

— the Österreichische Nationalbank, by I. Welser, Rechtsanwältin,

— the Austrian Government, by H. Dossi, acting as Agent,

— the United Kingdom Government, by R. Magrill, acting as Agent, and A. Robertson, Barrister,

— the Commission of the European Communities, by M. Nolin, acting as Agent, and R. Roniger, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of the Österreichische Nationalbank, represented by I. Welser, of the Austrian Government, represented by M. Winkler, acting as Agent, and of the Commission, represented by M. Nolin and R. Roniger, at the hearing on 14 March 2002,

after hearing the Opinion of the Advocate General at the sitting on 18 April 2002,

gives the following

Judgment

1 By order of 29 September 2000, received at the Court on 10 November 2000, the Bundesvergabeamt referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2 Those questions arose in the course of proceedings between Felix Swoboda GmbH ('Swoboda') and the Österreichische Nationalbank (the Austrian central bank) ('ANB'), concerning the ANB's decision to use a negotiated procedure for the award of a contract in order to nominate the service provider contracted to undertake a removal to new premises situated approximately 200 metres from the original address.

Legal framework

Community law

Directive 92/50

3 Article 1(d) to (f) of Directive 92/50 provides:

'For the purposes of this directive:

...

(d) *open procedures* shall mean those national procedures whereby all interested service providers may submit a tender;

(e) *restricted procedures* shall mean those national procedures whereby only those service providers invited by the authority may submit a tender;

(f) *negotiated procedures* shall mean those national procedures whereby authorities consult service providers of their choice and negotiate the terms of the contract with one or more of them.'

4 According to Article 2 of Directive 92/50:

'If a public contract is intended to cover both products within the meaning of Directive 77/62/EEC and services within the meaning of Annexes I A and I B to this directive, it shall fall within the scope of this directive if the value of the services in question exceeds that of the products covered by the contract.'

5 Article 7(3) of Directive 92/50 provides:

'The selection of the valuation method shall not be used with the intention of avoiding the application of this directive, nor shall any procurement requirement for a given amount of services be split up with the intention of avoiding the application of this article.'

6 According to Article 8 of Directive 92/50:

'Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.'

7 Article 9 of Directive 92/50 provides:

'Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.'

8 Article 10 of Directive 92/50 provides:

'Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

9 It follows from Article 11(4) of Directive 92/50 that the use of the negotiated procedure constitutes an exception in the context of the procedure for the award of public service contracts, the contracting authorities being obliged, outside the cases referred to in paragraphs 11(2) and (3), to award their contracts by the open procedure or by the restricted procedure.

10 Amongst the services in Annex I A to Directive 92/50 are, in Category 2, 'land transport services... including armoured car services, and courier services, except transport of mail' (and rail transport services) covered, respectively, by Category 4 of Annex I A and Category 18 of Annex I B to the directive. With respect to land transport services, there are listed reference numbers 712 (except 71235), 7512 and 87304 of the common product classification of the United Nations (the 'CPC nomenclature').

11 As for the services which are listed in Annex I B to Directive 92/50, they include in Category 20 'Supporting and auxiliary transport services', which correspond to reference number 74 of the CPC nomenclature.

Directive 93/36/EEC

12 Article 1(a) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) provides:

'For the purpose of this directive:

(a) "*public supply contracts*" are contracts for pecuniary interest concluded in writing involving the purchase, lease rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations.'

13 According to Article 5(6) of Directive 93/36

'No procurement requirement for a given quantity of supplies may be split up with the intention of avoiding the application of this directive.'

Directive 93/37/EEC

14 Article 1(a) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) provides that:

'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.'

Directive 93/38/EEC

15 Article 1(4) 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) provides:

'For the purpose of this directive:

...

4. "supply, works and service contracts" shall mean contracts for pecuniary interest concluded in writing between one of the contracting entities referred to in Article 2, and a supplier, a contractor or a service provider, having as their object:

(a) in the case of supply contracts, the purchase, lease, rental or hire-purchase, with or without options to buy, of products;

(b) in the case of works contracts either the execution, or both the execution and design or the realisation, by whatever means, of building or civil engineering activities referred to in Annex XI. These contracts may, in addition, cover supplies and services necessary for their execution;

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

...

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

16 Finally, under Article 14(8) of Directive 93/98:

'The basis for calculating the estimated value of a contract including both supplies and services shall be the total value of the supplies and services, regardless of their respective values. The calculation shall include the value of the siting and installation operations.'

