OPINION OF ADVOCATE GENERAL
BOT
delivered on 27 October 2009[1]

1. By this reference for a preliminary ruling, the Landgericht Frankfurt am Main (Germany) essentially seeks to ascertain the scope of the duty of transparency and the inferences to be drawn from a breach of that duty in the context of a procedure for the award of a service concession.

2. That request has been made in connection with a dispute between the undertaking Wall AG[2] and Stadt Frankfurt am Main (the city of Frankfurt am Main) and the undertaking Frankfurter Entsorgungs- und Service GmbH[3] concerning performance of a concession for the operation, maintenance and servicing of public lavatories in the territory of that city.

3. This case will enable the Court to clarify the circumstances in which a contracting authority may agree to amend a concession contract, in the course of its performance, without disregarding the scope of the duty of transparency.

4. It will also afford the Court the opportunity to clarify the circumstances in which a mixed-capital entity created in the context of a public-private partnership must comply with that duty.

5. Finally, the questions raised by the Landgericht Frankfurt am Main will enable the Court to set out the procedure for the judicial review of decisions which have been adopted in the context of service concessions. In particular, the Court must examine whether, where the competent national court finds that there has been a breach of the duty of transparency in the context of a procedure for the award of a service concession, Community law requires the Member States to recognise, on the part of their national courts, a power to grant injunctions against the parties to the contract.

1 — Original language: French.
2 — 'The applicant'.
3 — 'FES'.

I – Community law

A – *Primary law*

6. The EC Treaty does not restrict the freedom of Member States to conclude service concession contracts provided that the rules for awarding them are compatible with the provisions which establish and ensure the proper functioning of the single market.

7. Accordingly, as with any State measure laying down the conditions governing the provision of economic activities, concession awards must comply with the principles enshrined in the Treaty concerning the right of establishment (Article 43 EC) and the freedom to provide services (Article 49 EC), and must be subject to the rules prohibiting any discrimination on grounds of nationality (first paragraph of Article 12 EC).

8. Concession awards must, in addition, comply with the principles identified by the Court on the basis of those provisions, and in particular the principles of equal treatment and transparency, the scope of which I will explain below. Although that case-law relates in particular to proceedings concerning public works contracts, the full significance of the resulting principles nevertheless extends beyond the mere context of such contracts. I start from the premiss that those principles are also applicable to other situations and in particular to concessions.

B – *Secondary law*

9. As Community law stands at present, service concession contracts are not the subject of any secondary legislation. [4] However, the provisions adopted in the context of the directives relating to the award of public contracts make it possible to identify a number of rules governing the award of such contracts.

1. Legislation on the coordination of procedures for the award of public service contracts

10. The concept of 'contracting authorities' was first defined in Article 1(b) of Directive

4 — At present, secondary Community law contains only rules applicable to public works concessions awarded in traditional sectors.

92/50/EEC. [5] According to the eighth recital in the preamble thereto, the directive applies to 'public service contracts' [6] and therefore excludes service concessions from its scope. The purpose of Directive 92/50 is to eliminate barriers to the freedom to provide services and goods and to protect the interests of traders who wish to offer goods or services to contracting authorities established in another Member State. [7]

11. Article 1(b) of that directive defines the concept of 'contracting authorities' as follows:

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

Body governed by public law means any body:

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

and

— having legal personality

and

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

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

6 — According to Article 1(a) of that directive, they are 'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority'. Within the meaning of that directive, a public service contract involves consideration which is paid directly by the contracting authority to the service provider.

7 — Case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraphs 41 and 42 and case-law cited.

…'

12. The concept of 'service concession' was subsequently defined in Article 1(4) of Directive 2004/18/EC, [8] which consolidates all the provisions relating to the award of public service, supply and works contracts. [9]

13. According to that provision, a service concession is a 'contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment'.

14. Moreover, Article 1(9) of that directive reproduces in identical terms the concept of 'body governed by public law', set out in the second subparagraph of Article 1(b) of Directive 92/50.

2. Directive 89/665/EEC

15. Directive 89/665/EEC [10] allows a substantial increase in the guarantees of transparency and non-discrimination in the context of the opening-up of public procurement to competition, by requiring the Member States to introduce effective and rapid review procedures in the case of infringements of the 'public procurement' directives. [11] Pursuant to Article 1 of that directive, those procedures must be available, under detailed rules which the Member States may establish, to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement.

8 — Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

9 — Respectively, as regards public service contracts, Directive 92/50; as regards public supply contracts, Council Directive 77/62/EEC of 21 December 1976 (OJ 1977 L 13, p. 1), and, as regards public works contracts, Council Directive 71/305/EEC of 26 July 1971 (OJ 1971 L 185, p. 5), together 'the "public procurement" directives'.

10 — Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 92/50, 'Directive 89/665'. That directive was last amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31).

11 — Whilst Article 1 of Directive 89/665 covered only procedures for the award of public works and public supply contracts, Directive 2007/66 extends its scope to public service contracts.

16. Since procedures for the award of public contracts are of such short duration, those procedures must, under Article 2 of Directive 89/665, make it possible not only to deal urgently with alleged infringements and adopt interim measures but also to set aside decisions taken unlawfully and compensate persons harmed. That provision is worded as follows:

'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully …

(c) award damages to persons harmed by an infringement.

…

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

…',

17. As I have pointed out, Directive 89/665 was amended by Directive 2007/66. The latter is intended to strengthen the effectiveness of national review procedures and sets out the cases in which a contract concluded in breach of the procedural rules for the award of public contracts must be considered ineffective.

3. Directive 80/723/EEC

18. Article 2 of Directive 80/723/EEC [12] is worded as follows:

'1. For the purpose of this Directive:

…

(b) "public undertakings" means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it;

…

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

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

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

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

II – Facts and main proceedings

19. I will summarise below the facts which seem relevant for the purposes of my reasoning.

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

20. The contract at issue in this case is a service concession contract within the meaning of Article 1(4) of Directive 2004/18. That contract was concluded between Stadt Frankfurt am Main, which, as a regional or local authority, is regarded as a 'contracting authority' within the meaning of Article 1(b) of Directive 92/50, and the undertaking FES. The subject-matter of the contract is the operation, maintenance and servicing of eleven public lavatories located in the territory of Stadt Frankfurt am Main and includes the rebuilding of two public lavatories located at Rödelheim and Galluswarte stations, the foregoing constituting services within the meaning of Article 8 of that directive and Annex I A thereto.

21. The contract at issue was concluded for a term of sixteen years. FES, which is the main contractor, is not paid by Stadt Frankfurt am Main, but collects a charge paid by users and has the exclusive right to operate the lavatory installations for advertising purposes. That method of remuneration means that FES bears the risk of operating the services in question.

22. That concession was awarded to FES on the basis of the economically most advantageous tender. The tenders submitted by the undertakings, including those by FES and the applicant, were evaluated in the light of a number of award criteria set out in the call for tenders. As is apparent from the order for reference, each of those criteria was weighted and is set out in descending order of the importance attributed to them by Stadt Frankfurt am Main. [13]

23. In its tender, FES put forward the applicant as its subcontractor for the advertising services and the supply of the lavatory modules required to provide the awarded services. It relied in particular on the applicant's international reputation and technical expertise in those sectors. Stadt Frankfurt am Main accepted FES's tender.

24. Following the conclusion of the concession contract on 20 and 22 July 2004, FES invited the applicant and the intervener, Deutsche Städte Medien GmbH, [14] to submit offers on 5 January 2005, for the provision of

13 — In order: limited advertising needs (30%), coherence of the operator's project (public lavatories) (15%), plausibility of advertising project (10%), coherence of the safety project (10%), user-friendliness of the public lavatories (10%), appropriateness of the public lavatories (10%), integration of the public lavatories into the urban environment (5%), aesthetic merit of the public lavatories (5%) and environmental impact of the public lavatories (5%).

