JUDGMENT OF THE COURT (First Chamber)

11 January 2005 *

In Case C-26/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberlandesgericht Naumburg (Higher Regional Court, Naumburg, Germany), made by decision of 8 January 2003, received at the Court on 23 January 2003, in the proceedings

Stadt Halle,

RPL Recyclingpark Lochau GmbH

v

Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna,

* Language of the case: German.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, J.N. Cunha Rodrigues, E. Juhász (Rapporteur), M. Ilešič and E. Levits, Judges,

Advocate General: C. Stix-Hackl,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Stadt Halle, by U. Jasper, Rechtsanwältin,

— Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna, by K. Heuvels, Rechtsanwalt,

— the French Government, by G. de Bergues and D. Petrausch, acting as Agents,

— the Austrian Government, by M. Fruhmann, acting as Agent,

— the Finnish Government, by T. Pynnä, acting as Agent,

— the Commission of the European Communities, by K. Wiedner, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 23 September 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 1(1) of Council Directive 89/665/EEC 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 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), itself amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) ('Directive 89/665'). The reference for a preliminary ruling also concerns the interpretation of Articles 1(2) and 13(1) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1) ('Directive 93/38').

2 The reference was made in the course of proceedings between Stadt Halle (City of Halle) (Germany) and RPL Recyclingpark Lochau GmbH ('RPL Lochau') and Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna ('TREA Leuna') concerning the lawfulness, from the point of view of the Community rules, of the award without a public tender procedure of a contract for services concerning the treatment of waste by the City of Halle to RPL Lochau, a majority of whose capital is held by the City of Halle and a minority by a private company.

Legal background

Community legislation

3 Under Article 1(a) of Directive 92/50, as amended by Directive 97/52 ('Directive 92/50'), 'public service contracts' are 'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority'. Under Article 1(b) of that directive, 'contracting authorities' are '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'. Article 1(c) of that directive defines 'service provider' as 'any natural or legal person, including a public body, which offers services'.

4 Under Article 8 of Directive 92/50, '[c]ontracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI'. Those provisions essentially contain rules on putting out to tender and on advertising. Article 11(1) of the directive provides that, in awarding public service

contracts, 'contracting authorities shall apply the procedures defined in Article 1(d), (e) and (f), adapted for the purposes of this Directive'. The procedures referred to in that provision are 'open procedures', 'restricted procedures' and 'negotiated procedures' respectively.

5 Category 16 in Annex I A to that directive designates '[s]ewage and refuse disposal services; sanitation and similar services'.

6 Article 7(1)(a) of Directive 92/50 provides that the directive is to apply to public service contracts whose estimated value net of value added tax 'is not less than ECU 200 000'.

7 The second and third recitals in the preamble to Directive 89/665 show that its purpose is to ensure the application of the Community rules on public procurement by means of effective and rapid remedies, particularly at a stage when infringements can be corrected, given that the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination.

8 To that end, Article 1(1) and (3) of Directive 89/665 provides:

'1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives ... decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles

and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a ... public ... contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

9 Under Article 2(1) of Directive 89/665:

'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, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

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

...'

10 Under Article 1 of Directive 93/38:

'For the purposes of this Directive:

...

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

— hold the majority of the undertaking's subscribed capital, or

— control the majority of the votes attaching to shares issued by the undertaking, or

— can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body;

3. "affiliated undertaking" shall mean ... any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence within the meaning of paragraph 2 ... .

...'

11 Article 13 of Directive 93/38 provides:

'1. This Directive shall not apply to service contracts which:

(a) a contracting entity awards to an affiliated undertaking;

...

provided that at least 80% of the average turnover of that undertaking with respect to services arising within the Community for the preceding three years derives from the provision of such services to undertakings with which it is affiliated.

...'

National legislation

12 The order for reference states that reviews in the public procurement field are governed in German law by the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions of competition). Under Paragraph 102 of that law, 'awards of public contracts' may be the subject of review. A tenderer or candidate has a subjective right to compliance with the 'provisions governing the award procedure', which enables it to enforce against the contracting authority the rights conferred on it by Paragraph 97(7) of that law in relation to 'the performance or omission of an act in an award procedure'.

13 The order for reference states that, on the basis of those provisions, in accordance with the view taken in some of the case-law and by some legal writers in Germany, a review is available in the field of procurement only if the applicant is seeking to have the contracting authority ordered to act in a particular way in a current formal award procedure, which means that it is not possible to seek a review if the contracting authority has decided not to issue a public call for tenders and not formally to initiate an award procedure. That view is contested, however, in other decided cases and by other legal writers.

