ORDER OF THE COURT
26 November 1999 *

In Case C-192/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Corte dei Conti, Italy, for a preliminary ruling in the *ex post facto* review proceedings before it concerning

Azienda Nazionale Autonoma delle Strade (ANAS)

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

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward (Rapporteur), L. Sevón, R. Schintgen (Presidents of Chambers),

* Language of the case: Italian.

P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm, M. Wathelet and V. Skouris, Judges,

Advocate General: G. Cosmas,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General,

makes the following

Order

1 By decision of 7 April 1998, received at the Court on 19 May 1998, the Corte dei Conti (Court of Auditors) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2 Those questions arose in the course of the review of the lawfulness, procedural propriety and commercial viability of the financial management of the Azienda Nazionale Autonoma delle Strade (Autonomous National Highways Agency,

now the Ente Nazionale per le Strade (National Roads Authority); hereinafter 'the ANAS'), specifically in respect of two tranches of a loan obtained by that body.

The proceedings before the Corte dei Conti and the questions referred

3 In the context of its responsibilities concerning the construction, maintenance and management of the national roads and motorways, the ANAS obtained a number of loans, one of which comprised four tranches of ITL 2 000 billion each, being worth ITL 8 000 billion in total.

4 The first two tranches were obtained on the domestic market. The relevant agreements were approved and rendered effective by interministerial decrees of the Ministry of Public Works and the Ministry of Finance of 26 February 1991 and 30 January 1992 respectively.

5 In order to obtain the third tranche, however, the ANAS turned to the international capital markets because it considered the terms offered by the Italian bank group too onerous. It entered into a bond agreement with Nomura International plc, a bank whose registered office is in London, under which variable rate Eurobonds were to be issued in US dollars. That agreement, together with the related swap contracts, was approved by various decrees of the Ministry of Public Works and the Ministry of Finance adopted between December 1993 and November 1994, that is to say, after the expiry of the deadline — 1 July 1993 — for implementing Directive 92/50 and before the transposition of that measure into Italian law by Decree-Law No 157 of 17 March 1995.

6 The auditors assigned to the case pointed out that the agreements had been approved after the deadline for transposing Directive 92/50 into Italian law. They

found that the Directive had not been applied even though its provisions were directly applicable and ought, therefore, to have been complied with. The ANAS countered that Directive 92/50 did not meet the criteria for direct applicability, and that the ANAS was at the material time an autonomous undertaking and could not therefore be regarded as a 'contracting authority' within the meaning of Article 1(b) of the Directive.

7 That view prevailed also in respect of the acquisition of the fourth and last tranche of the loan — procured by virtue of a contract concluded with a group of Italian banks — even though the ministerial decree approving the loan agreement was adopted after Decree-Law No 157 entered into force.

8 Application was thereupon made to the division of the Corte dei Conti responsible for reviewing acts of the executive for a ruling as to the lawfulness, procedural propriety and commercial viability of the financial management of the ANAS with respect to the third and fourth tranches of the loan. The Corte dei Conti formed the view that certain points of Community law required interpretation before it could undertake such a review. It therefore stayed proceedings and referred the following three questions to the Court of Justice for a preliminary ruling:

'(1) Are the particular features of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts — which, as is known, provides for a transitional period prior to full application (21st recital in the preamble), the utilisation of two sets of provisions, depending on whether the services concerned are those listed in Annex IA or in Annex IB (Articles 8 and 9), and a procedure for review (within three years) of the results achieved, with a view to "making the

Directive fully applicable to a wider range of service contracts" (27th recital and Article 43) — such as to preclude or render more difficult its immediate applicability in domestic law (as from 1 July 1993) in the absence of a formal measure adopted by the Member State to transpose it?

(2) If the first question is answered in the negative: are the provisions of the abovementioned directive (services covered by Article 8) applicable to the ANAS (Azienda Nazionale Autonoma delle Strade — Autonomous National Highways Agency) as regards the fulfilment or otherwise of the requirements of Community law for it to be regarded as a "contracting authority" within the meaning of Article 1(b) of the abovementioned directive?