14 — That undertaking is none other than Ströer City-Marketing GmbH, its main competitor for the award of the concession ('DSM').

advertising services, and on 28 July 2005, for the supply of lavatory modules. The applicant's offers were rejected.

25. Under Clause 30(IV) of the concession contract, FES asked Stadt Frankfurt am Main to agree to the change of subcontractor. Stadt Frankfurt am Main raised no objection and, in addition, expressed its confidence that, in spite of that change, the standards described in the contract documents would be met.

26. Before the national court, the applicant alleges that Stadt Frankfurt am Main infringed the duty of transparency by authorising that change and thereby fundamentally amending the concession contract concluded with FES.

III – The reference for a preliminary ruling

27. The Landgericht Frankfurt am Main decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Are the principle of equal treatment expressed inter alia in Articles 12 EC, 43 EC and 49 EC and the prohibition in Community law of discrimination on grounds of nationality to be interpreted as meaning that the consequent duties of transparency for public authorities, namely to use an appropriate degree of advertising to enable the award of service concessions to be opened up to competition and the impartiality of the procurement procedure to be reviewed, [15] require national law to provide an unsuccessful tenderer with a claim to an order restraining an imminent breach of those duties and/or prohibiting the continuation of such a breach of duty?

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

3. Do the duties of transparency mentioned in Question 1 require, in the case also

15 — The national court refers to the judgments in Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 to 62; Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 17 to 22; Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraphs 46 to 50; Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 21; and Case C-260/04 *Commission* v *Italy* [2007] ECR I-7083, paragraph 24.

of an intended amendment to a service concession contract – including the substitution of a subcontractor who was mentioned as part of the tender – that the negotiations on this are again opened up to competition with an appropriate degree of advertising, or what would be the criteria for requiring such an opening up?

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

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

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

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

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

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

28. Written and oral observations were submitted by the parties to the main proceedings, and also by the Commission of the European Communities, the Surveillance Authority of the European Free Trade Association (EFTA) and six Member States. [16]

IV – The subject-matter of the questions referred

29. I will begin my analysis of this reference for a preliminary ruling by examining the third and fifth questions, relating to the scope of the duty of transparency.

30. By its third question, the national court asks the Court whether such a duty requires on the part of the contracting authority a new tendering procedure where the main contractor, to whom the concession was awarded, wishes, for the purpose of operating that concession, to use the services of a subcontractor other than that to which he referred when submitting his tender. Moreover, by its fifth question, the national court seeks to ascertain whether a main contractor such as FES, which is constituted as a mixed-capital entity, may also be regarded as a 'contracting authority' within the meaning of Directive 92/50 which is bound, as such, by the duty of transparency.

31. After examining those first two questions, I will continue my analysis by considering the first, second and fourth questions, which are concerned, in essence, with the procedure for the judicial review of decisions adopted in the context of service concessions.

32. Those last three questions are relevant only in the event that the national court takes the view that Stadt Frankfurt am Main and/or FES compromised the transparency of the procedure by changing the subcontractor in the course of performance of the concession contract at issue.

V – Analysis

33. Before commencing my examination, it seems to me important to recall the main features of the case-law on the duty of transparency. Although that case-law relates in

16 — The Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland.

part to public procurement, it was developed from Treaty principles and therefore seems relevant when applying Community law to service concessions.

A – *The main features of the case-law on the duty of transparency*

34. It is settled case-law that the duty of transparency constitutes a concrete and specific expression of the principle of equal treatment.

35. The Court has long taken the view that that principle is one of the fundamental principles of Community law, [17] which the Member States must observe when they act within the scope of Community law. That principle requires that similar situations should not be treated differently unless differentiation is objectively justified. [18] It is one of the fundamental rights whose observance the Court ensures. [19]

36. As a general principle of Community law, the principle of equal treatment must be observed by Member States when they implement Community rules. Consequently, Member States must, as far as possible, apply those rules in accordance with the requirements flowing from the protection of fundamental rights in the Community legal order. [20]

37. The Court has had the opportunity to define the scope of the principle of equal treatment in the context of public procurement in its judgments in *Commission* v *Denmark* and *Commission* v *Belgium*, [21] decisions which were then applied to service concessions. [22]

38. The aim of the principle of equal treatment as between tenderers is to promote the development of healthy and effective competition between applicant undertakings. Observance of that principle must make it

17 — Joined Cases 117/76 and 16/77 *Ruckdeschel and Others* [1977] ECR 1753, paragraph 7.

18 — See, in particular, Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraph 9, and Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraph 32 and case-law cited.

19 — *Rodríguez Caballero*, paragraph 32.

20 — Ibid., paragraph 30 and case-law cited.

21 — See, respectively, Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraphs 37 to 39, and Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, in particular paragraphs 51 to 56. See also Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 108 and case-law cited.

22 — See *Parking Brixen*, paragraph 48.

possible to ensure an objective comparison of the tenders and is required at every stage of the procedure. Equality of opportunity must be afforded to all tenderers, regardless of nationality, when formulating their tenders. [23] In other words, the rules of the game must be known to all potential tenderers and must apply to them all in the same way.

39. According to the Community judicature, compliance with the principle of equal treatment of tenderers requires an absence of discrimination on grounds of nationality and a duty of transparency which enables the concession-granting public authority to ensure that that principle is complied with. [24]

40. The Court defined the scope of the duty of transparency in *Telaustria and Telefonadress* and *Parking Brixen*. According to the Community judicature, that duty is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That duty consists in ensuring, in respect of all potential tenderers, a sufficient degree of advertising of the procurement procedure, thereby making it possible to open up the market to competition and to review the impartiality of the procedure. It also implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents. It must enable all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way. It must also enable the contracting authority to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract. [25]

41. An examination of the Court's case-law shows the close link between the duty of transparency and the principle of equal treatment. The first is intended to ensure the effectiveness of the second by guaranteeing the conditions for healthy competition. Since the principle of equal treatment is, as such, a general principle of Community law, the Member States are required, in the same way, to comply with the duty of transparency, which constitutes a concrete and specific expression of that principle.

23 — See *Commission* v *Belgium*, paragraphs 54 to 56. In that case, the Court accordingly held that that principle prevents a contracting entity from taking into account an amendment to the initial tenders of only one tenderer, since that tenderer would enjoy an advantage over his competitors.

24 — See *Commission* v *CAS Succhi di Frutta*, paragraph 109 and case-law cited, and *Parking Brixen*, paragraph 49 and case-law cited.

25 — *Telaustria and Telefonadress*, paragraphs 61 and 62, and *Parking Brixen*, paragraph 111.

B – *The scope of the duty of transparency*

1. The scope *ratione materiæ* of the duty of transparency

42. By its third question, the national court asks the Court whether the duty of transparency requires on the part of the contracting authority a new tendering procedure where the main contractor, to whom the concession was awarded, no longer wishes, for the purpose of operating that concession, to use the services of the subcontractor put forward when he submitted the tender.

43. To answer that question, it seems to me important to examine the way in which the duty of transparency must be applied, taking into account the intrinsic characteristics of service concessions. Service concessions are, in their purpose and manner of performance, fundamentally different from public service contracts.

44. Whatever its degree of complexity and sophistication, a public service contract can generally be regarded as the purchase of a service by a legal person governed by public law and is concerned with a specific service provided by an undertaking. In contrast, a service concession is a method of delegated management of a public service, by which a legal person governed by public law entrusts to a service provider outside the administration the management of a general interest activity and the responsibility for it vis-à-vis users, and does so for a significant period of time. The contracting authority, whether a public authority or a body governed by public law, stops managing the service and transfers responsibility for organising it to the holder of the concession. [26] The latter exploits the service at its expense and bears the related operating risks, being remunerated by the collection of a charge from service users.

