OPINION OF ADVOCATE GENERAL ALBER

delivered on 11 May 2000 *

I — Introduction

1. In these proceedings the High Court of Justice of England and Wales seeks a ruling from the Court of Justice on questions concerning the definition of a contracting authority. The main question is, under what conditions is a body 'financed for the most part' by the State, regional or local authorities, or other bodies governed by public law with the result that it is to be regarded as a contracting authority for the purposes of the directives on public procurement?

2. The question has arisen in proceedings brought by the University of Cambridge (or 'the applicant') against the United Kingdom Treasury. The applicant challenges the Treasury's proposal to retain universities in the list for the United Kingdom of bodies governed by public law in Annex I to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, [1] adding the phrase 'financed for the most part by other contracting authorities'.

II — Law

(1) *Community law*

3. In Article 1 of Directive 93/37 contracting authorities are defined as follows:

'For the purpose of this directive:

...

1 — OJ 1993 L 199, p. 54; amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1).

* Original language: German.

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

A "body governed by public law" means any body:

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

— having legal personality, and

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

The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I. ...

(c) to (h) ...'.

4. That provision is largely identical to Article 1(b) of Council Directives 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [2] and 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts. [3]

5. As far as the United Kingdom is concerned, the list of bodies and categories of bodies governed by public law in Annex I includes 'universities and polytechnics, maintained schools and colleges'.

2 — OJ 1992 L 209, p. 1.

3 — OJ 1993 L 199, p. 1. Those two directives were likewise amended by Directive 97/52 (referred to in footnote 1).

6. The contents of Annex I may be changed in accordance with the procedure set out in Article 35 of Directive 93/37, according to which the Commission may amend the Annex in order to ensure as far as possible that it reflects the actual state of affairs.

(2) *National legislation*

7. The Community legislation was transposed into national law by the following measures:

— Directive 92/50 by the Public Services Contracts Regulations 1993 (S.I. 1993/3228)

— Directive 93/36 by the Public Supply Contracts Regulations 1995 (S.I. 1995/201)

— Directive 93/37 by the Public Works Contracts Regulations 1991 (S.I. 1991/2680).

8. Those regulations do not reproduce the annex to Directive 93/37 but contain a definition of the bodies governed by public law based on the Community law definition.

III — Facts

9. The Committee of Vice-Chancellors and Principals of the Universities in the United Kingdom communicated to the Treasury in 1995 and 1996 its view that the public procurement directives did not apply universally to universities, so that the reference to 'universities' for the United Kingdom in Annex I to Directive 93/37, and to which Directives 92/50, 93/36 and 93/37 refer, should be abandoned.

10. On 17 January 1997, therefore, the Treasury suggested to the Commission that the following amendment be made with regard to universities: 'universities ... financed for the most part by other contracting authorities', thus restricting the circumstances in which the public procurement directives were applicable in the case of universities. The proposal has not yet been implemented by the Commission.

11. The applicant was not satisfied by the amendment suggested by the Treasury, and therefore by application for judicial review dated 7 November 1996 it sought leave from the High Court to challenge the

position adopted by the Treasury. Leave was granted on the basis that the application concerned the proper interpretation of the expression 'financed for the most part' by one or more contracting authorities.

12. It was common ground in the main proceedings that most universities in the United Kingdom, in particular the University of Cambridge, were indeed established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and had legal personality; they were not, however, subject to management supervision by contracting authorities, and such bodies did not appoint more than half of the members of the administrative, managerial or supervisory boards of the universities. The only issue in this case, therefore, was whether the universities were 'financed, for the most part, by one or more contracting authorities'.

13. In the order making the reference the national court states *inter alia* that universities in the United Kingdom are financed in different ways, not all of them receiving funds from contracting authorities. Funds are obtained from a variety of sources, and are provided for a variety of purposes and on various grounds; the way in which funds are obtained also varies.

14. The sources of financing for universities in the United Kingdom, including the applicant, mentioned by the national court include:

1. (a) Funds allocated by the Higher Education Funding Councils and the Teacher Training Agency, which are themselves recognised to be contracting authorities, for academic, research and related activities. More than 90% of the research funding is allocated on the basis of the quality of the research activities, which are periodically assessed. The university itself decides how the funds are to be used.

(b) Funds supplied by the Research Councils, which are likewise recognised to be contracting authorities, to the university on request by individual applicants wishing to conduct a research project in which the Research Councils themselves have no interest at stake, the monies going directly to the uni-

versity. Grants are allocated to individual applicants on the basis of an appraisal of merit. If the applicant moves to another university, the funding will also move to the new university.

