OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 15 June 2006 [1]

I — Introduction

1. In this case, a French court, the Tribunal administratif de Lyon, [2] has referred to the Court a number of questions concerning the interpretation of European procurement law. These questions have arisen in a dispute relating to a leisure centre in the French town of Roanne, the design and execution of which was entrusted to a semi-public urban development company without the prior issue of a call for tenders. The project is characterised in particular by the fact that only certain parts of the proposed leisure centre, once constructed, were intended for the town itself, while other parts were to be disposed of by the urban development company directly to third parties, although the town was to contribute towards their financing, take over those parts not disposed of at the end of the project, and bear the full risk of any losses incurred.

2. Against that background, the referring court first of all wishes to ascertain which provisions of European procurement law may apply at all to such a project, and, in particular, how the term 'public works contract' is to be interpreted. The question has also been raised whether, in the determination of the value of the contract, account is to be taken of the overall volume of the project or whether, in that calculation, regard is to be had only to the price which the contracting authority will pay for those parts of the work which are intended for it, plus any overall financial contribution which it has committed. Finally, it must be clarified whether a procurement procedure can be dispensed with where, under national law, the agreement in question can only be concluded with certain legal persons in the first place, and those persons would themselves have to carry out procurement procedures if they were to award any follow-up contracts.

1 — Original language: German.

2 — Administrative Court, Lyon; also referred to hereinafter as 'the referring court'.

II — Legal framework

A — *Community law*

3. Article 1 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [3] ('Directive 93/37') reads, in extract, as follows:

'For the purposes of this Directive:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

(b) "contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, 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

3 — OJ 1993 L 199, p. 54. This directive was repealed and replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, 'Directive 2004/18'). However, that legislative amendment is effective only from 31 January 2006 and is therefore immaterial to the facts of the main proceedings.

than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

...

(c) a "work" means the outcome of building or civil engineering works, taken as a whole, that is sufficient of itself to fulfil an economic and technical function;

...'

4. Article 6 of Directive 93/37, as amended by Directive 97/52,[4] provides as follows:

'1. This Directive shall apply to:

(a) public works contracts whose estimated value net of value-added tax (VAT) is not less than the equivalent in ecus of 5 000 000 special drawing rights (SDRs);

...

3. Where a work is subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the amounts referred to in paragraph 1. Where the aggregate value of the lots is not less than the amount referred to in paragraph 1, the provisions of that paragraph shall apply to all lots. Contracting authorities shall be permitted to depart from this provision for lots whose estimated value net of VAT is less than ECU 1 000 000, provided that the total estimated value of the lots exempted does not, in consequence, exceed 20% of the total estimated value of all lots.

4. No work or contract may be split up with the intention of avoiding the application of this Directive.

5. When calculating the amounts referred to in paragraph 1 and in Article 7, account shall be taken not only of the amount of the public works contracts but also of the estimated

4 — 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).

value of the supplies needed to carry out the works [and] made available to the contractor by the contracting authorities.

6. Contracting authorities shall ensure that there is no discrimination between the various contractors.'

5. At the time material to this case, the threshold of 5 000 000 SDRs corresponded to a value of EUR 6 242 028. [5]

B — *National law*

6. In the version of it which was applicable at the time of the facts of the main proceedings, [6] Article L. 300-4 of the French Code de l'urbanisme [7] ('the old Article L. 300-4 of the Code de l'urbanisme') provided:

'The State, local authorities or public bodies established by them may entrust the planning and implementation of development projects provided for in this Title to any suitably qualified public or private person.

Where the contract is concluded with a public body, a local semi-public company defined by Law No 83-597 of 7 July 1983 or a semi-public company more than half of whose capital is held by one or more of the following public persons: State, regions, *départements*, municipalities or groupings thereof, it may take the form of a public development agreement. In that case, the contracting partner may be entrusted with making acquisitions by way of expropriation or preemption and carrying out any operation or measure relating to development and installation which contributes towards the overall project forming the subject of the public development agreement.