(3) If the foregoing question is answered in the affirmative: must the application of Directive 92/50/EEC — which does not appear to be a matter of any doubt regarding the loan agreement concluded with the group of Italian banks to raise the fourth and last tranche of the ITL 8 000 billion loan authorised by Law No 405/90 — be extended to the agreement between ANAS and Nomura International plc raising ITL 2 000 billion (third tranche) by means of a bond loan based on the issue of variable-rate Eurobonds denominated in US dollars, having regard to the fact that the 13th recital in the preamble and Article 1(a)(vii) of the abovementioned directive exclude from bank services (mentioned in category 6 of Annex IA) "contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments"?'

The jurisdiction of the Court of Justice

9 The Corte dei Conti maintains that when it is sitting as a divisional review body, either to verify in advance the lawfulness of executive measures to be adopted or to determine *ex post facto* whether the State budget and assets have been properly

managed by the various administrative authorities, it satisfies all the criteria established by the Court of Justice for classification as 'a court or tribunal of a Member State' within the meaning of Article 177 of the Treaty.

10 It argues that the Corte dei Conti is a permanent body established by the Italian Constitution, under which the independence of both that institution and its members is inviolable; that the review procedure is conducted entirely on an *inter partes* basis, with the participation of the administrative authorities concerned; that its jurisdiction to review the financial management of the public administration is compulsory in so far as it is exercised in accordance with formal schedules drawn up by the Corte dei Conti itself which, once adopted, must be complied with by both that institution and the administrative departments concerned, for whom abstention is not an option.

11 The Corte dei Conti also points out that the review procedure culminates in a final decision by the bench. In that decision, pursuant to Article 3(4) of Law No 20/1994 of 14 January 1994 (GURI No 10 of 14 January 1994), the Corte dei Conti determines whether financial management has been conducted lawfully and in accordance with proper procedure or unlawfully and in breach of proper procedure, and makes a declaration reflecting its findings; it also appraises the extent to which the results of administrative action are in conformity with the objectives fixed by law. Thus a decision is composed of two sections. The first consists entirely in legal analysis; in the second, the Corte dei Conti determines whether financial management has been properly conducted and evaluates the results in terms of performance, efficacity and value for money in the light of financial and economic criteria, statistical data and other factors.

12 In a document dated 24 May 1999, which was forwarded to the Court by the Italian Government, the Corte dei Conti relies on the fact that the review procedure is conducted on an *inter partes* basis, in the form of a dispute in which the legality of acts is challenged by the auditors, who, in the course of the preliminary procedure, state objections which are then contested by the administrative authorities concerned. A decision on this dispute is then given

by the reviewing bench, following a public hearing in the course of which the representatives of the departments concerned present oral argument.

13 So far as concerns the legal effects of those decisions ('deliberazioni'), the Corte dei Conti states that they have an indirect effect on the management policy of the department concerned since it is required, under Article 3(6) of Law No 20/1994, subsequently to notify the Corte dei Conti of the measures adopted in the light of the decision. Furthermore, in the case of administrative authorities which are neither local nor regional, Article 3(8) of Law No 20/1994 provides that, in its decision, the Corte dei Conti may request re-examination of measures considered not to be in conformity with the law.

14 The ANAS argues that the Corte dei Conti, considered generally and in the abstract, is indisputably a court or tribunal within the meaning of Article 177 of the Treaty.

15 The Italian Government maintains, in reply to a question put by the Court, that the questions referred by the Corte dei Conti for a preliminary ruling are inadmissible.