2. Payment for research and services commissioned by and for the benefit of charities, industry, commerce, government departments and other institutions.

3. Tuition fees, which are paid by local education authorities (recognised as contracting authorities) direct to the universities. These funds are in the form of grants to students in respect of the tuition fees payable by them. Many students are eligible for mandatory, or at least discretionary, grants from the paying authorities; others must find the means to pay themselves, or are funded from abroad.

4. Various other sources of financing, such as the provision of residential accommodation and catering, as well as gifts and endowments.

15. The High Court of Justice appended to the reference for a preliminary ruling the following summary of sources of income from the accounts of the university (of Cambridge) for 1997 by percentage of total income:

Funding Council and Teacher Training Agency Grants	30
Academic Fees and Support Grants	14
Of which:	
Home and EU students (including some self-supporting)	9
Overseas (non EU) students	5
Research Grants and Contracts	33
Of which:	
Research Councils	14
Grants and contracts from other public and private bodies	19
Other operating income	12
Of which:	
Catering	1
Transferred from Local Examinations Syndicate	3
Health and Hospital authorities	2
Valued Added Tax Rebate	1
Other	5
Endowment Income and Interest Receivable	11
TOTAL	100

16. The national court considers that a proper understanding of the meaning of 'financed for the most part' is decisive for determining whether a university is to be regarded as a contracting authority, and has therefore referred the following four questions to the Court of Justice for a preliminary ruling.

IV — The questions referred

'1. Where Article 1 of Council Directive 92/50/EEC, Council Directive 93/37/EEC and Council Directive 93/36/EEC ("the Directives") refers to any body "financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law" what monies are to be included in the expression "financed ... by [one or more contracting authorities]"? In particular, in relation to payments to an entity such as the University of Cambridge, does the expression include:

(a) awards or grants paid by one or more contracting authorities for the support of research work;

(b) consideration paid by one or more contracting authorities for the supply of services comprising research work;

(c) consideration paid by one or more contracting authorities for the supply of other services, such as consultancy or the organisation of conferences;

(d) student grants paid by local education authorities to universities in respect of tuition for named students.

2. What percentage or other meaning is to be given to the expression "for the most part" in Article 1 of the Directives?

3. If the expression "for the most part" is defined in terms of a percentage figure, is the calculation limited to considering sources of finance for academic and related purposes or should it include finance obtained in relation to commercial activities as well?

4. Over what period should any calculation be made for determining whether a university is a "contracting authority" in respect of any particular procurement, and how are foreseeable or future changes to be taken into account?'

17. The applicant, the United Kingdom, Netherlands and Austrian Governments, and the Commission took part in the written procedure and the French Government took part in the oral procedure. I shall come back to their observations.

(a) Observations submitted to the Court

19. The view taken by the Netherlands Government, and by the United Kingdom in the oral procedure, is that Annex I is purely declaratory. That is indicated, according to the Netherlands Government, both by Article 35 of Directive 93/37, which provides for a procedure for amending the lists, and from the Commission's answer of 16 June 1992 to written question No 1443/92. [4]

(b) Opinion

V — Assessment

(1) *Preliminary remarks*

18. The first point to consider is whether the present reference to universities in the list for the United Kingdom in Annex I to Directive 93/37 or the proposed amendment to it has legal effect as regards this case.

20. As the Netherlands Government rightly observes, the definition of a 'contracting authority' is to be that set out in Article 1(b) of the directives. Whether an establishment falls within that definition must be determined solely on the basis of the criteria laid down therein. The fact that it is included in the list is not binding. Article 1(b), which provides that the list is to be as complete as possible, and Article 35 of Directive 93/37, which governs the procedure for changing the list, are sufficient to show that changes are possible and may be required if the bodies listed no longer fulfil the criteria set out in Article 1(b) of the directive. The list is also not

4 — OJ 1992 C 309, p. 43.

exhaustive, but is to be expanded where necessary.

21. The interpretation of Article 1(b), third indent, of the directive is therefore not to be influenced by Annex I to Directive 93/37.

(2) *The first question*

(a) Observations submitted to the Court

22. The *applicant* considers that the purpose of Directives 93/36, 93/37 and 92/50 is to impose special requirements on bodies in relation to which the State is in a position to exercise actual or potential control in the procedure for the award of public contracts. It relies in that respect on the case-law of the Court of Justice. [5] The directives serve to prevent distortion of the single market. Where a body is not subject to such control, or where it is merely theoretical, the directives ought not to apply.