The bodies referred to in the preceding paragraph may be entrusted with conducting preliminary studies necessary for the definition of the characteristics of the project under an agency contract requiring them to conclude study contracts for and on behalf of the authority or grouping of authorities.

...'

5 — See the publication of the values of thresholds under the directives on public procurement applicable from 1 January 2002 (Commission Notice, OJ 2001 C 332, p. 21, paragraph 2, third column).

6 — That version is based on Law No 2000-1208 of 13 December 2000, *JORF* of 14 December 2000.

7 — Town Planning Code.

7. After the Commission had brought proceedings against France for failure to fulfil obligations, Article L. 300-4 of the Code de l'urbanisme was amended as follows by Law No 2005-809: [8]

'The State and local authorities and the public bodies established by them may grant concessions for carrying out the development projects provided for in this Title to any suitably qualified person.

The grant of development concessions shall be subject by the awarding body to a notice procedure enabling a number of competing tenders to be submitted, in accordance with conditions laid down by decree in the Conseil d'Etat.

The concession holder shall oversee the works and installations forming part of the project which are provided for in the concession and carry out the relevant studies and any tasks necessary for their completion. It may be entrusted by the awarding body with acquiring the assets necessary for implementation of the project, including, where appropriate, by way of expropriation or preemption. It shall sell, lease or assign by concession the immovable property located within the area covered by the concession.'

8 — Law of 20 July 2005, *JORF* of 21 July 2005.

8. Furthermore, Article 11 of Law No 2005-809 provides:

'Subject to judicial decisions which have acquired the force of *res judicata*, the following are declared valid, in so far as their lawfulness is contested on the ground that the appointment of the developer was not preceded by a notice procedure enabling a number of competitive tenders to be submitted:

1. Development concessions, public development agreements and development agreements signed before the publication of this Law;

...'

III — Facts and main proceedings

9. In 2002, the French town of Roanne drew up plans to build a leisure centre as an urban development measure. The first phase of the project was to include, inter alia, a multiplex cinema. Provision was also made for the

construction of commercial premises, a public car park with some 320 spaces, access roads and public spaces. The construction of further commercial premises and a hotel was envisaged as part of a later phase.

10. Execution of the project was entrusted to Société d'équipement du département de la Loire (SEDL), a semi-public urban development company. To that end, on 25 November 2002, the town of Roanne concluded with SEDL a public development agreement, [9] which the Municipal Council of Roanne had previously authorised the mayor to sign by resolution of 28 October 2002.

11. Under that agreement, SEDL was entrusted, inter alia, with purchasing land, procuring funding, submitting certain accounts, having studies conducted, organising an engineering competition and having the construction works carried out, as well as with coordinating the work and reporting to the town.

12. The agreement concluded also provided that the public car park to be built for the leisure centre, the access roads and the public spaces were to become the property of the town of Roanne. The other works planned, however, were to be disposed of to third parties, the potential income for SEDL, as contractor, from the sale of those assets being estimated at EUR 8 099 000 in total.

13. Under the agreement, the town was to pay EUR 2 925 000 to SEDL as consideration for the public car park. In addition, the town was to make a capital contribution to finance all the facilities to be constructed which was estimated at EUR 2 443 103 for the first phase of the works and at EUR 3 034 341 for the works as a whole. [10] Moreover, the land and buildings which SEDL had not disposed of to third parties at the end of the project were at that point automatically to become the property of the town of Roanne, the town from then on ensuring the performance of contracts still ongoing and taking over the obligations previously entered into by SEDL. The town of Roanne also expressly assumed the full risk of any losses incurred in connection with the project. [11]

14. Before the public development agreement was concluded with SEDL, no public notice or invitation to tender was issued in relation to the project.

9 — Convention publique d'aménagement.

10 — An annex to the public development agreement, submitted to the Court by the French Government, also refers to an estimated sum of € 210 000 which is to be contributed by other parties to the project (described as 'partenaires du pôle d'échanges' (partners in the commercial centre)).

11 — Thus, for example, Article 25-1 of the public development agreement reads: '... le risque financier de l'opération est à la charge de la Collectivité Publique Cocontractante ...' (... the financial risk associated with the project shall be borne by the Contracting Public Authority ...).