National legislation

17 Directive 92/50 was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Federal law on the award of public contracts, BGBl. 1993/462, in the version published in BGBl. 1996/776, 'BVergG 1993'). That law was replaced in 1997 by a law of the same title (BGBl. I, 1997/56, 'BVergG 1997').

18 In accordance with the terms of Directive 92/50, the regime applicable to public service contracts depends in Austria on the type of services provided. While all the provisions of the BVergG 1993 and 1997 apply to contracts for the services referred to in Annex III to those laws (which corresponds essentially to Annex I A to Directive 92/50), only the provisions of the first and fourth parts of those laws, concerning their scope and legal remedies, and four Paragraphs concerning the advertising of contracts, the use of the Common Procurement Vocabulary ('CPV') and the technical specifications apply to contracts for the services referred to in Annex IV to the BVergGs of 1993 and 1997, which is identical, in essence, to Annex I B to Directive 92/50.

19 In addition, those laws contain a provision inspired by Article 10 of Directive 92/50 because in the case of contracts for services mentioned in Annex III and

Annex IV to the laws Paragraph 1b(3) of BVergG 1993 and Paragraph 3(3) of BVergG 1997 make all the provisions of those laws applicable when the value of the services referred to in Annex III thereto exceeds that of the services referred to in Annex IV. Where the situation is reversed only the first and fourth parts are applicable to the contracts, together with the four Paragraphs referred to in the preceding paragraph of this judgment.

The main proceedings and the questions referred for a preliminary ruling

20 In autumn 1996, after using the restricted procedure to award a contract for a move from premises situated in Vienna (Austria) to new premises some 200 metres away (the procedure was annulled in March 1997), the ANB awarded that contract by the negotiated procedure and in April 1997 published the contract award notice. In the notice, the ANB indicated as the procedure chosen for the award of the contract 'the negotiated procedure for a service provided for in Paragraph 1b(2) and (3) of the BVergG 1993, with the predominant value made up of services referred to in Annex IV to the BVergG', while in order to designate the services constituting the contract, it referred to the CPV reference numbers 63100000-0 (Cargo handling and storage services), 63200000-4 (Other supporting services for land transport), 63400000-0 (Freight forwarding services) and 60240000-2 (Freight transportation services by road).

21 Swoboda challenged the ANB's contract award decision before the national court which has made the reference, seeking a declaration that the contract had not been awarded to the most favourable tenderer as the result of a breach of federal law on the award of public contracts or of the rules governing its application. It argued, in that regard, that the value of the services listed in Annex III to the BVergG 1993 and 1997 was far greater than the value of the services in Annex IV to the BVergG, so that the BVergG had to be applied in full.

22 The ANB contested that view before the national court. Contending that the majority of the services to be provided by the supplier of services concerned, in the present case, logistics and computerised task management, planning and coordination of all the tasks connected with the move and the provision of storage facilities — the move and the transportation of the contents of the premises represented only 6.94% of the total value of the contract — the ANB argued that the contract concerned mainly 'supporting and auxiliary transport services', referred to in Annex IV to the BVergG 1993 and 1997, to which only the first and fourth parts and the four Paragraphs mentioned in paragraph 18 of the present judgment apply. It relied in particular, in that regard, on the CPC nomenclature which brings together, in Chapter 74, all supporting and auxiliary transport services, including, in sub-chapter 742, 'storage and warehousing' and in sub-chapter 7480, 'freight transport agency services, freight forwarding services (primarily transport organisation or arrangement services on behalf of the shipper or consignee), ship and aircraft space brokerage services and freight consolidation and break bulk services', which correspond essentially to coordination and logistics.

23 In those circumstances, being uncertain of the interpretation to be given to Directive 92/50 in view, in particular, of the judgments in Case C-331/92 *Gestión Hotelera Internacional* [1994] ECR I-1329 and Case C-76/97 *Tögel* [1998] ECR I-5357, the Bundesvergabeamt decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must a service which serves a single purpose, but which could be subdivided into part services, be classified as a single service consisting of a main service and accessory, supporting services in accordance with the scheme of Directive 92/50/EEC, and in particular the types of services contained in Annex I A and I B, and treated as a service listed in Annex I A or I B to the directive according to its main object, or must each part service instead be considered separately in order to establish whether the service is subject to the directive in full as a priority service or only to individual provisions thereof as a non-priority service?