23. Whether such control is exercised or not must be ascertained in the applicant's view on the basis of quantitative and qualitative criteria. A body will not be one governed by public law solely because another contracting authority supplies it with a number of financial payments, since not every payment by the contracting authority gives it such control. The purpose of the funding should also be taken into account. The only payment to be regarded as financing by a contracting authority is that which is provided to enable the establishment to fulfil its basic purpose — in the case of a university, teaching and research — and which therefore also enables the contracting authority making the payment to exercise direct or indirect control over public procurement. In this argument the applicant relied at the hearing also on the fact that were a different and broader interpretation to be adopted, churches or religious organisations, for instance, parties, State-funded charitable organisations or State-run lotteries might likewise be taken to be bodies governed by public law if they derived income from public resources. In any event 'financing' denotes payments made in order to enable the university to fulfil its basic purposes. Accordingly, financing for specific research projects or other types of contribution, such as endowments, fall outside the definition. Since, in addition, the sources of

5 — Case C-306/97 *Connemara Machine Turf* v *Coillte Teoranta* [1998] ECR I-8761; Opinion of Advocate General Lenz in Case C-247/89 *Commission* v *Portugal* [1991] ECR I-3659, at p. 3670; Case C-44/96 *Mannesmann Anlagenbau Austria* v *Strohal Rotationsdruck* [1998] ECR I-73, paragraph 18 (paragraph 28 is meant); Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 8; and Opinion of Advocate General Van Gerven in Case C-188/89 *Foster* [1990] ECR I-3313, at p. 3326, paragraphs 13 and 16.

funding mentioned in Question 1(a) to (d) of the reference for a preliminary ruling do not provide the contracting authority with any control over public procurement, they are not to be regarded as financing within the meaning of the provision.

24. The *United Kingdom Government* considers that all funds provided by contracting authorities which serve to fulfil tasks in the sphere of education and thus to meet a need in the general interest fall within the concept of financing by a contracting authority. That does not include commercial payments by a contracting authority, which must thus be left out of account. As to the question whether a payment serves educational or commercial purposes, the judgment in Case 263/86 *Belgian State* v *Humbel* [6] is a useful reference.

25. In addition, the United Kingdom Government submitted at the hearing that what ultimately counts is whether a service is provided free, that is to say without any claim for consideration, or as a result of public law duties or, by contrast, under a particular contractual obligation. It relies on the criterion laid down in *Mannesmann* [7] of 'close dependency' between the body and the contracting authority; in the case of payments which the body has so to speak earned for itself that element is absent. Such payments cannot therefore fall within the concept of financing by a contracting authority.

26. For those reasons, the United Kingdom Government maintains, payments such as those mentioned in Question 1(b) and (c) are purely commercial and therefore to be excluded from the concept of financing by a contracting authority. Payments to the university such as those mentioned in Question 1(a) would fall within the definition, however, even if they were coupled to an application made by an individual applicant. They are ultimately intended to provide the universities with the means to achieve educational and academic aims. Payments by contracting authorities to a university towards tuition fees as described in Question 1(d) also constitute such financing, since they provide the body with the means of fulfilling the task it has in the general interest, even if they are made for specific named students.

27. The *Netherlands Government* observes that the three criteria set out in Article 1(b), third indent, of the directives, namely financing provided primarily by the State, State supervision and influence in staff

6 — [1988] ECR 5365, paragraphs 15 to 29.

7 — Case C-44/96, cited in footnote 5, paragraph 20.

appointments, are to be interpreted in the light of the judgment in *Mannesmann*[8] as 'close dependency' on the State or contracting authorities.

28. It follows that in order to answer the question whether financing by a contracting authority or some other form of contribution is present a distinction must be drawn between financial support and true consideration. Only in the case of the former is the criterion of 'close dependency' fulfilled. The same criterion is used in Article 1(a)(ix) of Directive 92/50, according to which the directive applies only where the payment does not constitute consideration. In the case of Question 1(b) and (c), therefore, it must be ascertained whether what is involved is consideration earned in the marketplace or a financial subsidy. Consequently, payments made in connection with commercial activities will as a rule fall outside the concept of financing by a contracting authority.

29. The *Austrian Government* refers in suggesting an interpretation to the history of the concept of the contracting authority. The three criteria in Article 1(b), third indent, describe bodies which participate in economic life without being exposed to market forces.[9] Accordingly, the expression 'financed for the most part by a contracting authority' should be given a broad interpretation. It covers all forms of valuable payment containing an element of subsidy made to a body by a contracting authority. The only exception is if the body is obtaining consideration for services offered on the market in competition with other bodies or undertakings, the amount of the consideration being governed by the market itself.