15. The claimants in the main proceedings are members of the opposition in the Municipal Council of Roanne. Before the Tribunal administratif de Lyon, they claim that the Municipal Council Resolution of 28 October 2002 should be annulled. They contend inter alia that there has been an infringement of the provisions of European procurement law. They submit that a procurement procedure under Directive 93/37 should have been carried out.

IV — Reference for a preliminary ruling and procedure before the Court

16. By judgment of 7 April 2005, the Tribunal administratif de Lyon stayed the proceedings before it and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Does an agreement under which one contracting authority engages a second contracting authority to carry out a development project for a purpose of general interest, pursuant to which contract that second contracting authority is to deliver works to the first which are intended to meet its needs, and at the end of which such of the other land and works as have not been disposed of to third parties vest automatically in the first contracting authority, constitute a public works contract within the meaning of Article 1 of Directive 93/37/EEC of 14 June 1993, as amended?

(2) If the answer to question 1 is in the affirmative, is it necessary, in assessing the threshold of 5 000 000 special drawing rights imposed by Article 6 of the same directive, to take into account only the price paid in return for the delivery of the works to the contracting authority, or the sum of that price and the contributions paid, even if the latter are only partly allocated to the execution of those works, or the total value of the works, with assets not disposed of at the end of the contract vesting automatically in the first contracting authority and the latter then pursuing the execution of ongoing contracts and assuming the debts incurred by the second contracting authority?

(3) If the answer to both questions 1 and 2 is in the affirmative, is the first contracting authority, when entering into such an agreement, not required to follow the procurement procedures laid down in that directive, on the grounds that that agreement can be concluded only with certain legal persons and that those procedures will be applied by the second contracting authority when awarding its public works contracts?'

17. Written observations and oral argument were presented to the Court by the municipality of Roanne, as defendant in the main proceedings, and by the French Government and the Commission of the European Communities. Written observations were also submitted by the Austrian Government, the Lithuanian Government and the Polish Government. The claimants in the main pleadings did not submit their written observations within the prescribed time-limit, but did present oral argument before the Court.

V — Assessment

A — *Admissibility of the reference for a preliminary ruling*

18. The town of Roanne and the French Government express doubts as to the admissibility of the reference for a preliminary ruling.

19. Firstly, the town of Roanne takes the view that the questions referred are not material to the decision to be given because the French legislature subsequently expressly declared public development agreements such as that at issue in this case to be valid (by way of 'validation législative' (legislative validation)). Consequently, it submits, their lawfulness can no longer be called into question on grounds of the failure to carry out a procurement procedure.

20. In accordance with settled case-law, it is solely for the national court to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The Court may reject a reference from a national court only *where it is obvious* that the interpretation sought by that court bears no relation to the actual facts of the main action or its purpose, or where the question is general or hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [12] With the exception of those cases, the Court of Justice is in principle bound to give a ruling on questions concerning the interpretation of provisions of Community law. [13]

21. In this case, it is by no means *obvious* that the questions raised by the Tribunal administratif de Lyon concerning the inter-

12 — See, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 59 to 61, Case C-216/01 *Budějovický Budvar* [2003] ECR I-13617, paragraph 47, Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 34, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 24.

13 — *Bosman* (paragraph 59), *Budějovický Budvar* (paragraph 47) and *IATA and ELFAA* (paragraph 24), each cited in footnote 12.

pretation of Directive 93/37 are immaterial to the resolution of the dispute in the main proceedings.

22. It is true that Article 11 of Law No 2005-809 subsequently declared certain public development agreements to be valid, even if they were concluded without any necessary procurement procedure.