(2) How far may a service which describes a specific type of service (e.g. transport services) be broken down into individual services in accordance with the scheme of Directive 92/50/EEC without infringing the provisions on the award of service contracts or undermining the *effet utile* of the directive on services?

(3) Must the services referred to in this case (having regard to Article 10 of Directive 92/50/EEC) be regarded as services falling within Annex I A to Directive 92/50/EEC (Category 2, Land transport services) so that contracts which have as their object such services are to be awarded in accordance with the provisions of Titles III to VI of the directive, or must they be classified as services falling within Annex I B to Directive 92/50/EEC (Category 20, Supporting and auxiliary transport services, and Category 27, Other services) so that contracts which have as their object such services are to be awarded in accordance with Articles 14 and 16, and under which CPC reference number must they be subsumed?

(4) In the event that consideration of the part services leads to the conclusion that a part service falling within Annex I A to the directive which, in principle, is subject in full to the provisions of Directive 92/50/EEC is, by way of an exception, not subject in full to the provisions of the directive on account of the principle of predominance laid down in Article 10 thereof, is there an obligation on the contracting authority to split off non-priority part services and to award contracts for them separately in order to respect the priority nature of the service?'

Admissibility of the questions referred for a preliminary ruling

24 The arguments used by the Commission and the ANB to challenge the admissibility of the questions referred for a preliminary ruling must be examined first.

25 On the basis of the order for reference of the Bundesvergabeamt in Case C-314/01 *Siemens and Arge Telekom & Partner* pending before the Court, the Commission expresses doubts as to the judicial nature of the body making the reference on the ground that it acknowledged in the order that its decisions do not contain 'binding, enforceable directions addressed to the contracting authority'. In those circumstances, the Commission has doubts as to the admissibility of the questions referred for a preliminary ruling by the Bundesvergabeamt in the present proceedings in the light of the case-law of the Court, in particular Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14, and Case C-178/99 *Salzmann* [2001] ECR I-4421, paragraph 14, according to which a national court or tribunal may refer a question to the Court or tribunal only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

26 In that regard, it suffices to observe that the doubts expressed by the Commission as to the admissibility of the questions referred for a preliminary ruling on the ground that the decisions given by the Bundesvergabeamt are not binding, which was strongly contested during the hearing by both the ANB and the Austrian Government, are without relevance in the circumstances of the main proceedings.

27 As the Commission itself admitted during the hearing, in answer to a question put by the Court, the main case relates to the period after the award of the contract. However, it is common ground that in Austrian law both the parties and the civil courts which are seised of a claim in damages during that time are bound in any case by the findings of the Bundesvergabeamt.

28 In those circumstances, the binding nature of the decision of the Bundesvergabeamt in the main case cannot reasonably be called into question.

29 The ANB, for its part, doubts the admissibility of the questions referred for the following reasons. First, the applicant in the main proceedings did not participate

in the tendering procedure in question either as a tenderer or as a candidate, so that it has no direct individual right on which it can rely vis-à-vis the contracting authority. Second, the Court of Justice has already ruled on similar facts and questions in *Tögel*, so that the questions referred should either be dismissed for lack of relevance or dealt with by way of a reasoned order in accordance with Article 104(3) of the Court's Rules of Procedure. Third, the contract at issue in the main proceedings did not contain any cross-border aspect, which relieves the contracting authority of the obligation to award the contract by a public tendering procedure at Community level. The ANB refers in that respect to Case C-108/98 *RI.SAN.* [1999] ECR I-5219, also concerning a public tendering procedure, in which the Court held that 'Article 55 of the EC Treaty (now Article 45 EC) does not apply in a situation such as that in the main proceedings in which all the facts are confined to... a single Member State and which does not therefore have any connecting link with one of the situations envisaged by Community law in the area of freedom of movement for persons and freedom to provide services'.

30 In relation, first, to the ANB's argument that the applicant in the main proceedings did not participate in the public tendering procedure at issue in the main proceedings as a candidate or a tenderer, it is sufficient to observe that the right to bring proceedings is a question governed by the national rules of procedure. It is not for the Court of Justice to rule on the application of those rules in the circumstances at issue in the main proceedings.

31 Next, concerning the argument that in *Tögel* the Court of Justice has already ruled on comparable facts and questions, making it unnecessary to rule in the present case, or at least enabling it to decide by reasoned order, it must be observed that the facts and questions referred in the present case appear to be substantially different from those which gave rise to the judgment in *Tögel*. In that judgment the Court of Justice was not called upon to rule, in particular, on the question whether a contract for a single purpose but composed of various services, some falling within Annex I A to Directive 92/50 and others within Annex I B, should be classified in accordance with its main purpose.