30. Likewise, the *French Government* observed at the hearing that for the purposes of determining whether there is financing by a contracting authority it is necessary to distinguish between payments made in the general interest and those having the character of consideration for the provision of services. Consequently, of the payments listed in Question 1, those having the character of such consideration must be excluded from the concept of financing by a contracting authority.

31. The *Commission* also refers to the purpose of the directives, which is to prevent disturbance of the free movement of goods and services. The provision is intended to cover bodies which owing to their close dependency on the State or contracting authorities are not subject to

8 — Cited in footnote 5, paragraph 20.

9 — It refers in that respect to the Opinion of Advocate General Léger in *Mannesmann*, cited in footnote 5, at p. 77, and to the judgment in Case C-360/96 *Gemeente Arnhem, Gemeente Rheden* v *BFI Holding* [1998] ECR I-6821, paragraph 62.

market forces as are others. [10] The decision in *Mannesmann* [11] has made it clear that the alternative conditions referred to in Article 1(b), third indent, relate to 'close dependency' on the contracting authority. There is such dependency, if only indirect, where financing comes for the most part from a contracting authority. At the hearing the Commission pointed out that even in commercial relationships there may be 'close dependency'. That is taken entirely into account in the purpose of the directives, since even when a contracting authority is acting as a contractual partner it may have a very strong position of influence.

32. The Commission is therefore of the opinion that in the assessment, which must be based on the criterion of 'close dependency', in principle all payments made by a contracting authority must be taken into account. No distinction should be made according to the activities which form the purpose of the payment, since it is not the purpose of the directive to distinguish between activities in the general interest and other work. In the view of the Commission research awards to particular persons also constitute income for the university and are destined for the purposes of the university. Similarly, payments towards tuition fees for students are intended to provide funds for the university. Any distinction between the types of funding listed in Question 1(a) to (d) is not compatible with the purpose of the directives and would be most difficult in practice to apply.

(b) Opinion

33. The first question to be asked is, what considerations led to the adoption of Article 1(b), third indent, of the directives and what consequences do they have for the interpretation of the concept of 'financing by the State, or regional or local authorities, or other bodies governed by public law' (which I will also call for the sake of simplicity 'public financing').

34. The purpose of the directives on the coordination of procedures for the award of public contracts is to remove the risk of considerations other than economic ones influencing the award of public contracts. Bodies which are not subject to the laws of the marketplace are prevented by the directives from giving preference in the award of such contracts to an applicant or tenderer favoured by them. That was what the Court of Justice decided with regard to the directives concerned in this case, Direc-

10 — Cited in footnote 9, paragraphs 40 to 43.
11 — Cited in footnote 5, paragraphs 20 and 34.

tive 92/50 in *BFI Holding* [12] and Directive 93/37 in *Mannesmann*; [13] see also the Opinion of Advocate General Léger in that case, [14] and, with reference to an earlier directive, Directive 71/305/EEC, in Case 31/87. [15]

35. That the notion of a contracting authority is thus to be given a broad meaning based on function, in order to ensure the effectiveness in practice of the principles of the free movement of goods and services, has been confirmed by the Court of Justice on a number of occasions regarding the legal form of the body or the provisions governing it. [16]

36. As regards the determination whether the conditions for a body to be regarded as one governed by public law are satisfied, the Court of Justice described in *Mannesmann* [17] the three alternative conditions laid down in Article 1(b), third indent, of the directives, which include that of being primarily public-financed, as representing 'close dependency' [18] of the body on the State, a local or regional authority, or other bodies governed by public law. The provision thus defines, according to the Court of Justice, the three manifestations of a body governed by public law as three variants of 'close dependency' on another contracting authority.

37. It is true that in *Connemara Machine Turf* [19] and *Commission* v *Ireland* [20] the Court held that it was necessary, as regards the existence of a contracting authority in Ireland, for there to be control over the award of public supply contracts (and it was also regarded as sufficient for that control to be indirect, that is to say, not expressly provided for). That is what the applicant argues for in this case, too. Those principles, however, are not applicable to this case because the directive at issue in that case, Directive 77/62/EEC, itself imposed the requirement of State control over public supply contracts by means of a reference to the annex in respect of the relevant Member State, which in that case was Ireland. [21]

12 — Cited in footnote 9, paragraphs 41 to 43.

13 — Cited in footnote 5, paragraph 33.

14 — Cited in footnote 9, point 69.