45. When applying Community law to that contractual method of managing a service of general interest, it is necessary to take into account various requirements.

46. At the stage of concluding the contract, it is necessary to reconcile the duty of transparency with the contracting authority's broad discretion in assessing tenders and determining which is most economically advantageous. The most economically advantageous tender is that which economically, in the broadest sense, best satisfies the stated

26 — Case C-272/91 *Commission* v *Italy* [1994] ECR I-1409.

needs of the public authority, taking into account the chosen criteria and their weighting. The contracting authority must be able to choose the service provider who, on the basis of his references, the quality of his tender, his knowledge of the sector and the confidence he inspires, seems to offer the contracting authority the best guarantees of correctly performing the service. The specific nature of service concessions therefore allows a choice of provider based on a wide range of criteria, and favours the *intuitu personæ* criterion. Nevertheless, that freedom of choice does not mean that the concession should be awarded in an arbitrary or discriminatory manner. In order to prevent corruption and ensure greater transparency in economic life and public procedures, the courts have restricted that freedom on the basis of the principles governing public procurement procedures. Accordingly, the freedom of negotiation and decision remains, but it must be exercised in a manner consistent with the prior publicity and tendering obligation, thereby enabling the applicant to be selected in a transparent manner and ensuring equal treatment between tenderers. [27]

47. Then, at the stage of performing the contract, it is necessary to reconcile the duty of transparency with the public service interest, which means, in certain circumstances, that the contract must be adapted and amended.

48. As I have pointed out, the holder of the concession takes on the responsibility of organising the service as well as the consequent operating risks. Given the complex and long-term nature of a service concession, a concession-holder must have sufficient leeway to adapt to market conditions and to any changes in the economic, technical or legal context of the concession. The parties must therefore be particularly flexible and act in a spirit of cooperation, in view of the unforeseeable constraints and performance setbacks which are inevitable in the case of long-term investments. Accordingly, there are many reasons to renegotiate contracts. Nevertheless, some of them may constitute abuse if they substantially alter the structure of the contract, making the transparency of the procedure and the prior call for competition illusory. It is therefore necessary to determine whether the planned amendment is merely an additional clause of the contract, justified by legitimate reasons, or whether it ultimately results in the conclusion of a new contract which, in accordance with the fundamental principles of Community law, must be subject to a sufficient level of publicity and a new tender procedure.

27 — As the European Parliament pointed out, compliance with those rules 'can be an effective mechanism for preventing inappropriate restrictions on competition that at the same time enables the public authorities themselves to lay down and monitor conditions for ensuring quality, availability, social standards and compliance with environmental requirements' (European Parliament Resolution on the Green Paper on services of general interest (P5_TA (2004)0018, paragraph 32)).

49. In *Commission* v *France*, [28] the Court held that amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract where negotiations 'were substantially different in character from those already conducted and were, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract.' [29]

50. The Court set out the scope of that ground in *pressetext Nachrichtenagentur*, [30] referring to four situations in which such amendments may be regarded as substantial.

51. The first situation is where the amendment introduces conditions into the contract which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.

52. The second situation is where the amendment extends the scope of the contract considerably to encompass services which were not initially covered.

53. The third situation is concerned with cases in which an amendment changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.

54. Lastly, the fourth situation is concerned with cases in which a new contractual partner is substituted for the one to which the contracting authority had initially awarded the contract. Such an amendment must be regarded as constituting a change to one of the essential terms of the public contract, unless, according to the Court, that 'substitution was provided for in the terms of the initial contract, such as, by way of example, provision for sub-contracting'.

55. As I have pointed out, under Clause 30(IV) of the service concession contract concluded between Stadt Frankfurt am Main and FES, the subcontractor may be changed provided that the contracting authority agrees thereto. In this case, that procedure was complied with.

56. In the present case, the issue is therefore whether, in spite of the existence of that clause and compliance with the related procedure, the change of subcontractor constitutes,

28 — Case C-337/98 [2000] ECR I-8377.

29 — Paragraphs 44 and 46.

30 — Case C-454/06 [2008] ECR I-4401, paragraphs 35 to 37 and 40.

within the meaning of Community case-law, an amendment to one of the essential terms of the service concession concerned.

57. That assessment is difficult in so far as Stadt Frankfurt am Main itself agreed to that amendment, taking the view that the standards described in the contract documents would be met. Nevertheless, having regard to the particular circumstances in which that change arose, I think that the national court must satisfy itself that the act by which that authority authorised the amendment does not circumvent the principle of equal treatment of tenderers and the consequent duty of transparency.

58. For the purposes of that examination, it seems to me important to bear in mind the circumstances in which the holder of a concession may have recourse to subcontracting.

59. Having regard to the complexity and duration of concession contracts, a holder of a concession may decide to subcontract, wholly or in part, the performance of a contract concluded with the contracting authority. It is accepted that choosing a subcontractor is a discretionary act constituting one of the contractor's prerogatives. That freedom of choice is the corollary of the rule that the holder remains fully liable for the operation of the concession, since a subcontractor is bound only to him, by a contract which, because it is concluded between two private individuals, is governed by private law.

60. Nevertheless, to be lawful, the subcontracting must be subject to acceptance by the contracting authority either at the time of concluding the contract or in the course of the latter's performance. It is at that time that the contracting authority verifies the technical and economic capacities of the subcontractor. [31]

61. Where the subcontractor is put forward when the offer is submitted, notification of the concession constitutes acceptance of the subcontractor. Generally, the contracting authority may reject an undertaking as a subcontractor where that undertaking is, for example, in an irregular tax or business situation or has insufficient capacity properly to provide the services which are entrusted to it.

31 — See Case C-314/01 *Siemens and ARGE Telekom* [2004] ECR I-2549, paragraphs 45 and 46, relating to a procedure for the award of a public contract.

62. The subcontracting is not restricted to that announced when the tender is submitted. When performing the contract, the main contractor may use other subcontractors or change subcontractors for legitimate reasons relating, for example, to the actual quality of their services or to their financial situation. That allows it to adapt its services or to free itself, in accordance with the terms of the subcontract, of an undertaking which fails to give satisfaction.

63. Where the change of subcontractor is provided for in the terms of the contract and the contracting authority itself agrees to that amendment, it is, in principle, difficult to maintain that that change, in itself, alters an essential term of the concession and necessitates a new tender procedure.

64. Indeed, by giving its agreement, the contracting authority takes the view that the subcontractor's identity is not essential in the light of the purpose of the concession and that the services entrusted to the main contractor will be provided in accordance with the contract documents, regardless of that amendment. Such a situation may arise where there are, on the market at issue, many undertakings offering services of a similar nature and quality.

65. Moreover, where the contracting authority provides that certain conditions for the award of the contract may be altered after choosing the concession-holder and where it expressly provides in the contract documents for the possibility of making such an alteration and lays down the detailed rules governing its application, all the undertakings interested in participating in the concession are, from the outset, aware of that and are thus placed on an equal footing when submitting their tenders.

66. Nevertheless, that amendment to the concession contract may appear to be open to criticism in a situation such as that at issue in the main proceedings.

67. After all, the change of subcontractor occurred for no legitimate reason, after the contract was concluded and before the first services were provided, even though the concession-holder relied on the reputation and technical expertise of the subcontractor when submitting its tender.

68. In my view, such a practice, although accepted by the contracting authority, is an

infringement of the duty of transparency and the principle of equal treatment of tenderers. By so acting, the contracting authority excludes FES's tender, as amended, from a serious and transparent examination of the various applications, which is likely to give that undertaking an unfair advantage in obtaining the contract.