32 In any case, Article 104(3) of the Rules of Procedure permits the Court to give a decision by reasoned order in the three situations mentioned therein, but by no means requires it to do so; the Court always retains in such cases the right to rule by means of a judgment.

33 Finally, as regards the argument that it was unnecessary to bring the existence of the contract at issue in the main proceedings to the knowledge of traders established in Member States other than the Austrian Republic because the contract had no cross-border aspect, it must be observed that that fact, supposing it to be established, is not such as to relieve the contracting authority of its duty to comply with the obligations set down in Directive 92/50. As stated expressly in the 20th recital in the preamble, the very purpose of the directive is to improve access for suppliers of services to the contract award procedures in order to eliminate practices which restrict competition in general and participation in contracts by nationals of other Member States in particular.

34 In the light of the above, the questions referred by the Bundesvergabeamt for a preliminary ruling must be declared admissible.

The questions referred for a preliminary ruling

35 By the questions referred to the Court, the national court asks, in essence, which regime is applicable to public service contracts composed of both services falling within Annex I A to Directive 92/50 — described by that court as 'priority' services — and services falling within Annex I B to the directive — described as 'non-priority'. In that regard, it seeks to ascertain more particularly what regime applies to a removal contract such as that at issue in the main proceedings in which the transportation itself is only a relatively small part, the contract being essentially for coordination, logistics and the provision of storage facilities.

36 As the first, second and fourth questions relate to the scope of Directive 92/50, it is appropriate to examine them before the third question, which concerns the classification of the services at issue in the main proceedings in the annexes to the directive.

The first question

37 By its first question, the national court asks, in essence, whether the purpose of a contract is relevant in determining the applicable regime. It seeks to know more particularly whether, for the award of a contract with a single object but which is composed of several services, those services must be classified individually in the categories provided for in Annex I A and I B to Directive 92/50 in order to determine the regime applicable to the contract in accordance with Articles 8 to 10 of the Directive, or whether on the contrary the main purpose of the contract must be identified, in which case the ancillary services are governed by the same regime as the service relating to the main purpose. The Bundesvergabeamt refers in particular in that regard to the judgment in *Gestion Hotelera Internacional*, in which the Court laid down the principle that the main purpose of the contract determined which directive was applicable to a given contract.

Observations submitted to the Court

38 For the ANB and the United Kingdom Government, the latter approach is wholly excluded in the context of Directive 92/50. The directive does not contain any definition of what constitutes the main purpose of a contract, whilst Article 10 explicitly acknowledges, on the contrary, that a contract may have as its purpose the provision of different services falling under different annexes to the directive.

39 The United Kingdom Government also states in that respect that in *Tögel* the Court held that the references in the annexes to Directive 92/50 to the CPC nomenclature were binding. It is thus contrary to the purpose of the directive to classify a contract composed of several services, referred to in different sections of the CPC nomenclature, according to only one of those services.

40 As regards, moreover, the reference made by the Bundesvergabeamt to the judgment in *Gestion Hotelera Internacional*, the ANB and the United Kingdom Government maintain that the judgment is wholly irrelevant in the main case in so far as, first, its purpose was to determine whether a contract constituted a contract for works or a contract of another type, and secondly, the criterion adopted by the Court in that judgment was the merely incidental nature of repair work in relation to the main purpose of the contract based on the express definition of public works contracts at the time in Article 1(a) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as reproduced now in Article 1(a) of Directive 93/37. According to the ANB, if in the context of that judgment the Court had taken the view that the determining factor for distinguishing between contracts for works and contracts for services was the predominant nature of a service in terms of value, it would have clearly so ruled, referring to Article 10 of Directive 92/50 and not to the 16th recital in the preamble thereto, which provides that when those works are incidental rather than forming the object of a contract, they do not justify treating the contract as a public works contract.

41 On the other hand, the Austrian Government argues that for the award of a contract with a single object but composed of several services, it is the object and the corresponding principal service which, once identified, determine the classification of the contract.

42 The Austrian Government cites first in that regard the reference numbers of the CPC nomenclature and the explanatory notes to the CPC, which do not contain

an exhaustive list of the services classified, but give a basic description of the typical composition of those services or of the activities necessary for the provision of such services.