15 — Cited in footnote 5, paragraph 11.

16 — *Beentjes* (cited in footnote 5), paragraph 11; *BFI Holding* (cited in footnote 9), paragraph 62; *Connemara Machine Turf* (cited in footnote 5), paragraph 31.

17 — Cited in footnote 5, paragraph 20.

18 — Compare the French and English versions — somewhat narrower — which speak of 'dépendant étroitement' and 'closely dependent'.

19 — Cited in footnote 5, paragraph 29.

20 — Case C-353/96 [1998] ECR I-8565, paragraph 34 et seq.

21 — Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1). In Article 1(b) of that directive 'contracting authorities' was defined as follows: 'For the purpose of this directive ... "contracting authorities" shall be the ... bodies corresponding thereto as specified in Annex I'. According to point VI of Annex I to the directive the 'bodies corresponding thereto' in Ireland were 'other public authorities whose public supply contracts are subject to control by the State'.

38. It is also not possible, at least in this case, to apply the conclusions drawn by Advocate General Lenz in *Portugal* v *Commission*,[22] which the applicant relies on in support of its argument, since Annex I to the relevant directive (Directive 77/62) requires in the case of Portugal that there be State control over public supply contracts.

39. It is clear that the directives are based on a functional approach, which requires a broad interpretation. In special cases, however, as the Netherlands and Austrian Governments accept, and the United Kingdom also essentially accepts, a teleological approach may be justified. If the funding provided by a contracting authority cannot give rise to, or reinforce, any particular dependency, the purpose of the directives no longer serves to justify the inclusion of such funding as public financing, a concept intended precisely to cover only cases where there is a special link between the body and the contracting authority.

40. It is therefore necessary also to clarify the meaning of 'financing' in order to be able to conclude that there is close dependency between the recipient and the provider of the payment. As the Commission also rightly observes, such dependency exists in the case of public financing only indirectly. As a result, it is not possible to regard every payment from public sources automatically as public financing, which only covers funding which does not constitute payment for a particular consideration, that is to say, which amounts to a financial subsidy to fund or support the general activities of the establishment in question.

41. Funding such as that mentioned in Question 1(a), in the form of grants in support of research, must therefore be regarded as public financing. Even if the actual recipient is not the establishment itself, but a person supplying services as part of the university, it is nevertheless financing which benefits the establishment as a whole. Precisely in this case there is one of the relationships defined by the directive,[23] there being close dependency between the university and the contracting authority providing the finance.[24]

22 — Case C-247/89, cited in footnote 5.

23 — See Article 1(b), third indent, of Directive 93/37.

24 — Whether churches or religious organisations, which also receive public monies, State-funded charities or State-run lotteries are to be regarded as bodies governed by public law need not be determined, as that is not at issue in these proceedings.

42. It is questionable, however, whether that extends, in accordance with the principles set out above, to the payments referred to Question 1(b) and (c). The purpose of the payment, the criterion suggested by the United Kingdom Government *inter alia*, is not sufficient to determine whether public financing includes consideration paid by a contracting authority for services provided by the university under contract. In *Humbel*[25] the Court decided that teaching services did not fall within the scope of services for the purposes of Articles 59 and 60 of the EC Treaty (now Articles 49 EC and 50 EC). However, the Court distinguished between the case where there was economic consideration for a service and that where payment was made for the fulfilment by the State of an obligation incumbent upon it in the social, cultural and educational sphere.[26] The reason for that given by the Court was that the protection which freedom to provide services was designed to afford did not extend to the latter sphere. The question whether a payment falls in this case under the heading of public financing cannot be answered on that basis, however, since the protection which the directives are designed to afford (described above) is one entirely different to that afforded by freedom to provide services. The fact is that the nature of the payment as consideration raises precisely the question whether it is possible for there to be close dependency even where the service provided by the establishment nevertheless serves purposes which are in the general interest. That criterion makes it more difficult, moreover, to draw the distinction, since activities which are in the general interest, that is to say, in the case of a university, education and research services, may overlap with activities of a commercial character, as Question 1(b) shows.

43. In the same way, it is not possible to apply by analogy the principles developed by the Court of Justice in *BFI Holding*.[27] In that case the Court decided, with regard to Article 1(b), second subparagraph, first indent, of Directive 92/50, that the fact that services were also supplied by private undertakings or could be supplied by them did not prevent a task from being one that was in the general interest. At first sight, the judgment might be taken to indicate that a distinction between commercial and other services cannot be made in the case of public financing under the third indent, either. However, the three cumulative criteria for defining a body governed by public law raise quite different issues. The separate issue raised here is whether particular payments to a body which was undoubtedly established for the purpose of meeting needs in the general interest are to be regarded as public financing.