69. First of all, it is not inconceivable that Stadt Frankfurt am Main might have preferred a tender other than that originally submitted by FES if FES had not relied, in respect of the subcontracting of advertising services, on a number of qualities of the applicant, an 'efficient and experienced … partner', an 'experienced advertising specialist operating worldwide', with 'modern and aesthetic products'. [32]

70. It is clear from the order for reference that it was the presentation of the applicant as the subcontractor which enabled FES to obtain the concession contract at issue. FES was selected in the light of its advertising aspirations since it obtained, under that award criterion, 27,3 points, whereas its main competitor, the intervener in this case, obtained 20,1 points. With regard to the other criteria, Stadt Frankfurt am Main awarded the intervener as many points, if not more. It follows from the documents available to me that the applicant's inclusion in FES's tender as a whole was a decisive factor in the award of the concession.

71. Secondly, the conduct of FES, which, after obtaining the concession contract, engaged in negotiations concerning the subcontracting of the advertising services and the supply of lavatory modules, [33] before finally rejecting the applicant for no legitimate reason, [34] makes its initial tender, as accepted by Stadt Frankfurt am Main, seem like a sham tender, essentially conceived with the sole aim of excluding serious competitors in order to obtain the concession, but with the intention, immediately shown, of subsequently operating it under financial and technical conditions different from those set out in the tender, which alone had been subject to the competition.

72. Having regard to all those factors, as presented in the order for reference, I therefore

32 — Order for reference, p. 7 of the original German text.

33 — Although the concession contract was concluded with Stadt Frankfurt am Main on the 20 and 22 July 2004, FES invited the applicant and the intervener to submit tenders for the advertising services and for the supply of lavatory modules respectively on 5 January and 28 July 2005. It is at that stage that the applicant was rejected as a subcontractor.

34 — In this case, I can see no evidence in the file to suggest that FES may be able to rely on a legitimate reason for not using the services of the subcontractor to which it referred when submitting its tender. As the national court points out, that change is not comprehensible in so far as the applicant offered FES an annual payment far greater than that of the intervener.

consider that that change of subcontractor, occurring before even the first services were provided and without any reasons relating to the least technical or financial difficulty having been put forward, should have been preceded by a new tender procedure. I consider that, by allowing such a change of subcontractor without meeting the publicity and tender requirements laid down by Community law, Stadt Frankfurt am Main therefore infringed the duty of transparency.

73. After all, even if, in the context of concessions, public funds are actually less committed that in the context of public procurement, the fact remains that the procedure for the award of a service concession must guarantee to public authorities and users the best quality service, and do so on the basis of a serious and transparent assessment of the various applications, which observes the principle of equal treatment of tenderers.

74. If the national court, in the light of all the evidence in the file, should confirm that analysis of the facts, it seems to me that it must draw all the necessary inferences from such a breach.

75. Consequently, I propose that the Court's answer to the national court should be that, where, in the context of a procedure for the award of a service concession, the identity of the subcontractor is an essential element on which the contracting authority based its decision to award the concession, the duty of transparency requires the Member States to organise a new tender procedure when the holder of the concession wishes to change the subcontractor before even the first services are provided and without legitimate reasons having been put forward. It is for the competent national court to assess whether the name, reputation and technical expertise of the subcontractor put forward by FES when it made its tender were an essential element on which Stadt Frankfurt am Main based its decision to award the service concession to that undertaking.

2. The scope *ratione personæ* of the duty of transparency

76. By its fifth question, the national court asks whether an undertaking such as FES, in the light of its characteristics as described in the order for reference, must be regarded as a 'contracting authority' within the meaning of Article 1(b) of Directive 92/50 or as a 'public undertaking' within the meaning of Article 2 of Directive 80/723, which, as such, would be bound by the duty of transparency during the award of a service concession.

77. The national court refers to the abovementioned directives since, with regard to service concessions, no provision of secondary legislation has precisely defined the entities which are bound by the duty of transparency.

78. I think that the absence of such rules is not disadvantageous since the principles which have been identified in that regard in the context of public procurement may, in my view, be applied to service concessions.

79. Indeed, it seems to me important to adopt a uniform definition of the concept of contracting authority, in so far as that concept is meant to cover all public entities capable of entrusting the provision of economic activities to a third party, irrespective of the type of contract concluded, whether in the field of public procurement or the field of public service concessions. In that regard, it is important to bear in mind that the scope of Directive 92/50 is determined not according to the nature of the operation at issue, but according to the legal personality of the person proposing it, since all contracts awarded by a contracting authority must be awarded in accordance with the principles laid down by that directive.

80. However, the reference to the concept of 'public undertaking' set out in Article 2 of Directive 80/723, concerning, it should be recalled, the transparency of financial relations between Member States and public undertakings, seems to me far less relevant. Having regard to the factors which I will set out in the context of the examination concerning the concept of a body governed by public law, the national court may nonetheless assess, in the event that it considers it necessary to do so, whether an undertaking such as FES is capable of being regarded as a 'public undertaking'. [35]

(a) The concept of 'body governed by public law' within the meaning of Directive 92/50

81. Before recalling the various conditions referred to in Directive 92/50 which must be satisfied for an entity to be regarded as a 'contracting authority', it is interesting to note, as a preliminary matter, that FES is a semi-public undertaking created in the context of a public-private partnership. [36] Stadt Frankfurt am Main holds 51% of the shares in that undertaking.

35 — The conditions referred to in Article 2 of Directive 80/723 which must be satisfied for an entity to be regarded as a 'public undertaking' overlap those referred to in Article 1 of Directive 92/50 which must be satisfied for an entity to be regarded as a 'contracting authority'.

36 — See, in that regard, the undertaking's website: www.fes-frankfurt.de/profil (see the headings 'profil' and 'chronik').

82. This case therefore provides the Court with the opportunity to determine whether such an entity is capable of constituting a 'body governed by public law' within the meaning of Directive 92/50 and, as such, required to observe the fundamental principles of the Treaty.

83. Before commencing that examination, it is necessary to define what is covered by the concept of public-private partnership.

84. That type of partnership is a mechanism bringing together public capital, usually the major share, and minority private capital in a legal structure which is in principle subject to the ordinary rules of commercial law. The public and private partners thus establish a mixed-capital entity, which may take the form of a semi-public company, in a position to perform public contracts or to take responsibility, in the context of a concession, for a local public service. As the Commission pointed out in a recent communication, [37] the hallmark of this form of cooperation, which is generally geared to the longer term, is the role of the private partner, who is involved in the various phases of the project (planning, implementation and operation), who is intended to bear risks that are traditionally borne by the public sector and who often contributes to financing the project. [38]

85. The fact remains that such a mixed-capital entity does not constitute, within the meaning of the Court's case-law, an 'internal' management structure of a public authority department. Accordingly, where a contracting authority awards a public contract or a concession to that type of entity, it must observe all the rules applicable to public procurement and to concessions, whether they derive from the Treaty or secondary legislation. [39]

86. It is now necessary to examine the various conditions referred to in Article 1(b) of directive 92/50 which must be satisfied for an entity to be regarded as a 'body governed by public law'.

87. Under the second subparagraph of Article 1(b) of Directive 92/50, a body governed by public law is a body which must have legal personality and have been established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character and whose activities, financing or management bodies are closely dependent on the State, a regional or local

37 — Commission Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP) of 5 February 2008 (C(2007)6661).

38 — Page 2.