The main proceedings and the questions referred for a preliminary ruling

14 According to the order for reference, the City of Halle, by decision of the city council of 12 December 2001, awarded to RPL Lochau a contract to draw up a plan for the pretreatment, recovery and disposal of its waste, without having formally initiated an award procedure. At the same time, the City of Halle decided, again without calling for tenders, to enter into negotiations with RPL Lochau with a view to concluding a contract with that company concerning the management of the residual urban waste from 1 June 2005. RPL Lochau would be the investor in the construction of the thermal waste disposal and recovery plant.

15 RPL Lochau is a limited liability company set up in 1996. Of its capital, 75.1% is held by Stadtwerke Halle GmbH, whose sole shareholder Verwaltungsgesellschaft für Versorgungs- und Verkehrsbetriebe der Stadt Halle mbH is wholly owned by the City of Halle, and 24.9% by a private limited liability company. The national court describes RPL Lochau as a 'semi-public company' and notes that the allocation of the shareholdings in the company was not agreed in the company's statutes until the end of 2001, when the award of the contract for carrying out the project at issue was envisaged.

16 The national court also observes that RPL Lochau's objects are the operation of recycling and waste treatment plants. Resolutions of the general meeting of shareholders are adopted either by a simple majority or by a majority of 75% of the votes. The commercial and technical management of the company is currently contracted out to another undertaking, and the City of Halle is entitled inter alia to audit the accounts.

17 On learning of the award of the contract outside the procedure laid down by the Community rules in the field of public procurement, TREA Leuna, which was also interested in providing the services, opposed the decision of the City of Halle and made an application to the Procurement Board of the Regierungspräsidium Halle for the City of Halle to be ordered to issue a public call for tenders.

18 The City of Halle argued in its defence that, in accordance with the national legislation referred to in paragraphs 12 and 13 above, the application was inadmissible since it, as contracting authority, had not formally initiated an award procedure. Furthermore, RPL Lochau was really an emanation of the City of Halle, since it was controlled by it. There was therefore an 'in-house operation' to which the Community rules on public procurement did not apply.

19 The Procurement Board allowed TREA Leuna's application, on the ground that, even in the absence of an award procedure, decisions of the contracting authority ought to be subject to review. It also considered that in the present case there was no question of an 'in-house operation', since the private minority shareholding exceeded the threshold of 10% above which, in accordance with the German legislation on limited companies, there is a minority with certain specific rights. Moreover, it could be predicted with sufficient certainty that the activity performed for the City of Halle by RPL Lochau would make use of only 61.25% of its capacity, so that, in order to find outlets for the remainder of its capacity, the company would be obliged to look for orders in the market in which it operated.

20 The City of Halle appealed to the Oberlandesgericht Naumburg, which decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. (a) Does the first sentence of Article 1(1) of [Directive 89/665] require Member States to ensure that the decision of a contracting authority not to award a public contract in a procedure which complies with the directives relating to the award of public contracts may be reviewed effectively and as rapidly as possible?

(b) Does the first sentence of Article 1(1) of [Directive 89/665] require Member States to ensure that decisions of contracting authorities made prior to the issue of a formal invitation to tender, in particular the decision on the preliminary questions of whether a particular procurement process falls within the personal or material scope of the directives relating to the award of public contracts or exceptionally is outside the scope of procurement law, may be reviewed effectively and as rapidly as possible?

(c) If Question [1(a)] is answered in the affirmative and Question [1(b)] is answered in the negative:

Is the obligation of a Member State to ensure that the decision of a contracting authority not to award a public contract in a procedure which complies with the directives relating to the award of public contracts may be reviewed effectively and as rapidly as possible satisfied if the availability of review procedures depends on a specified, formal stage in the procurement procedure having been reached, for example the commencement of oral or written contractual negotiations with a third party?

2. (a) Where a contracting authority such as a regional or local authority intends to conclude in writing, with an entity which is formally distinct from it ("the contracting partner"), a service contract for pecuniary interest which would fall within [Directive 92/50], and that contract would exceptionally not be a public service contract within the meaning of Article 1(a) of [Directive 92/50] if the contracting partner were to be regarded as part of the public administration or, as the case may be, of the contracting authority's undertaking (a "procurement-exempt self-supply"), does the mere fact that a private undertaking is a shareholder in the contracting partner always preclude the classification of such a contract as a procurement-exempt self-supply?