44. If one is to be guided by the purpose of the directives and by the question whether close dependency between university and contracting authority is created or reinforced, the answer must be that it is not public financing if the combined effect of the service and the consideration paid is that the contracting authority has an economic interest in obtaining the service

25 — Cited in footnote 6.

26 — See *Humbel* (cited in footnote 6), paragraph 15 et seq.

27 — Cited in footnote 9, paragraph 47.

which goes beyond support for the needs to be served in the general interest. There can only be close dependency if the purpose of the payment is to support the tasks of an establishment and to aid it for that purpose. That can only be the case if a service provided by the establishment under contract is at the same time an activity which is performed in the general interest or which serves academic purposes.

45. As a rule such dependency does not arise precisely where an establishment receives payment as consideration for an activity which it offers in the same way as an undertaking operating on the market independently in competition with private undertakings and on the basis of a specific agreement for the supply of services. That is because the establishment acquires its entitlement to payment on a reciprocal basis. The services are supplied on request in the interest of the establishment, as in the case of research for specific purposes, consultancy or the organisation of conferences. The right to obtain services is therefore not based on the decision of principle to support the establishment in its duties, but is rather a contractual entitlement.

46. A business relationship of that type can, of course, give rise to dependency, but that dependency is not of the same kind as that which arises from the mere provision of support. The dependency between business partners, even where one is technically a contracting authority, is not 'close dependency' for the purposes of the directives, since in the case of freely negotiated contracts performance by both parties takes the form of *do ut des*. Any other approach to this question would lead to the paradoxical result that even a private undertaking conducting most of its business with contracting authorities would be a contracting authority for the purposes of the procurement directives.

47. Since the payments referred to in Question 1(b) and (c) are made in respect of a claim based on an autonomous contractual foundation and do not therefore create close dependency on a contracting authority within the meaning of the directive, they do not constitute public financing.

48. The last question to be discussed in this regard is whether tuition fees, as described in Question 1(d), paid by the contracting authority to a university for named students may be counted as public financing.

49. It is true that such payments also constitute a social measure for individual students, for whom it represents a grant

towards the sometimes very high tuition fees. Nevertheless, it constitutes a reliable source of income for the establishment from public funds, which accrue to the university. The test for whether there is 'dependency' is that the establishment obtains support from the contracting authority, for which, moreover, there is no contractual consideration. Accordingly, a contribution such as that referred to in Question 1(d) falls within the concept of public financing.

50. Naturally that excludes tuition fees paid by the student himself from private means, which do not involve any contribution from a contracting authority. Likewise excluded are funds provided from abroad by way of grants or other forms of support for students.

(3) *The second question*

51. The second question seeks to know how the expression 'for the most part' in Article 1 of the directives is to be understood.

(a) Observations submitted to the Court

52. The *applicant* considers that in view of its position on the first question it is not necessary to answer the second. Solely in the alternative, it submits that the expression 'for the most part' should be interpreted not on the basis of purely quantitative criteria but rather on the basis of qualitative criteria, with the result that only financing which confers on the payer control over procurement decisions is to be included. In any event, as regards the quantitative aspect, the test cannot be a purely mathematical one: there must be a predominant amount of such financing, which, in the applicant's view, can only be present where the financing amounts to at least three- quarters of the total.

53. The *Netherlands*, *Austrian* and *United Kingdom Governments*, together with the *Commission*, consider rather that 'for the most part' must be taken to have its natural meaning of 'over 50%'. The French Government supported that view at the hearing.

54. The *United Kingdom Government* argues that if the financing provided by the contracting authority exceeds 50%, there should be control over the use of

those funds by the financing body. That is the approach taken in Article 2(1) of Directive 93/37, according to which the directive extends to contracting authorities who subsidise by more than 50% a contract awarded by a different body.

55. The *Netherlands Government* considers that that approach is also justified on systematic grounds, since there is another instance in Article 1(b), third indent, of the directives where a simple majority is determinative: where more than half the members of an administrative, managerial or supervisory board are appointed by the board there is assumed to be dependency. In addition, the definition of a public undertaking in Article 1(2) of Directive 93/38/EEC, [28] and the definition of an affiliated undertaking in the third subparagraph of Article 3(4) of Directive 93/37 [29] and in Article 1(3) of Directive 93/38 [30] can also be referred to for comparison, each of them employing the criterion of 'more than half'.