23. However, the main proceedings are concerned with the validity not of the *agreement* concluded between the town of Roanne and SEDL but of the *Municipal Council resolution* by which the mayor of Roanne had previously been authorised to sign that agreement. This is therefore, essentially, a dispute internal to the municipality which essentially places in issue the powers of the authorities of the town of Roanne. [14] The question of which provisions of Community procurement law should have been complied with may well be material to the resolution of that dispute, even if, externally, the agreement concluded with SEDL proves to be valid. In any event, it does not necessarily seem inconceivable that a municipal council resolution may be annulled even if the public development agreement with an urban development company concluded on the basis of it is in itself beyond judicial challenge. Furthermore, it falls to the national courts alone to examine the impact of the invalidity, if that is the case, of the municipal council resolution on the effectiveness of the agreement between the town of Roanne and SEDL.

24. The objection raised by the town of Roanne against the admissibility of the questions referred is therefore untenable.

25. Moreover, in the view of the French Government, the questions referred are not material to the decision to be given because they relate to the case of a public development agreement. In reality, a municipal leisure centre such as that at issue in the main proceedings does not constitute a development measure. The questions referred to the Court are therefore purely hypothetical.

26. That objection too is unconvincing. It makes no difference how the agreement

14 — Since, therefore, the validity of the public development agreement is not at issue in the main proceedings, the referring court is not faced with the question of *setting aside* Article 11 of Law No 2005-809 in the event of its being contrary to Community law (on the obligation incumbent on national courts automatically to set aside provisions of national law which conflict with Community law, see the settled case-law since Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 and 24, recently confirmed in Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraph 72, with further references).

concluded with SEDL should have been classified under national law or whether the town of Roanne and the referring court are right or wrong to assume that the agreement in question is a public development agreement. [15] For, in proceedings under Article 234 EC, the Court has jurisdiction only to interpret Community law, not to interpret provisions of national law, and it does not have to determine whether the referring court's interpretation of them is correct. [16] As regards the factual and legislative context in which the questions referred for a preliminary ruling are set, the Court of Justice must take as its starting point the findings of the national court. [17]

27. However, even if the agreement between the town of Roanne and SEDL should not in fact have been classified as a public development agreement, the Court would in this case have sufficient information concerning the factual and legislative context of the dispute in the main proceedings to be able to provide the referring court with a meaningful answer to the questions it has raised on the interpretation of Directive 93/37. Also, as I said earlier, these questions have arisen from a specific dispute over the validity of a resolution adopted by the Municipal Council of Roanne and cannot therefore by any means be regarded as hypothetical.

28. The reference for a preliminary ruling is therefore admissible.

B — *Substantive assessment of the questions referred*

1. First question: Definition of a public works contract

29. By its first question, the referring court essentially wishes to ascertain whether the fact that one contracting authority engages another contracting authority to design and build, as an urban development measure, a leisure centre only certain parts of which, when constructed, are intended for the first contracting authority, while other parts are to be disposed of by the second contracting authority directly to third parties, even though the first contracting authority is to take over those parts not disposed of at the end of the project and to bear the full risk of any losses incurred, constitutes a public works contract within the meaning of Article 1 of Directive 93/37.

15 — To this effect, see also Case C-264/03 *Commission* v *France* [2005] ECR I-8831, paragraph 36. According to that judgment, it is not necessary to ascertain how national law classifies a particular agreement in order to establish whether that agreement is a public contract within the meaning of the procurement directives.

16 — Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I-589, paragraph 20, and Case C-222/04 *Cassa di Risparmio di Firenze* [2006] ECR I-289, paragraph 63.

17 — *Turn- und Sportunion Waldburg* (cited in footnote 16, paragraph 21), and Case C-28/04 *Tod's and Tod's France* [2005] ECR I-5781, paragraph 14, with further references.

30. It follows from the definition in Article 1(a) of Directive 93/37 that a public works contract relates to certain works, which are defined in the same directive, in respect of which a contracting authority establishes with a contractor a contract for pecuniary interest concluded in writing.

(a) Subject-matter of the contract: distinction in relation to a public services contract and other public contracts

31. Under Article 1(a) of Directive 93/37, public works contracts may have as their object the following three types of works: [18]

— The execution, or both the execution and design, of works related to one of the activities referred to in Annex II of Directive 93/37; [19] or

— The execution, or both the execution and design, of a work; for these purposes, work means the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic and technical function (Article 1(c) of Directive 93/37); or

— The execution, by whatever means, of a work [by third parties [20]] corresponding to the requirements specified by the contracting authority.