39 — Since its judgment in Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, relating to the award of a public service contract to a semi-public company, the Court has considered that the participation of a private undertaking, even as a minority, in the capital of a company in which the contracting authority in question is also a participant excludes the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments (paragraph 49). See also *ANAV*, paragraphs 30 to 32 and case-law cited.

authority or on another body governed by public law.

88. As the Court has consistently held, those three conditions are cumulative, so that if a single one of those conditions is unfulfilled a body cannot be regarded as a 'body governed by public law' and, therefore, as a 'contracting authority' within the meaning of Directive 92/50. [40]

89. Furthermore, in the light of the aim pursued by the directives relating to the award of public contracts, the Court takes the view that the concept of a body governed by public law must be interpreted in functional terms. [41]

(b) Examination of the constituent elements of a body governed by public law

90. In this instance, the legal personality of FES is not in dispute. The uncertainties relate to the two other requirements set out in Directive 92/50.

(i) Whether FES has the specific purpose of meeting needs in the general interest not having an industrial or commercial character

91. It is common ground, first of all, that FES was actually established for the specific purpose of meeting needs in the general interest, [42] since it has been responsible, since its establishment, for waste management and waste disposal and urban cleaning in the territory of Stadt Frankfurt am Main. [43] Those activities are indisputably in the general interest. As the Court has already held in *BFI Holding*, [44] those needs are among those which cannot be entirely satisfied by private undertakings in so far as they are considered necessary for reasons of public health and environmental protection, for which reason the State seeks to retain a decisive influence over them. [45]

92. It is now necessary to ascertain whether such needs in the general interest

40 — See Case C-300/07 *Hans & Christophorus Oymanns* [2009] ECR I-4779, paragraph 48 and case-law cited.

41 — Case C-393/06 *Ing. Aigner* [2008] ECR I-2339, paragraph 37 and case-law cited.

42 — According to settled case-law, they must be needs which, for reasons in the general interest, the State or a regional or local authority generally chooses to meet itself or over which it wishes to retain a decisive influence (*Ing. Aigner*, paragraph 40 and case-law cited). The Court thus recognised that that was the case with the production of official printed matter such as passports, driving licences or identity cards (Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73), with the maintenance of national forests (Case C-353/96 *Commission* v *Ireland* [1998] ECR I-8565), with the management of a university (Case C-380/98 *University of Cambridge* [2000] ECR I-8035), or indeed with the management of a public telecommunications network (*Telaustria and Telefonadress*).

43 — In Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, the Court recognised that the body need not have been entrusted with that task at the outset.

44 — Case C-360/96 [1998] ECR I-6821.

45 — Paragraphs 51 to 53.

have a character other than industrial or commercial. That question is, however, more difficult.

93. There is a great deal of case-law on how the existence of those needs ought to be ascertained. [46] According to the Court, account must be taken of a number of legal and factual elements which could be relevant, such as the circumstances prevailing at the time when the body concerned was established or the conditions under which it exercises its activity. In that regard, the Court states that it is important to check whether that body carries on its activities in normal market conditions. [47] To that end, the Court examines the competitive situation on the market of the products and services for which that body was established. Although the existence of competition may constitute evidence that a need in the general interest is industrial or commercial in character, that evidence is not conclusive. [48] It is still necessary to examine whether the body aims at making a profit, whether it bears any losses associated with carrying out its activity and whether it receives public financing for carrying out the activity in question. [49]

46 — I refer, in particular, to Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605; Case C-373/00 *Adolf Truley* [2003] ECR I-1931; Case C-18/01 *Korhonen and Others* [2003] ECR I-5321; *BFI Holding, Mannesmann Anlagenbau Austria and Others* and *Ing. Aigner*.

47 — *Ing. Aigner*, paragraph 41 and case-law cited.

48 — In *Adolf Truley* the Court considered that the existence of significant competition does not, of itself, permit the conclusion that there is no need in the general interest not having an industrial or commercial character, paragraph 61.

49 — *Korhonen and Others*, paragraphs 55 to 59.

94. There is insufficient evidence in the file for me to carry out a proper assessment of all those circumstances. It is for the national court, which alone has in-depth knowledge of the file, to examine them. Nevertheless, I will offer some guidance.

95. With regard to the circumstances prevailing when that body was established, it seems to me important to take into account the specific features of the market for the collection and treatment of waste, which is one of the activities for which FES was established.

96. The market for the collection and treatment of waste has undergone considerable expansion, in particular with the development of an increasingly stringent legislative framework relating to the management and recovery of waste and the prevention of environmental pollution. That increased stringency has had the immediate effect of increasing the costs of collecting and treating waste, whilst making the activity more complex and more technical. In view of those constraints, a large majority of local authorities have chosen to delegate that activity to specialised undertakings, which have been able fully to benefit from the development of that market.

97. Those factors therefore lead me to think that that body was not established with the aim of making a profit. Although that activity actually generates significant profits, the fact remains that the aim of making a profit was, in any event, not the main purpose for establishing FES. Those factors apply all the more to urban cleaning activities, which, unlike the collection and treatment of waste, are less profitable.

98. With regard to the conditions in which FES exercises its activity, and in particular to competitiveness in the sectors for the collection and treatment of waste and for urban cleaning, the national court should examine whether FES operates in a competitive market in which there are true competitors or whether it is, on the contrary, in a *de facto* quasi-monopoly situation associated, for example, with its status as an 'incumbent operator' [50] or with the existence of barriers to entry to the market. The absence of real competition is not a requirement for regarding FES as a body governed by public law, but it could constitute evidence that FES is involved in meeting a need in the general interest not having an industrial or commercial character.

99. Moreover, the fact that FES carries out, in addition to its duty to meet needs in the general interest, other profit-making activities is not relevant to the resolution of the dispute in the main proceedings. The Court has held that classification as a body governed by public law is not dependent on the relative importance in the activities of the relevant body of satisfying needs in the general interest other than those having an industrial or commercial character. If the undertaking continues to attend to those needs, the Court accordingly takes the view that it is irrelevant that the undertaking carries out other profit-making activities, whatever the proportion of those activities in the undertaking's overall turnover. [51]

100. Furthermore, although from a legal standpoint there are few differences between FES and a limited company owned by private operators, since FES bears the financial risks associated with its activity and may also be declared insolvent, it follows from the order for reference that Stadt Frankfurt am Main would not allow such a situation to arise. I would point out, in addition, that that authority levies on its residents a municipal tax in order to finance the payments made to FES for the disposal of waste and cleaning of public highways.

50 — I would point out that, according to the website of FES, the origins of that undertaking lie in the municipal Office for Waste Management and Street Cleaning.

51 — *Mannesmann Anlagenbau Austria and Others*, paragraphs 25, 26 and 31; *BFI Holding*, paragraphs 55 and 56; and *Ing. Aigner*, paragraph 47 and case-law cited.

101. In the light of those considerations, I am therefore inclined to think that FES was established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character.

102. Nevertheless, so as to define the exact nature of the needs attended to by that undertaking, it is for the national court, which alone has the relevant information, to assess the conditions in which FES carries out its activity and, in particular, competitiveness in the sectors for which that undertaking was established.

ii) The condition concerning close dependence of the body on the State, a local or regional authority or other bodies governed by public law

103. I would point out that, under the third indent of the second subparagraph of Article 1(b) of Directive 92/50, that condition covers the following three alternative criteria:

— 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.

104. It is common ground that Stadt Frankfurt am Main holds 51% of the capital in FES, that is the majority of it. Although that holding could indeed lead to the presumption that the public authority has a dominant influence on the undertaking, it is not clear that that influence is reflected in the undertaking's operating and management procedures.

105. I will examine, first of all, that undertaking's management procedures, since Stadt Frankfurt am Main possesses a right of veto at the shareholders' meeting, which, according to the detailed rules governing its use, may make the undertaking subject to *de facto* management supervision by the authority.