56. The *Commission* considers that taking the expression to mean more than 50% is a simple test to apply and also follows logically from the fact that the assessment is based on only two aspects, financing from contracting authorities and financing from other sources.

(b) Opinion

57. The ordinary meaning of the words 'for the most part' suggests that they should be interpreted as referring to an arithmetical 'more', that is to say 'over half' or 'more than 50%'. Even if the words are not

28 — 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). The provision reads (in part) as follows:
'For the purpose of this directive:
... "public undertaking" shall mean any undertaking over which the public authorities may exercise directly or indirectly a dominant influence ... . 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'.

29 — The provision reads as follows: 'An "affiliated undertaking" means any undertaking over which the concessionaire may exercise, directly or indirectly, a dominant influence.... A dominant influence on the part of an undertaking shall be presumed when, directly or indirectly, in relation to another undertaking, it:
— holds the major part of the undertaking's subscribed capital, or
— controls 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.'

30 — The provision reads (in part): 'For the purpose of this directive: ...
"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'.

considered to be unequivocal in that respect, any interpretation such as that suggested by the applicant, for instance depending on funds of a particular sort, would not meet the purpose of the provision. It must be borne in mind that close dependency, with the corresponding possibility of influence, might arise in certain circumstances even where the financing is less than 50%, if it comes as a single contribution among a large number of smaller amounts. A qualitative approach is therefore not an appropriate one for determining the meaning of 'for the most part' because of the many imponderables it raises. The possibility need not be discussed here, since all that is necessary is to establish the meaning of 'for the most part'. What is required is a practical interpretation which satisfies the purpose of the provision.

58. We can also refer to the definition in Article 1(2) of Directive 93/38, in which 'public undertaking' is defined *inter alia* as an undertaking in which the State owns, directly or indirectly, at least half of the capital. [31] If that quantitative criterion is what makes an undertaking a public undertaking, it must certainly apply to a body governed by public law, when determining the conditions under which financing is to be regarded as 'for the most part' public.

31 — See footnote 28.

(4) *The third question*

59. The issue of what contributions fall within the concept of financing by a contracting authority has already been dealt with in connection with the first question. The third question posed by the national court, namely what funds are to be included in the calculation, should therefore not be understood as meaning what kind of funds should be taken into account in calculating the public financing, but as asking what is to be the basis for calculating the whole financing. In other words, it asks how to define the total income, of which the funds provided by public financing are to constitute 'the most part'.

(a) Observations submitted to the Court

60. The applicant and the United Kingdom Government argue that the calculation should cover all income. The French Government supported that view at the hearing.

(b) Opinion

61. In referring to financing 'for the most part' from public funds, Article 1(b), third indent, implies that the institution can obtain funds at least partly from other sources without forfeiting its identity as a contracting authority. Any reliable assessment of the proportion of public financing when considering the economy of the institution as a whole must take account of all funding in the assessment of its income. Consequently, in order to calculate the total income (100%) of which 'over 50%' is to be public financing, all resources accruing to the institution must be taken into account.

(5) *The fourth question*

62. Since universities' financing may vary from year to year, the national court seeks by means of the fourth question to know what period should be used as the basis for deciding whether an institution is to be classed as a body governed by public law, and how foreseeable or future changes in funding are to be taken into account.

(a) Observations submitted to the Court

63. The *applicant* suggests that the relevant time is the time of the contract award procedure.

64. The *United Kingdom Government* submits that for practical reasons it should occur a priori at the time of the award procedure. It refers to the possibility of taking interim measures under Directive 89/665/EEC, [32] which would have no purpose if the status of an institution as being a body governed by public law were only to be made at a later date. At the hearing it suggested that the assessment could be a yearly one. Bodies wishing to award a contract must be able to determine the situation on the basis of the information available to them at that time, which would include figures from past years as well as a reasonable estimate of the duration of the contract and the funds already committed. The element of prognosis is one which is to be found in the three directives.

32 — Council Directive 89/655/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 regards interim measures, see Article 2(c)(4) of the directive.

65. The *Austrian Government* considers that the assessment must be made for given periods, and suggests an annual approach, since contracting authorities draw up their budgets annually. Reference might be made to the calendar, accounting or budgetary year. That would also be appropriate in view of the fact that a yearly assessment is also made in other cases (Article 7(6) and the notification provisions in Article 15(1) of Directive 92/50).