43 Next, it refers to Article 7(3) of Directive 92/50 and Article 5(6) of Directive 93/36, from which it is clear that the division of a service into part services and the award of separate contracts relating to them is unlawful, especially when the value of each part service does not reach the threshold applicable and the contracting authority therefore avoids the application of those directives.

44 Finally, the Austrian Government relies on Article 1(a) of Directive 93/36 and Article 1(4)(b) of Directive 93/38 on the definition of public supply contracts and public works contracts respectively. Those provisions make it plain that all the Community directives on the coordination of the procedures for the award of public contracts define what constitutes a main service, which is decisive for the classification of the contract.

Reply of the Court

45 Directive 92/50 pursues fundamentally the same object as the directives on the coordination of the procedures for the award of public works and supply contracts, which is, according to the settled case-law of the Court, to avoid the risk of preference being given to national tenderers or candidates whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities, or other bodies governed by public law may choose to be guided by considerations other than economic ones (see, to that effect, Case C-44/96 *Mannesmann Anlagenbau*

Austria [1998] ECR I-73, paragraph 33, Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraphs 42 and 43, and Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 17). However, Directive 92/50 does not apply in the same way to all public service contracts.

46 Thus, the 21st recital in the preamble to Directive 92/50 states that the application of its provisions in full must be limited, for a transitional period, to contracts for services where its provisions will enable the full potential for increased cross-border trade to be realised, the contracts for other services during that period being subject only to monitoring.

47 To that end Directive 92/50 makes a distinction between contracts for services referred to in Annex I A, which under Article 8 are awarded in accordance with the provisions of Titles III to VI, and those for services referred to in Annex I B, which under Article 9 are subject to the provisions of Articles 14 and 16.

48 In Article 10, Directive 92/50 also provides that contracts which have as their object services listed in both Annex I A and Annex I B are to be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A exceeds the value of the services listed in Annex I B, and where this is not the case only in accordance with Articles 14 and 16.

49 It follows from those provisions that in the context of Directive 92/50 the argument that the main purpose of a contract determines the regime applicable to it cannot be accepted.

50 In the first place, Directive 92/50 itself states, in the seventh recital in the preamble, that for the application of procedural rules and for monitoring purposes the field of services is best described by subdividing it into categories corresponding to particular positions of a common classification, in this case the CPC nomenclature.

51 In paragraph 37 of the judgment in *Tögel*, the Court held that the reference made in Annexes I A and I B to Directive 92/50 to the CPC nomenclature was binding.

52 In the second place, Article 10 of Directive 92/50 provides an unequivocal test for the determination of the regime applicable to a contract composed of several services, which is based on the comparison of the value of the services referred to in Annex I A to the directive with the value of the services referred to in Annex I B.

53 In the light of the preceding observations, the answer to the first question must be that the determination of the regime applicable to public service contracts composed partly of services falling within Annex I A to Directive 92/50 and partly of services falling within Annex I B to the directive does not depend on the main purpose of those contracts and is to be made in accordance with the unequivocal test laid down by Article 10 of that directive.

The second and fourth questions

54 By its second and fourth questions, which it is appropriate to deal with together, the national court asks, in essence, whether in the award of a contract having one purpose but composed of several services the classification of those services in

Annexes I A and I B to Directive 92/50 deprives the directive of its effectiveness. It also asks whether there is an obligation on the part of the contracting authority, if as a result of that classification the value of the services falling within Annex I B exceeds that of the services falling within Annex I A, to separate the services referred to in Annex I B from the contract in question and to award separate contracts in respect of them.

55 In that regard, it suffices to observe that the answer given to the first question makes it clear that the classification of services in Annexes I A and I B to Directive 92/50 — even in the context of a contract with a single object — is in accordance with the system provided for by the directive as it appears, inter alia, in the seventh and 21st recitals in the preamble and in Articles 8 and 10, which envisage the application of the directive on two levels.

56 Directive 92/50 must be interpreted as in no way requiring the separate award of a contract for the services referred to in Annex I B thereto when, in accordance with the classification made by reference to the CPC nomenclature, the value of those services exceeds, for the contract in question, the value of the services referred to in Annex I A. As the Advocate General observed in point 55 of his Opinion, to require such a separation in that case would effectively deprive Article 10 of Directive 92/50 of any purpose. Under the second sentence of Article 10 of the directive the contract is subject only to Articles 14 and 16.