– The criterion concerning management supervision of the relevant body

106. According to settled case-law, that criterion concerns cases where a body is in a position of dependence on the public authorities equivalent to that which exists where one of the other alternative criteria is fulfilled. That dependence must enable the public authorities to influence the decisions of that body in relation to public procurement [52] or, by analogy, in relation to concessions.

107. *Adolf Truley* is an illustration of cases in which the Court rules that that criterion is satisfied. In that case, the monitoring office of the public authority was authorised to examine not only the annual accounts of the relevant body but also its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency. That office was also authorised to inspect that body's business premises and facilities and could report the results of those inspections to the competent bodies and the company shareholders as well as the authority. According to the Court, such powers therefore enable the public authority actively to control the management of that body.

52 — See *Adolf Truley*, paragraph 69 and case-law cited.

108. In the present case, the national court must take into account all the factual and legal circumstances which might allow Stadt Frankfurt am Main to exercise a decisive influence on the activity of FES. In this instance, I think that it should consider the arrangements by which that authority exercises the right of veto attached to its majority shareholding at the shareholders' meeting of that undertaking. In that regard, the national court must examine the importance of that right, taking into consideration the decisions to which it may apply and examining any conditions restricting its use.

109. Indeed, although the authority cannot impose decisions, [53] the fact remains that it can exercise exclusive control over FES if it is in a position to oppose the strategic decisions of the undertaking on its commercial policy, on the appointment of its administrators, on its budget or on its business plan. If the national court shows that Stadt Frankfurt am Main may, by exercising its right of veto, oppose significant decisions relating to the commercial strategy of FES and create deadlock in the decision-making process of that undertaking, Stadt Frankfurt am Main therefore has a decisive influence on the management of FES and, consequently, *de facto* control.

53 — I would note that the shareholders' meeting of FES can adopt decisions only by a three-quarters majority. Although Stadt Frankfurt am Main holds 51% of that undertaking's capital, that share is therefore insufficient to allow it independently to adopt decisions at shareholders' meetings.

110. Under those circumstances, in order to determine the precise extent to which FES is subject to management supervision by Stadt Frankfurt am Main, it is for the national court to assess whether the public authority can exercise a decisive influence on the management of the undertaking through the right of veto conferred on it as the majority shareholder.

111. In the event that the national court takes the view that that right of veto does not make the undertaking subject to management supervision by Stadt Frankfurt am Main, it will have to examine the other two criteria.

– The criterion concerning financing, for the most part, by the local or regional authority

112. The Court defined the scope of that condition in *University of Cambridge*. In its view, only payments which go to finance or support the activities of the body concerned without any specific consideration therefor may be described as public financing. In contrast, the sums which a contracting authority pays in consideration for contractual services do not fall within that category. [54]

113. The Court also stated that, on a proper construction, the term 'for the most part' means 'more than half', that the determination of that percentage of public financing must relate to all of the income received by the body in question, including that which results from a commercial activity, and that the calculation must be made annually.

114. In this instance, it is clear from the order for reference that more than half of the annual turnover of FES derives from bilateral contracts concluded with Stadt Frankfurt am Main for the collection and treatment of waste and urban cleaning. The sums which that authority pays therefore constitute consideration for the contractual services offered by FES, and that authority clearly has a financial interest in the provision of those services. Although such a contractual relationship may indeed make FES dependent on the authority, such dependency, in the Court's view, is not of the same nature as that which would result

54 — Paragraphs 21 and 24. In that case, the public financing comprised student grants and subsidies paid to support research work at the university, not payments made by the State in consideration for services provided by the university.

from a mere subsidy and is analogous to the dependency that exists in normal commercial relationships. [55]

115. In the light of the foregoing, it seems to me that the payments made by Stadt Frankfurt am Main to FES do not therefore constitute public financing within the meaning of the above-cited case-law.

– The criterion concerning the composition of the administrative, managerial or supervisory body

116. The order for reference provides no details on the identity of the members of the administrative board and the members of the management of FES, or on how they are appointed. The national court states only that Stadt Frankfurt am Main appoints one quarter of the members of the supervisory board and its chairman, who has a casting vote where voting is tied. [56] That is therefore insufficient to satisfy that criterion.

117. In the light of all those factors, I take the view that a mixed-capital entity such as FES, established in the context of a partnership with Stadt Frankfurt am Main, constitutes a 'body governed by public law' within the meaning of the second subparagraph of Article 1(b) of Directive 92/50 where it can be shown, first, that that entity meets needs in the general interest not having an industrial or commercial character and, second, that its management and administration are closely dependent on the public authority.

118. That entity satisfies needs in the general interest within the meaning of the first indent of the second subparagraph of Article 1(b) of Directive 92/50 where it attends to the collection and treatment of waste and urban

55 — *University of Cambridge*, paragraph 25.

56 — Such a board, as its name indicates, has the task of monitoring and supervising the management of the company. Very often, a supervisory board may carry out random as well as regular monitoring, conducting, in particular, the checks which it considers opportune or presenting to the shareholders' meeting its comments on the annual accounts of the company. It may also have particular powers allowing it, for example, to appoint members of the managerial board or its chairman, or even to authorise share transfers. In general, the chairman of the supervisory board assumes two types of functions, generally relating to convening the board and overseeing proceedings. The role and functions of the supervisory board are laid down by law and codified in the company's articles of association, which are not available to me (see Cozian, M., Viandier, A., and Deboissy, F., *Droit des sociétés*, 17th edition, Litec, Paris, 2004, pp. 286 and 287).

cleaning in the territory of the public authority. In order to assess whether those are needs having no industrial or commercial character, it is for the competent national court to assess the conditions in which FES carries out its activity, and in particular the competition situation in those sectors.

119. Such an entity is closely dependent on the public authority for the purposes of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 where its managerial, administrative or supervisory boards are subject to supervision by that authority. In order to determine the precise extent to which FES is subject to management supervision by Stadt Frankfurt am Main, it is for the competent national court to assess whether the public authority can, through its right of veto at the shareholders' meeting or through the composition of those boards, exercise active management supervision of that entity and likewise influence its decisions in matters relating to the award of service concessions.

C – *The national court's power to grant injunctions in the event of a breach of the duty of transparency*

120. By its first and fourth questions, the Landgericht Frankfurt am Main seeks from the Court a ruling on the procedure for the judicial review of decisions which have been adopted in the context of service concessions. In particular, the national court asks whether, in circumstances such as those in the main proceedings, Community law requires Member States to confer on their national courts a power to grant injunctions against parties who have concluded contracts in breach of the duty of transparency.

121. In the present case, the applicant does not challenge the decision whereby Stadt Frankfurt am Main granted the service concession to FES. However, it does challenge the decision whereby the administration authorised, on the basis of Clause 30(IV) of the concession contract, the change of subcontractor in the course of performance of that contract. According to the applicant, by so acting, Stadt Frankfurt am Main infringed the duty of transparency by making an essential amendment to that contract without complying with the publicity and tendering requirements laid down by Community law.

122. That dispute therefore relates not to the formation of the concession contract, but to its performance. By its action, the applicant asks the national court to prevent a further breach of the duty of transparency by ordering the administration not to authorise any change of subcontractor for the supply

and maintenance of the public lavatories to be installed at Kornmarkt, Galluswarte and Bahnhof Rödelheim. Similarly, the applicant asks the national court to order FES not to conclude a new subcontracting contract relating to the above-mentioned services. To regularise the conditions of performance of the service concession, the applicant also asks the national court to order the administration and, if appropriate, FES to terminate the contracts concluded in breach of the duty of transparency.

123. In order to answer the questions referred by the national court, it is necessary to recall the circumstances in which the national court is required to ensure protection of the rights conferred on individuals by Community law.