32. According to the information from the referring court, the municipal leisure centre to be built in Roanne was to include, in particular, a multiplex cinema and commercial premises, as well as a public car park, access roads and public spaces; the construction of further commercial premises and a hotel was envisaged as part of a later phase of work.

33. The building of such a leisure centre requires works of all three varieties defined in Article 1(a) of Directive 93/37. First, it is a work the execution of which involves many of the activities referred to in Annex II to

18 — See also Case C-399/98 *Ordine degli Architetti delle province di Milano e Lodi and Others, 'La Scala'* [2001] ECR I-5409, paragraph 58.

19 — Annex II to Directive 93/37 contains a list of professional activities in the construction industry as set out in the General Industrial Classification of Economic Activities in the European Communities (NACE). It includes NACE Subgroup 501.1, 'General building contractors', which falls within NACE Group 501, 'Construction'.

20 — The expressly added phrase 'by third parties' in the German version does not appear in other language versions of the directive.

Directive 93/37.[21] Secondly, in this case, SEDL is to build the leisure centre with the assistance of third-party contractors carrying out works corresponding to the requirements laid down by the town of Roanne[22] and under its control.[23] And thirdly, a leisure centre such as that at issue here is also an outcome of building works that, in view of the purpose of improving the municipal infrastructure[24] which it serves, fulfils an economic function.[25] Consequently, it is a work within the meaning of Article 1(a) in conjunction with Article 1(c) of Directive 93/37.[26] Each of those three points therefore individually suggests that the building of a leisure centre such as that planned by the town of Roanne falls in principle within the material scope of Directive 93/37.

34. However, judging by its subject-matter, the public development agreement concluded by the town of Roanne with SEDL went beyond the mere *construction* of the municipal leisure centre. Thus, SEDL was required, inter alia, to purchase land and procure funding, to submit certain accounts, to have studies conducted, to organise a competition, and to coordinate the project and report to the town. It was also responsible for marketing a large part of the facilities to be constructed.

35. Because of those additional tasks, elements of service provision also found their way into the contract between the town of Roanne and SEDL. This raises the question of the distinction between public works contracts, on the one hand, and public service contracts within the meaning of Article 1(a) of Directive 92/50, on the other.[27] This question has also been raised before the Court by a number of participants in these proceedings.

36. Of the aforementioned elements of service provision only the *design* of the works can clearly be classified as falling within the material scope of Directive 93/37), provided that the contract relates to *both* the design *and* the execution of the work (see Article 1(a) of Directive 93/37). In the case of

21 — See point 31, first indent, above.

22 — See point 31, third indent, above. See also points 52 and 53 below.

23 — In this regard, the order for reference shows in particular that the plans drawn up by SEDL are to be submitted to the town of Roanne for approval, and that the town of Roanne can require SEDL to submit all documents, supervise the construction sites, enter them and raise objections with SEDL.

24 — In the order for reference, the project is expressly described as an urban development measure.

25 — See to this effect — in the context of the construction of sections of motorway — Case C-276/97 *Commission* v *France* [2000] ECR I-6251, paragraph 32, and judgment of 27 October 2005 in Joined Cases C-187/04 and C-188/04 *Commission* v *Italy*, not published in the ECR, paragraph 28.

26 — See point 31, second indent, above.

27 — 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, 'Directive 92/50'). This directive was repealed and replaced by Directive 2004/18, although only with effect from 31 January 2006, which means that this legislative amendment is immaterial to the facts of the main proceedings.

a public development agreement such as that concluded between the town of Roanne and SEDL, that condition is satisfied, SEDL having been expressly entrusted in that agreement with both the design and execution of the works.