(b) If Question [2(a)] is answered in the negative:

In what circumstances is a contracting partner whose shareholders include a private person (a "semi-public company") to be regarded as part of the public administration or, as the case may be, of the contracting authority's undertaking? In particular:

— Does "control" by the contracting authority, for example within the meaning of Articles 1(2) and 13(1) of [Directive 93/38] as amended by the [Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1)] and by Directive 98/4/EC of the European

Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1), suffice, from the point of view of structure and degree of control, for a semi-public company to be regarded as part of the contracting authority's undertaking?

— Does any influence the private co-shareholder in the semi-public company may legally have on the contracting partner's strategic objectives and/or individual decisions relating to the management of its undertaking preclude regarding the semi-public company as part of the contracting authority's undertaking?

— Does a comprehensive right of direction, in respect only of decisions on concluding the contract and providing the services concerning the specific procurement procedure, suffice, from the point of view of structure and degree of control, for a semi-public company to be regarded as part of the contracting authority's undertaking?

— Does the fact that at least 80% of the undertaking's average turnover in the services sector within the Community during the last three years derives from providing those services for the contracting authority or for undertakings affiliated to or to be regarded as part of the contracting authority, or, where the mixed undertaking has not yet carried on business for three years, that it is to be expected by way of forecast that that 80% rule will be fulfilled, suffice, from the point of view of carrying out the essential part of its activities for the contracting authority, for a semi-public company to be regarded as part of the contracting authority's undertaking?'

The questions referred for a preliminary ruling

21 To give the national court a useful and coherent answer, the questions referred should be distinguished and considered in two groups, according to their content and subject-matter.

Question 1(a), (b) and (c)

22 By this first series of questions, the national court essentially asks whether Article 1 (1) of Directive 89/665 must be interpreted as meaning that the Member States' obligation to ensure that effective and rapid remedies are available against decisions taken by contracting authorities extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders, in particular the decision on whether a particular contract falls within the personal or material scope of Directive 92/50, and from what moment during a procurement procedure the Member States are obliged to make a remedy available to a tenderer, candidate or interested party.

23 It must be observed, first, that Directive 92/50 was adopted, as stated in the first and second recitals in its preamble, in the context of the measures necessary to implement the internal market, in other words an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. It is apparent from the fourth and fifth recitals in the preamble to that directive that, as the directive's aim is to bring about an opening-up of public procurement in the field of services in conditions of equal treatment and transparency, it must be applied by all contracting authorities.

24 It must be noted, next, that the provisions of Directive 92/50 set out clearly the conditions which make it obligatory for the rules in Titles III to VI of that directive to be applied by all contracting authorities, with the exceptions to the application of those rules being listed exhaustively in the directive itself.

25 Consequently, where those conditions are satisfied, in other words where an operation falls within the personal and material scope of Directive 92/50, the public contracts in question must, by virtue of Article 8 taken together with Article 11(1) of that directive, be awarded in accordance with the provisions of Titles III to VI of the directive, that is to say, they must be made the subject of a call for tenders and be adequately advertised.

26 That obligation is binding on contracting authorities with no distinction between public contracts awarded by them in order to fulfil their task of meeting needs in the public interest and those which are unrelated to that task (see, to that effect, Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraph 32).

27 To give an answer to the national court, the expression 'decisions taken by the contracting authorities' in Article 1(1) of Directive 89/665 must be examined. Since that concept is not expressly defined in the directive, its scope must be determined on the basis of the wording of the relevant provisions of the directive and the objective of effective and rapid judicial protection pursued by it.

28 The wording of Article 1(1) of Directive 89/665 assumes, by using the words 'as regards ... procedures', that every decision of a contracting authority falling under the Community rules in the field of public procurement and liable to infringe them is subject to the judicial review provided for in Article 2(1)(a) and (b) of that

directive (see, to that effect, Case C-92/00 *HI* [2002] ECR I-5553, paragraph 37, and Case C-57/01 *Makedoniko Metro and Mikhaniki* [2003] ECR I-1091, paragraph 68). It thus refers generally to the decisions of a contracting authority without distinguishing between those decisions according to their content or time of adoption.

29 Article 2(1)(b) of Directive 89/665 provides, moreover, for the possibility of annulling unlawful decisions of the contracting authorities in relation to the technical and other specifications not only in the invitation to tender but also in any other document relating to the award procedure in question. That provision can therefore include documents containing decisions taken at a stage prior to the call for tenders.