1. Preliminary remarks

124. As it stands at present, Community law does not regulate the way in which the Member States are required to ensure the enforcement of judgments and to penalise breaches of the duty of transparency which have been committed in the context of the operation of a service concession. In order to assess the extent to which the Member States are therefore required to confer on their national courts a power of injunction, reference must be made to the principles governing the Community legal order, in particular to the principle of the primacy of Community law and to the principle of the procedural autonomy of the Member States.

125. The principle of the primacy of Community law requires the Member States to provide for effective penalties for breaches of the duty of transparency in connection with a procedure for the award of a service concession.

126. I would point out that the duty of transparency constitutes a concrete and specific expression of a general principle of law which must be complied with by the Member States when they act within the scope of Community law. Such a duty creates, on the part of individuals, rights which must be afforded effective judicial protection by the national courts. The latter therefore must be in a position to ensure that their judgments are enforced in their entirety and must be able to adopt effective, proportionate and deterrent penalties so as to ensure that Community law is fully effective.

127. That is my starting point.

128. However, in the absence of Community rules, I think that it is consistent with the principle of the procedural autonomy of the Member States to leave to them the task of determining the powers which must be available to the national courts for the purpose of ensuring that their judgments are enforced and penalising breaches of the duty of transparency during the award of a concession contract. Such a reference to the national rules of procedure of the Member States, which must, of course, comply with the principles of equivalence and effectiveness, seems to me more consistent with the settled case-law of the Court, which respects the procedural autonomy of the Member States.

129. It follows from that case-law that, in the absence of Community rules, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing legal actions for safeguarding rights which individuals derive from Community law, it being understood that those rules must be no less favourable than those governing similar domestic actions (principle of equivalence), nor render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). [57]

57 — Case C-268/06 *Impact* [2008] ECR I-2483, paragraphs 44 and 46 to 48, and case-law cited.

130. It is in the light of those considerations that it is necessary to answer the questions raised by the national court.

2. Assessment

131. By its first, second and fourth questions, the national court essentially asks the Court whether the duty of transparency must be interpreted as meaning that the Member States are required to confer on their national courts a power of injunction against the parties to a dispute, in order to ensure compliance with that duty. It also asks the Court whether the national courts are required to order the parties to terminate a contract concluded in breach of that duty. [58]

58 — The fourth question is worded in such a way that we do not know whether the contract referred to by the national court is the service concession contract concluded between Stadt Frankfurt am Main and FES or the subcontracting contract subsequently concluded between the holder of the concession and DSM. According to the order for reference, the applicant does not challenge the decision whereby Stadt Frankfurt am Main awarded the service concession to FES. It therefore does not seek termination of the concession contract concluded with FES. On the other hand, the applicant challenges the decision whereby Stadt Frankfurt am Main authorised, on the basis of Clause 30(IV) of the concession contract, the change of subcontractor. By its action before the national court, the applicant seeks, essentially, to render the subcontracting contract concluded between FES and DSM ineffective. As for the national court, it argues in its order for reference that Stadt Frankfurt am Main was required to terminate the service concession contract which it had agreed to amend. Given the uncertainty, I will take the view that that question refers to both situations.

132. A power of injunction enables a court to order a party to act or refrain from acting in a manner determined by that court, possibly subject to a periodic penalty payment. The court before which a dispute has been brought may thus order an individual or the administration to take specific action where the judgment necessarily requires one of the parties to the dispute to take such action. That power is a useful mechanism for ensuring the enforcement of judicial decisions, and for addressing difficulties in enforcing binding judgments and refusals to do so.

133. The principle that a national court may grant an injunction is not, at present, subject to any Community rules. Moreover, that principle is not applied in a uniform way throughout the Member States, in particular where an injunction is addressed to the administration.

134. In Germany, as in the United Kingdom, the courts have an established power to address injunctions to the administration. The German courts have a general power to address injunctions to the administration. Similarly, the United Kingdom courts may address orders to act or refrain from acting to any administration, with the exception of the government and those directly associated with it. The issue was for a longer period debated by the French administrative courts on account of the traditional conception of the separation of powers. That conception is today subject to many exceptions, following the adoption of the Law of 8 February 1995. [59]

135. As I have stated, as Community law now stands, it is within their domestic legal systems and in accordance with the principles of effectiveness and equivalence that the Member States must determine whether a power of injunction is necessary and, if so, the conditions under which it must be allowed. In that respect, the Member States must base their decisions on the principles underlying their national judicial systems. They must examine the degree to which that power of injunction is compatible with all existing legal remedies and must take into account the powers which are already conferred on the national court. When making that assessment, the Member States must make an effort to ensure that judicial decisions concerning the existence of rights relied on under Community law are enforced in their entirety. In pursuit of that aim, the Member States must seek to guarantee the full effectiveness of Community law and to ensure the protection of the rights which it confers on individuals.

59 — Law No 95-125 on the organisation of the courts and on civil, criminal and administrative procedure (*Journal officiel de la République française*, 9 February 1995). See Articles L-911-1 to L-911-3 of the Code of administrative justice.

136. To order the termination of the contract, while it is not required by Community law, may seem to be the most suitable penalty for ensuring the effectiveness of Community law and the protection of individual rights. That may be the case especially where there is a particularly serious infringement of Community law provisions, such as those requiring adequate publicity or a prior tender procedure. In that regard, it is possible to be guided by the provisions adopted in that context by the Community legislature, in Article 2d inserted by Directive 2007/66. [60]

137. In its order for reference the Landgericht Frankfurt am Main argues that Stadt Frankfurt am Main was obliged to terminate the service concession contract which it had agreed to amend.

138. To support its view, the national court argues that the principles identified by the Community legislature in Article 2 of Directive 89/665 and reaffirmed by the Court in *Commission* v *Germany* [61] are applicable by analogy to procedures for the award of service concessions.

139. In that judgment, the Court, in a case brought before it under Article 228 EC, gave judgment against the Federal Republic of Germany for failing to terminate a contract relating to the disposal of waste of the city of Braunschweig (Germany), concluded in breach of Directive 92/50. The Federal Republic of Germany relied on the second subparagraph of Article 2(6) of Directive 89/665 to claim that the compensation which an undertaking suffering harm could obtain was sufficient to penalise the breach committed by the contracting authority. The Court did not adopt that reasoning. In its view, that provision governs the relationship between a Member State and its nationals, but does not govern the relationship between a Member State and the Community and therefore does not allow the former to avoid its own liability under Community law. By maintaining the effects of the contract at issue, the Federal Republic of Germany's failure to fulfil its obligations therefore continued and the infringement of the freedom to provide services risked lasting through the entire period of performance thereof. According to the Court,

60 — Under that provision, a contract may be declared wholly or partially ineffective where it was concluded without prior publication of a contract notice in the *Official Journal of the European Communities*, or where the tenderer suffering harm has not had the possibility to pursue pre-contractual remedies or in the very particular case of contracts based on a framework agreement or on a dynamic purchasing system covered by Directive 2004/18. Article 2e inserted by Directive 2007/66 nevertheless allows the Member States to provide for alternative penalties, having regard in particular to the seriousness of the infringement, the behaviour of the contracting authority and, where appropriate, the scope of the annulment of contractual obligations. They may be financial penalties or a shortening of the duration of the contract.

61 — Case C-503/04 [2007] ECR I-6153, paragraphs 29 to 36.

termination of the contract was therefore necessary not only to ensure the implementation in its entirety of a judgment establishing a failure to fulfil obligations, but also to ensure compliance with Community law.

140. Unlike the national court, I do not think that the principles identified in the context of proceedings relating to public procurement are wholly applicable to proceedings relating to service concessions; there are two reasons for that view.