16 It adds that the Italian Constitutional Court has consistently held (notably in Judgment No 335/95, *Rivista della Corte dei Conti*, 1995, 3, II, p. 163) that a distinction must be drawn between the preliminary review of the lawfulness of executive measures and the *ex post facto* review of the financial management of undertakings. Whereas, in the former case, the responsibilities discharged by the Corte dei Conti are in many respects comparable with judicial functions, its *ex post facto* review of financial management, provided for in Article 3(4) of Law No 20/1994, 'is not such as to sustain comparison with judicial review, that is to say, with a power directed to the protection of the rules of law, to be exercised solely on the basis of legal criteria'; it is rather to be classed 'as an empirical verification, established not so much by reference to specific rules of law as to

guidelines extrapolated from practical experience which have been given formal expression in the knowledge acquired in various fields of technical and scientific enquiry, which may be used in evaluating the results of administrative action'.

17 According to the Austrian Government, the explanations provided by the Corte dei Conti in the order for reference suggest that the latter has jurisdiction to refer questions to the Court of Justice for a preliminary ruling. However, since the Austrian Government does not have before it the relevant provisions of national law concerning the organisation of the Corte dei Conti and, generally speaking, delimiting its position within the Italian legal system, it cannot make a definitive assessment of the competence conferred on that institution.

18 The Commission maintains that the Corte dei Conti, in the exercise of its powers of *ex post facto* review, cannot be classified as a court or tribunal within the meaning of Article 177 of the Treaty. It argues in particular that, in the main proceedings, the Corte dei Conti is not hearing a dispute which it must settle by a decision which is judicial in nature. Since its powers of *ex post facto* review concern measures which — like the ministerial decrees approving the loan agreements at issue in the main proceedings — have already been implemented, the task of the Corte dei Conti is to test the results obtained by the administrative department against its initial remit. In so doing, the Corte dei Conti is discharging a duty characteristic of an administrative authority, not a judicial body.

19 The Commission also points out that the Corte dei Conti assesses the acts of the administration not solely by applying rules of law, but also on the basis of other criteria. The position would be different if the loan agreements between the ANAS and Nomura International plc had been challenged by another company. Only then would the ensuing dispute lie between an individual and the administration. Moreover, the body with competence to decide such a dispute

would not be the Corte dei Conti but the Tribunale Amministrativo Regionale (Regional Administrative Court).

20 In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes into account a number of factors, such as whether the body concerned is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, in particular, Case 61/65 *Vaassen-Göbbels* [1966] ECR 261; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; and Case C-416/96 *Eddline El-Yassini* [1999] ECR I-1209, paragraph 17).

21 Moreover, it is settled law that a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see the order in Case 318/85 *Greis Unterweger* [1986] ECR 955, paragraph 4; Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9; and Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14).

22 The question whether a body may refer a question to the Court falls to be determined, therefore, on the basis of criteria relating both to the constitution of that body and to its function. Thus, a national body may be classified as 'a court or tribunal' within the meaning of Article 177 of the Treaty when it is performing judicial functions, but not when exercising other functions — of an administrative nature, for example.

23 It follows that in order to establish whether a national body, entrusted by law with different categories of function, is to be regarded as a court or tribunal within the meaning of Article 177 of the Treaty, it is necessary to determine in what specific capacity it is acting within the particular legal context in which it seeks a ruling from the Court. For the purposes of that analysis, no relevance is to be attributed to the fact that, when otherwise configured — or even when it is the same, but exercising powers other than those in the context of which the reference was made — the body concerned falls to be classified as a court or tribunal for the purposes of Article 177 of the Treaty.

24 It is clear from the observations submitted to the Court that the powers of *ex post facto* review exercised by the Corte dei Conti in the main proceedings characterise an administrative role consisting in the evaluation and verification of the results of administrative action. Accordingly, in the context in which the present reference to the Court arose, that body is not exercising a judicial function.

25 In those circumstances, the Court has no jurisdiction to reply to the questions referred by the Corte dei Conti for a preliminary ruling.

Costs

26 The costs incurred by the Italian and Austrian Governments and by the Commission, which have submitted observations to the Court, are not

recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the Corte dei Conti, the decision on costs is a matter for that body.

On those grounds,

THE COURT

hereby orders:

The Court of Justice does not have jurisdiction to answer the questions raised by the Corte dei Conti in its decision for reference of 7 April 1998.

Luxembourg, 26 November 1999.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President