37. In the light of all the other service elements, the agreement must be assumed to be a *mixed contract* the legal classification of which depends on an assessment of the predominant nature of the tasks involved. Only if the design and execution of the work represents the principal subject-matter of the contract by comparison with the other tasks entrusted to the contractor can that contract constitute a public works contract. Design and execution of the work must not be merely incidental. [28]

38. It is for the national court to make that determination. [29] However, the Court can provide the national court with a ruling on the interpretation of Community law which will facilitate its task of giving judgment and by which it must be guided. [30]

39. In principle, the value of the agreed acts of performance may serve as a guide in determining the principal subject-matter of a mixed contract and in establishing the significance of its component parts. In so far as an individual price can be determined for each particular act to be performed, the value of the design and construction works should therefore be compared with that of the other acts to be performed. In any event, however, it is also important to carry out an objective assessment of the contract as a whole. For only on that basis is it possible to determine whether the construction works constitute the principal subject-matter of the contract not only quantitatively but also qualitatively. [31]

40. In this case, it is not known what value was placed on the individual acts to be performed by SEDL. [32] Consequently, the objective overall assessment is alone decisive. SEDL was entrusted with the execution of a municipal leisure centre as an urban devel-

28 — See, to this effect, the 16th recital in the preamble to Directive 92/50, the content of which is also confirmed in recital 10 in the preamble to Directive 2004/18. On the requirement of an assessment of the predominant nature of the contract for the purposes of distinguishing between the material scope of Directive 93/37 and that of other procurement directives, see also Case C-331/92 *Gestión Hotelera Internacional* [1994] ECR I-1329, paragraphs 26 to 29.

29 — *Gestión Hotelera Internacional* (cited in footnote 28, paragraph 28); see also Case C-265/04 *Bouanich* [2006] ECR I-923, paragraph 54.

30 — Settled case-law; see, for example, *La Scala* (cited in footnote 18, paragraph 48).

31 — While, under Article 2 of Directive 92/50, the distinction between public service and public supply contracts is made solely on the basis of the value of the services and products concerned (see most recently in this regard Case C-340/04 *Carbotermo and Others* [2006] ECR I-4137, paragraph 31), there is no such provision on the distinction between public service and public works contracts. The 16th recital in the preamble to Directive 92/50 makes the latter distinction on the basis of *qualitative criteria* (works must be 'the object of the contract'); that reliance on qualitative criteria is even clearer in recital 10 in the preamble to Directive 2004/18, which refers to works which are 'incidental to the principal subject-matter of the contract' and 'a possible consequence thereof or a complement thereto'.

32 — An individual price is fixed only for the public car park intended for the town of Roanne. Otherwise provision is made only for an overall financial contribution to be made by the town of Roanne to the project as a whole. Moreover, the town of Roanne declared itself willing to take over those parts of the leisure centre not disposed of to third parties at the end of the project and to enter into the contractual obligations applicable in this regard.

opment measure. The task of purchasing land and procuring funding merely formed part of the preparation for that project. The same is true of the engineering competition to be conducted by SEDL. Moreover, as regards the task of coordinating the work and the obligation to report to the town and submit accounts, these are nothing more than ancillary duties intended only to accompany the actual design and construction of the leisure centre by SEDL. The task of marketing large parts of the leisure centre likewise seems largely incidental to its design and construction.

41. The referring court therefore rightly assumes that the construction of facilities such as those at issue here cannot be regarded as purely incidental, given the nature and significance of the other works involved. In fact, according to the evidence before the Court in relation to the facts of the main proceedings, the design and construction of the municipal leisure centre constitutes the core of the contract which the town of Roanne awarded to SEDL.

42. Classification of an agreement such as that at issue here as a works contract is not precluded, for example, by the fact that the leisure centre to be constructed was intended as an urban development measure, or by the fact that only a relatively insignificant part of that leisure centre — a public car park, access roads and public spaces — was to become the property of the town on completion of the project, while the facilities were otherwise to be disposed of to third parties. Definition as a public works contract does not depend on the use to which the work to be constructed is to be put. Thus, for example, the Court has already held that that term does not only include contracts awarded for the purpose of fulfilling tasks in the general interest. [33] Nor can it make any difference whether the contracting authority intends to use the work to be constructed itself or plans to make it available either to the general public or to individual third parties.