57 It would be the same if the contracting authority artificially grouped in one contract services of different types without there being any link arising from a joint purpose or operation, with the sole purpose of increasing the proportion of the services referred to in Annex I B to Directive 92/50 in the contract and thus of avoiding, by way of the second sentence of Article 10, the application of its provisions in full.

58 Moreover, that conclusion is supported by the wording of Article 7(3) of Directive 92/50, from which it is clear that the choice of the valuation method is not to be made with the intention of avoiding the application of the directive. Although that article relates to a different situation (the artificial splitting up of the contract), the purpose which inspires it (the concern to avoid any risk of manipulation) also precludes a contracting authority from artificially grouping different services in the same contract solely in order to avoid the application in full of the directive to that contract.

59 In the main case there can be no question, however, of such an artificial grouping in so far as the Bundesvergabeamt has clearly established that the services forming the object of the contract awarded by the ANB, although different in nature, all serve to achieve a single purpose.

60 In the light of the preceding observations, the answer to the second and fourth questions must be that in the award of a contract with a single object but composed of several services, the classification of those services in Annexes I A and I B to Directive 92/50, far from depriving it of its effectiveness, is in accordance with the system laid down by the directive. When, following the classification thus made by reference to the CPC nomenclature, the value of the services falling within Annex I B exceeds the value of the services falling within Annex I A, there is no obligation on the part of the contracting authority to separate from the contract in question the services referred to in Annex I B and to award separate contracts in respect of them.

The third question

61 By its third question, the national court wishes to know which annex to Directive 92/50 and which reference numbers of the CPC nomenclature cover the services at issue in the main proceedings.

62 In that regard, it must be observed that the classification of services in Annexes I A and I B to Directive 92/50 is primarily a question of fact for the contracting authority to determine, subject to review by the national courts.

63 In the present case, it is thus for the national court to review the classification made by the ANB, taking account, in particular, of the principles laid down in paragraphs 49 to 51 of the present judgment. The Bundesvergabeamt must verify, more particularly, that the services which make up the contract and the reference numbers of the CPC nomenclature correspond.

64 However, the Commission's argument that Category 20 of Annex I B to Directive 92/50, on supporting and auxiliary transport services, can be interpreted as covering the whole of the services forming the object of the contract in the main proceedings must in any case be rejected.

65 It follows from the title of that category that the services to which it refers do not include the transportation itself. In that regard, it is common ground that land transport services fall within Category 2 of Annex I A to Directive 92/50, with the exception of postal services and rail services, covered by Category 4 of Annex I B and Category 18 of Annex I B respectively.

66 In the light of those considerations, the answer to the third question must be that it is for the national court to determine the regime applicable to the contract forming the object of the procedure at issue in the main proceedings on the basis of Article 10 of Directive 92/50, in particular by verifying that the services which make up that contract and the reference numbers of the CPC nomenclature correspond. In any case, Category 20 of Annex I B to Directive 92/50 cannot be interpreted as also including land transport services themselves, as they are explicitly covered by Category 2 of Annex I A to the Directive.

Costs

67 The costs incurred by the Austrian and the United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 29 September 2000, hereby rules:

1. **The determination of the regime applicable to public service contracts composed partly of services falling within Annex I A to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and partly of services falling within Annex I B to the directive does not depend on the main purpose of those contracts and is to be made in accordance with the unequivocal test laid down by Article 10 of that directive.**

2. In the award of a contract with a single object but composed of several services, the classification of those services in Annexes I A and I B to Directive 92/50, far from depriving it of its effectiveness, is in accordance with the system laid down by the directive. When, following the classification thus made by reference to the nomenclature of the United Nations Common Product Classification, the value of the services falling within Annex I B exceeds the value of the services falling within Annex I A, there is no obligation on the part of the contracting authority to separate from the contract in question the services referred to in Annex I B and to award separate contracts in respect of them.

3. It is for the national court to determine the regime applicable to the contract forming the object of the procedure at issue in the main proceedings on the basis of Article 10 of Directive 92/50, in particular by verifying that the services which make up that contract and the reference numbers of the nomenclature of the United Nations Common Product Classification correspond. In any case, Category 20 of Annex I B to Directive 92/50 cannot be interpreted as also including land transport services in themselves, as they are explicitly covered by Category 2 of Annex I A to the Directive.

Wathelet Timmermans Edward

Jann von Bahr

Delivered in open court in Luxembourg on 14 November 2002.

R. Grass M. Wathelet

Registrar President of the Fifth Chamber