30 That broad meaning of the concept of a decision taken by a contracting authority is confirmed by the Court's case-law. The Court has already held that Article 1(1) of Directive 89/665 does not lay down any restriction with regard to the nature and content of the decisions it refers to (Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraph 35). Nor may such a restriction be inferred from the wording of Article 2(1)(b) of that directive (see, to that effect, *Alcatel Austria and Others*, paragraph 32). Moreover, a restrictive interpretation of the concept of a decision amenable to review would be incompatible with the provision in Article 2(1)(a) of that directive which requires the Member States to make provision for interim relief procedures in relation to any decision taken by the contracting authorities (*HI*, paragraph 49).

31 In line with this broad interpretation of the concept of a decision amenable to review, the Court has held that the contracting authority's decision prior to the conclusion of the contract as to the tenderer to whom the contract will be awarded must in all cases be open to review, regardless of the possibility of obtaining an award of damages once the contract has been concluded (*Alcatel Austria and Others*, paragraph 43).

32 The Court has also held, referring to the objective of abolishing obstacles to the free movement of services pursued by Directive 92/50 and to the objectives, wording and scheme of Directive 89/665, that the contracting authority's decision to withdraw the invitation to tender for a public service contract must be open to a review procedure, in accordance with Article 1(1) of Directive 89/665 (see, to that effect, *HI*, paragraph 55).

33 In this respect, as the Advocate General observes in point 23 of her Opinion, the contracting authority's decision not to initiate an award procedure may be regarded as the counterpart of its decision to terminate such a procedure. Where a contracting authority decides not to initiate an award procedure on the ground that the contract in question does not, in its opinion, fall within the scope of the relevant Community rules, such a decision constitutes the very first decision amenable to judicial review.

34 Having regard to that case-law and to the objectives, scheme and wording of Directive 89/665, and in order to preserve the effectiveness of that directive, it must be concluded that any act of a contracting authority adopted in relation to a public service contract within the material scope of Directive 92/50 and capable of producing legal effects constitutes a decision amenable to review within the meaning of Article 1(1) of Directive 89/665, regardless of whether that act is adopted outside a formal award procedure or as part of such a procedure.

35 Not amenable to review are acts which constitute a mere preliminary study of the market or which are purely preparatory and form part of the internal reflections of the contracting authority with a view to a public award procedure.

36 On the basis of those considerations, the approach of the City of Halle — according to which Directive 89/665 does not require judicial protection outside a formal award procedure, and the contracting authority's decision not to initiate such a procedure cannot be the subject of review, nor indeed can the decision as to whether a public contract falls within the scope of the relevant Community rules — should not be adopted.

37 The effect of that approach would be to make the application of the relevant Community rules optional, at the option of every contracting authority, even though that application is mandatory where the conditions of application are satisfied. Such an option could lead to the most serious breach of Community law in the field of public procurement on the part of a contracting authority. It would substantially reduce the effective and rapid judicial protection aimed at by Directive 89/665, and would interfere with the objectives pursued by Directive 92/50, namely the objectives of free movement of services and open and undistorted competition in this field in all the Member States.

38 As to the time from which such a possibility of review is open, it must be noted that no such time is formally laid down in Directive 89/665. However, having regard to that directive's objective of effective and rapid judicial protection, in particular by interlocutory measures, it must be concluded that Article 1(1) of the directive does not authorise Member States to make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage.

39 On the basis of the consideration that, in accordance with the second recital in the preamble to that directive, compliance with the Community rules must be ensured in particular at a stage at which infringements can still be corrected, it must be

concluded that an expression of the will of the contracting authority in connection with a contract, which comes in whatever way to the knowledge of the persons interested, is amenable to review where that expression has passed the stage referred to in paragraph 35 above and is capable of producing legal effects. Entering into specific contractual negotiations with an interested party constitutes such an expression of will. The obligation of transparency, to which the contracting authority is subject in order to make it possible to verify that the Community rules have been complied with (*HI*, paragraph 45), should be noted in this respect.

40 As to the persons to whom review procedures are available, it suffices to state that under Article 1(3) of Directive 89/665 the Member States must ensure that review procedures are available at least to any person having or having had an interest in obtaining a public contract who has been or risks being harmed by an alleged infringement (see, to that effect, the judgment of 24 June 2004 in Case C-212/02 *Commission* v *Austria*, not published in the ECR, paragraph 24). The formal capacity of tenderer or candidate is not thus required.

41 In the light of the foregoing, the answer to Question 1(a), (b) and (c) must be that Article 1(1) of Directive 89/665 must be interpreted as meaning that the obligation of the Member States to ensure that effective and rapid remedies are available against decisions taken by contracting authorities extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders, in particular the decision on whether a particular contract falls within the personal and material scope of Directive 92/50. That possibility of review is available to any person having or having had an interest in obtaining the contract in question who has been or risks being harmed by an alleged infringement, from the time when the contracting authority has expressed its will in a manner capable of producing legal effects. The Member States are not therefore authorised to make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage.