43. Rather, Article 1(a) of Directive 93/37 is to be interpreted in the light of the objectives of that legislation, [34] according to which restrictions on the freedom of establishment and the freedom to provide services are to be abolished in respect of public works contracts and the markets concerned are to be opened up to genuine competition. [35] Those objectives may equally be undermined where the contracting authority awards a contract for a work all or part of which — as a measure of regional or urban development or for reasons of social policy, for example —

33 — Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraph 32; see, to the same effect, Case C-126/03 *Commission* v *Germany* [2004] ECR I-11197, paragraph 18, and Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 26.

34 — *La Scala* (cited in footnote 18, paragraphs 52, 54 and 75).

35 — See in particular the second and tenth recitals in the preamble to Directive 93/37, and *La Scala* (cited in footnote 18, paragraphs 52 and 75), Joined Cases C-285/99 and C-286/99 *Impresa Lombardini* [2001] ECR I-9233, paragraphs 34 and 35, Case C-470/99 *Universale-Bau* [2002] ECR I-11617, paragraphs 51 and 89, and Case C-247/02 *Sintesi* [2004] ECR I-9215, paragraph 35; similarly *Carbotermo* (cited in footnote 31, paragraph 58).

is to benefit either the general public or private third parties. The risk of a distortion of competition brought about by the preferential treatment of some operators in relation to others is always present where a contracting authority decides to entrust a work to an undertaking, irrespective of the reasons and context for construction of the work or the purpose to which it is to be put.

44. Even the fact that SEDL is required to procure the land to be developed and that the town of Roanne does not acquire those parts of the leisure centre — public car park, access roads and open spaces — which are intended for it from SEDL until they are *in a state of completion* [36] does not remove a public development agreement such as that in this case from the material scope of Directive 93/37. For, according to the information available, the subject-matter of the agreement between the town of Roanne and SEDL is not only the transfer of a completed leisure centre but also and expressly the prior design and construction of the work in accordance with the specifications laid down by the town, to which SEDL has made an express contractual commitment. Conversely, the town of Roanne has, for its part, not only decided to purchase a completed work but has already awarded a contract for the execution of that work.

45. For the same reason, moreover, the agreement at issue likewise cannot be classified as a *public supply contract* within the meaning of Article 1(a) of Directive 93/36. [37] As I have said, the design and construction works required here are by no means only incidental acts of performance but constitute the core of the agreement in question. In a case such as this, the provisions relating to public works contracts represent the more specific legislation. [38]

46. Finally, it cannot be concluded from the authority given to SEDL to dispose of large parts of the leisure centre directly to third parties that what is involved is a *public works concession* within the meaning of Article 1(d) of Directive 93/37. It is true that the triangular relationship between the town of Roanne, SEDL and the third-party purchasers, the payments from whom make up a large part of SEDL's remuneration, is indicative of a concession. However, a public concession is also characterised by the fact that the party with which the public authority has entered into a contract bears the economic risk of the business. [39] That characteristic is absent in this case, the town of Roanne having made a contractual com-

36 — In France, this is known as a 'vente en l'état futur d'achèvement' (sale on future completion).

37 — Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1; 'Directive 93/36'). That directive was repealed and replaced by Directive 2004/18, although with effect only from 31 January 2006, so that that legislative amendment is immaterial to the facts of the main proceedings.

38 — Second sentence of Article 1(a) of Directive 93/36; see also *Gestión Hotelera Internacional* (cited in footnote 28, paragraphs 25 und 26).

39 — On the distinction between public service contracts and public service concessions, see to this effect Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 40.

mitment to take over any parts of the leisure centre not disposed of at the end of the project and to bear the risk of any other losses incurred in connection with the project.

47. Against that background, an agreement such as that concluded between the town of Roanne and SEDL must, on the basis of its subject-matter, be classified as a public works contract which falls within the material scope of Directive 93/37.

(b) Contract for pecuniary interest concluded in writing between a contractor and a contracting authority

48. The assumption of a public works contract also presupposes, in accordance with Article 1(a) of Directive 93/37, that the execution of the works was agreed in the form of a contract for pecuniary interest concluded in writing between a contracting authority and a contractor.