66. The *Commission* takes the view that Article 15(1) of Directive 92/50 and Article 9(1) of Directive 93/36 indicate that contracting authorities retain their status for 12 months. [33] Whether a body is a contracting authority or not may thus change from one budgetary year to another. Accordingly, it suggests that the determination be made annually on the basis of anticipated sources of finance for the coming budgetary year.

67. The *Netherlands Government* considers that the assessment should be made rather on structural lines, since any other approach would be incompatible with the principle of legal certainty.

68. The *French Government* supported that view at the hearing. The difficulties of application and the considerable uncertainty which would arise particularly in the case of more lengthy award procedures could only be overcome by adopting a structural approach. Any other approach might have the result of making the status of the body vary in the course of the award procedure purely as a result of temporary and short-term changes in funding.

(b) Opinion

69. That the fundamental general principle of legal certainty in Community law applies when classifying financing was upheld by the Court of Justice in *Mannesmann*. [34] The principle requires that provisions be clear and their application foreseeable by all

33 — Article 9(1) of Directive 93/36 provides (in part) as follows:
'The contracting authorities shall make known, as soon as possible after the beginning of their budgetary year, by means of an indicative notice, the total procurement ... which they envisage awarding during the subsequent 12 months ...'.
Article 15(1) of Directive 92/50 provides (in part) as follows:
'Contracting authorities shall make known, by means of an indicative notice to be published as soon as possible after the beginning of their budgetary year, the intended total procurement ... which they envisage awarding during the subsequent 12 months ...'.

34 — Cited in footnote 5, paragraph 34.

those concerned. [35] Accordingly, the application of objective and transparent criteria for determining the status of a body as being one governed by public law must be decisive.

70. Determining status on the basis of structural elements would admittedly have the advantage of legal certainty and clarity; it would not, however, enable actual or future variations in funding to be taken into account. Isolated instances of public funding, for example for building projects, would then be disregarded, contrary to the intention of the directive.

71. Taking the time of the procurement procedure as the time at which status is to be determined likewise does not necessarily reflect longer-term, and thus actual, financing. It would also open the way to manipulation.

72. Annual reassessment of their status, by contrast, might not offer the foreseeability required by the principle of legal certainty, since the status of the institution could change from year to year depending on the sources of its financing.

73. On the other hand, the basis for making the abovementioned calculations must be certain, correct and transparent. It ought therefore to be reasonable to do it on an annual basis in any event; not for a year in the past calculated from the time of the procurement procedure, however, but for the budgetary year in which the contract is awarded. For reasons of legal certainty and protection of tenderers that should be expanded, however, in order to ensure that in the course of the procurement procedure the establishment retains until completion of the contract the status it had at the time of the award procedure, even if the contract extends over a period of more than a budgetary year in the course of which the institution's financing changes.

74. The new assessment of the financing for the purposes of determining the establishment's status is only to be undertaken within a budgetary year (also to prevent manipulation) in the case of significant changes in funding which have already occurred or in the case of foreseeable future changes.

35 — See also Case C-143/93 *Van Es Douane Agenten* [1996] ECR I-431, paragraph 27; Case C-202/97 *Fitzwilliam Executive Search* [2000] ECR I-883, paragraph 54; and Case C-54/99 *Scientology* [2000] ECR I-1335, paragraph 22.

VI — Conclusion

75. In the light of those considerations I suggest the following answers to the questions which have been referred for a preliminary ruling:

(1) The expression 'financed for the most part by one or more contracting authorities' in Article 1 of Council Directives 92/50/EEC, 93/37/EEC and 93/36/EEC covers in principle all funding provided by the State, regional or local authorities, or other bodies governed by public law to a body for the purpose of providing financial support for that body. Payments made by a contracting authority as consideration for services offered on competitive conditions by the body in the context of a reciprocal contract do not constitute public financing for the purpose of the directives.

(a) Research grants made by one or more contracting authorities to support research are covered by the expression 'financing by one or more contracting authorities'.

(b) Payments made by one or more contracting authorities under a specific contract for the supply of services as consideration for the supply of services or for research work, and

(c) for the supply of other services, such as consultancy or the organisation of conferences, do not constitute 'financing by one or more contracting authorities'.

(d) Student grants paid by local education authorities to universities in respect of tuition for named students constitute 'financing by one or more contracting authorities'.

(2) 'For the most part' means 'more than 50%'.

(3) Whether financing is 'for the most part' is determined on the basis of all funds accruing to the body.

(4) Whether a body is to be regarded as one governed by public law is to be determined on the basis of the budgetary year of the procurement procedure. The status should be reviewed if there are significant changes in the way in which the body is financed during the budgetary year.