Question 2(a) and (b)

42 By this second series of questions, which should be considered together, the national court essentially asks whether, where a contracting authority intends to conclude with a company governed by private law, legally distinct from the authority and in which it has a majority capital holding and exercises a certain control, a contract for pecuniary interest relating to services within the material scope of Directive 92/50, it is always obliged to apply the public award procedures laid down by that directive, merely because a private company has a holding, even a minority one, in the capital of the company with which it concludes the contract. If that question is answered in the negative, the national court asks what the criteria are by reference to which it should be considered that the contracting authority is not subject to such an obligation.

43 This question concerns the particular situation of a 'semi-public' company, set up and functioning in accordance with the rules of private law, from the point of view of the obligation of a contracting authority to apply the Community rules in the field of public procurement where the conditions for such application are satisfied.

44 On this point, the principal objective of the Community rules in the field of public procurement, as stated in connection with the answer to Question 1, should be recalled, namely the free movement of services and the opening-up to undistorted competition in all the Member States. That involves an obligation on all contracting authorities to apply the relevant Community rules where the conditions for such application are satisfied.

45 The obligation to apply the Community rules in such a case is confirmed by the fact that in Article 1(c) of Directive 92/50 the term 'service provider', that is, a tenderer

for the purposes of the application of that directive, also includes 'a public body, which offers services' (see Case C-94/99 *ARGE* [2000] ECR I-11037, paragraph 28).

46 Any exception to the application of that obligation must consequently be interpreted strictly. Thus the Court has held, concerning recourse to a negotiated procedure without the prior publication of a contract notice, that Article 11(3) of Directive 92/50, which provides for such a procedure, must, as a derogation from the rules intended to ensure the effectiveness of the rights conferred by the EC Treaty in relation to public service contracts, be interpreted strictly and that the burden of proving the existence of exceptional circumstances justifying the derogation lies on the person seeking to rely on those circumstances (Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 58).

47 In the spirit of opening up public contracts to the widest possible competition, as the Community rules intend, the Court has held, with reference to Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), that that directive is applicable in the case where a contracting authority plans to conclude a contract for pecuniary interest with an entity which is legally distinct from it, whether or not that entity is itself a contracting authority (Case C-107/98 *Teckal* [1999] ECR I-8121, paragraphs 50 and 51). It is relevant to note that the other contracting party in that case was a consortium consisting of several contracting authorities, of which the contracting authority in question was also a member.

48 A public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. In such a case, there can be no question of a

contract for pecuniary interest concluded with an entity legally distinct from the contracting authority. There is therefore no need to apply the Community rules in the field of public procurement.

49 In accordance with the Court's case-law, it is not excluded that there may be other circumstances in which a call for tenders is not mandatory, even though the other contracting party is an entity legally distinct from the contracting authority. That is the case where the public authority which is a contracting authority exercises over the separate entity concerned a control which is similar to that which it exercises over its own departments and that entity carries out the essential part of its activities with the controlling public authority or authorities (see, to that effect, *Teckal*, paragraph 50). It should be noted that, in the case cited, the distinct entity was wholly owned by public authorities. By contrast, the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments.

50 In this respect, it must be observed, first, that the relationship between a public authority which is a contracting authority and its own departments is governed by considerations and requirements proper to the pursuit of objectives in the public interest. Any private capital investment in an undertaking, on the other hand, follows considerations proper to private interests and pursues objectives of a different kind.

51 Second, the award of a public contract to a semi-public company without calling for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, in particular in that such a procedure would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors.

52 The answer to Question 2(a) and (b) must therefore be that, where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of Directive 92/50 with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, the public award procedures laid down by that directive must always be applied.

53 In view of that answer, there is no need to answer the national court's other questions.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) rules as follows:

1. Article 1(1) of Council Directive 89/665/EEC 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, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, itself amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, must be interpreted as meaning that the obligation of the Member States to ensure that effective and rapid remedies are available against decisions taken by contracting authorities extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders, in particular the decision on whether a particular contract falls within the personal and material scope of Directive 92/50, as amended. That possibility of review is available to any person having or having had an interest in obtaining the contract in question who has been or risks being harmed by an alleged infringement, from the time when the contracting authority has expressed its will in a manner capable of producing legal effects. The Member States are not therefore authorised to make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage.

2. **Where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of Directive 92/50, as amended by Directive 97/52, with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, the public award procedures laid down by that directive must always be applied.**

[Signatures]