141. First, I would point out that the Member States have not sought to legislate in connection with the procedure for the award of service concessions, in contrast with the many measures which have been adopted in the context of the award of public contracts. We therefore cannot disregard the absence of relevant Community rules and apply, by analogy, the precise and binding rules set out in Directive 89/665.

142. Secondly, it seems to me difficult to assess in the same way the inferences which must be drawn from a breach of the duty of transparency regardless of whether a public contract or a public service concession is at issue. In the case of the latter, the penalties cannot have the sole purpose of ensuring compliance with the law or penalising the wrongful conduct of a contracting authority. They are also, and perhaps particularly, intended to ensure the proper functioning of the public services and to preserve the public interest which is to be met by the contract.

143. If an injunction is to ensure the full effectiveness of Community law, it must be possible for the national court to make an assessment on a case-by-case basis. The assessment must take account of all the relevant factors of the case, such as the conduct of the contracting authority, the nature of the unlawful act committed, and all the interests capable of being adversely affected, in particular the public interest.

144. In the present case, it is an established principle in Germany that the national courts may issue injunctions. It follows from the order for reference that the national court may exercise that power under Paragraph 1004(1)

of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB') [62] in two types of situations:

— where a person is harmed on account of an interference with interests protected by law, such as life, bodily integrity and legal personality, health, freedom and property, or

— where a person is harmed on account of an infringement of a 'law intended to protect another person' within the meaning of Paragraph 823(2) of the BGB.

145. In the present case, the national court will have to ascertain whether national procedural law, and, in this instance, Paragraph 823(2) of the BGB, allows the competent court to issue an injunction to the administration where the latter has breached the duty of transparency and to order it to terminate the contract with FES and not give consent to any further change of subcontractor. [63]

146. To that end, it will be for the national court, first, to assess whether that duty constitutes a 'protective law' within the meaning of that provision. As the national court explained in relation to its second question, that will be the case if that duty constitutes a principle of customary law.

147. I would point out to the national court that the duty of transparency is an expression of the general principle of equal treatment. That principle is one of the fundamental principles of Community law and stems directly from the provisions of the Treaty. [64] It creates individual rights and binds all the authorities of the Member States when they implement Community law. Subsequently, they are bound, so far as possible, to apply that right in a manner which is consistent with the requirements deriving from the protection of fundamental rights in the Community legal order. In the present case, the national court

62 — That provision is worded as follows:
'If the ownership is interfered with otherwise than by dispossession or withholding of possession, the owner may demand from the disturber the removal of the interference in question. If further interference with ownership is to be apprehended, the owner may seek an injunction.'
It is clear from the order for reference that that provision has been applied by analogy to other forms of interference (and, in particular, to interference with life, bodily integrity, legal personality, health and liberty) and to certain forms of unlawful conduct.

63 — See, in particular, *Rodríguez Caballero*, paragraph 30 and case-law cited; Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 62 and 63; and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 44.

64 — See *Parking Brixen*, paragraphs 48 and 49.

will therefore have to interpret, so far as possible, the national rules granting the courts a power of injunction in a way which ensures the full effectiveness of Community law and guarantees protection of the rights which the applicant derives therefrom.

148. If the national court considers that the duty of transparency actually constitutes a 'protective law' within the meaning of Paragraph 823(2) of the BGB, it will therefore have to satisfy itself that the circumstances in which the national court may issue an injunction in the event of a breach of the duty of transparency are equivalent to those provided for in a dispute based on an infringement of domestic law. It will also have to satisfy itself that those procedural rules do not render practically impossible or excessively difficult the exercise of rights conferred by Community law.

149. In the context of the present dispute, the aim is to guarantee the full effectiveness of Community law by effectively penalising breaches of the duty of transparency and by preventing an imminent breach of that duty resulting from further misuse of the provision on subcontracting in Clause 30(IV) of the concession contract.

150. It is the light of that aim that the referring court will have to assess whether Stadt Frankfurt am Main and if necessary FES should be ordered to terminate the contracts concluded in breach of Community law. In this respect, as is clear from the order for reference, that court considers that a breach of the duty of transparency is capable of constituting a compelling reason for termination of the concession contract within the meaning of Paragraph 314 of the BGB. [65]

151. It is also in the light of that aim that it will have to assess whether the administration and FES should be ordered not to proceed, in circumstances such as those in the main proceedings, to a change of subcontractor for the supply and maintenance of the public lavatories to be installed at Kornmarkt, Galluswarte and Bahnhof Rödelheim.

152. Consequently, I propose that the Court's reply to the national court should be that, where the competent national court establishes that there has been a breach of

65 — According to that provision: 'A continuing obligation may be terminated by either party to the contract for a compelling reason without a notice period. There is a compelling reason if the terminating party, taking into account all the circumstances of the individual case and weighing the interests of both parties, cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period.'

the duty of transparency in the context of a procedure for the award of a service concession, Community law, as it now stands, does not require the Member States to grant that court a power of injunction as against the parties to the dispute. It is for the domestic legal order of each Member State to define, in accordance with the Community principles of equivalence and effectiveness, the detailed procedural rules allowing the competent national court to ensure the full effectiveness of Community law and that judicial decisions concerning the existence of rights relied on under that law are fully enforced.

VI – Conclusion

153. In the light of the foregoing considerations, I propose that the Court should answer as follows the questions referred by the Landgericht Frankfurt am Main:

(1) Where, in the context of a procedure for the award of a service concession, the identity of the subcontractor is an essential element on which the contracting authority based its decision to award the concession, the duty of transparency requires the Member States to organise a new tender procedure when the holder of the concession wishes to change the subcontractor before even the first services are provided and without legitimate reasons having been put forward. It is for the competent national court to assess whether the name, reputation and technical expertise of the subcontractor put forward by Frankfurter Entsorgungs- und Service GmbH when it made its tender were an essential element on which Stadt Frankfurt am Main based its decision to award the service concession to that undertaking.

(2) A mixed-capital entity such as Frankfurter Entsorgungs- und Service GmbH, established in the context of a partnership with Stadt Frankfurt am Main, constitutes a 'body governed by public law' within the meaning of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001, where it can be shown, first, that that entity meets needs in the general interest not having an industrial or commercial character and, second, that its administration and its management are closely dependent on the public authority.

That entity satisfies needs in the general interest within the meaning of the first indent of the second subparagraph of Article 1(b) of Directive 92/50, as amended, where it attends to the collection and treatment of waste and urban cleaning in the territory of the public authority. In order to assess whether those are needs having no industrial or commercial character, it is for the competent national court to assess the conditions in which FES carries out its activity, and in particular the competition situation in those sectors.

Such an entity is closely dependent on the public authority for the purposes of the third indent of the second subparagraph of Article 1(b) of Directive 92/50, as amended, where its managerial, administrative or supervisory boards are subject to supervision by that authority. In order to determine the precise extent to which Frankfurter Entsorgungs- und Service GmbH is subject to management supervision by Stadt Frankfurt am Main, it is for the competent national court to assess whether the public authority can, through its right of veto at the shareholders' meeting or through the composition of those boards, exercise active management supervision of that entity and likewise influence its decisions in matters relating to the award of service concessions.

(3) Where, in the context of a procedure for the award of a service concession, the competent national court establishes that there has been a breach of the duty of transparency, Community law, as it now stands, does not require the Member States to grant that court a power of injunction as against the parties to the dispute. It is for the domestic legal order of each Member State to define, in accordance with the Community principles of equivalence and effectiveness, the detailed procedural rules allowing the competent national court to ensure the full effectiveness of Community law and that judicial decisions concerning the existence of rights relied on under that law are fully enforced.