49. As a local authority, the town of Roanne is a *contracting authority* (see Article 1(b) of Directive 93/37). The fact that the leisure centre may initially be constructed by SEDL in its own name in order then to be transferred — in part — to the town of Roanne does not preclude the town's status as a contracting authority awarding a works contract. [40]

50. The term *contractor* is not defined in Directive 93/37. In competition law, the term undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, an economic activity being any activity consisting in offering goods or services on a given market. [41] That definition can also be transposed to the field of public procurement. For, in accordance with the objectives of Directive 93/37, namely to contribute towards the attainment of freedom of establishment and freedom to provide services and to ensure the development of effective competition in the field of public contracts, [42] the term contractor is to be interpreted broadly in the latter context also. This is further confirmed by the legal definition applicable to future cases which is contained in Article 1(8) of Directive 2004/18. According to that provision, for the purposes of procurement law, contractors are natural or legal persons or public entities or groups thereof which offer on the market the execution of the services in question.

40 — *La Scala* (cited in footnote 18, paragraph 95).

41 — Settled case-law: see, most recently, *Cassa di risparmio di Firenze* (cited in footnote 16, paragraphs 107 und 108) and Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraphs 28 and 29, each with further references.

42 — Second recital and first sentence of the tenth recital in the preamble to Directive 93/37. See also point 43 above.

51. There is a market for services relating to the design and execution of construction works such as those required by the town of Roanne in this case. Not only private undertakings but also semi-public urban development companies can operate as suppliers on that market. Such a company may therefore be a contractor for the purposes of Directive 93/37.

52. The possibility that an urban development company such as SEDL may have the status of a contractor is not automatically precluded by the fact that it may not be able to and will not execute the design and execution of the works through the use of its own resources, but is itself largely or entirely reliant on the services of subcontractors. [43] For, according to the aforementioned directive, works may be executed 'by whatever means'. [44] The fact that this also includes the use of subcontractors is particularly clear in the German-language version of the provision, which refers to the execution of a work 'by third parties'.

53. Consequently, if an urban development company designs and executes a work, be that even with the assistance of subcontractors, it is itself a contractor for the purposes of Article 1(a) of Directive 93/37. In such a case, the urban development company is more than just an agent (in French, 'mandataire') of the contracting authority whose own role is merely to help the authority seek suitable contractors and to act as coordinator. Anyone who undertakes on his own behalf to design and execute a work [45] is a contractor for the purposes of Directive 93/37.

54. Furthermore, the status of contractor for the purposes of Article 1(a) of Directive 93/37 does not necessarily require a profit-making aim. This follows not least from the fact that public contracts can also be awarded to contracting authorities. [46] Even private undertakings may, when their order books are empty, have an interest in accepting commissions from which they expect little or no profit if only to be better able to cover their fixed costs in this way. In the present case too, therefore, the status of SEDL as a contractor is not automatically precluded by the fact that, in the public development agreement, it undertook to transfer to the town of Roanne any surplus from the construction and marketing of the municipal leisure centre. [47]

43 — *La Scala* (cited in footnote 18, paragraph 90). On the use of subcontractors, see also — in the context of public service contracts — Case C-176/98 *Holst Italia* [1999] ECR I-8607, paragraph 26 et seq., and *Commission* v *Germany* (cited in footnote 33, paragraph 18).

44 — See also in this regard point 31 above, third indent.

45 — In the public development agreement (see Article 4(2)), SEDL expressly undertook on its own behalf to construct the facilities: 'l'Aménageur s'engage, pour sa part, à ... réaliser la construction des volumes, y compris les parkings, ...' (the Developer undertakes, for its part, to undertake the construction of the facilities, including the car parks, ...).

46 — Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50, second sentence, and Case C-94/99 *ARGE* [2000] ECR I-11037, paragraph 40; see to the same effect *Commission* v *Germany* (cited in footnote 33, paragraphs 18 and 19) and Case C-84/03 *Commission* v *Spain* [2005] ECR I-139, paragraphs 38 to 40).

47 — Article 22(2) of the public development agreement.

55. The public development agreement of 25 November 2002 created between the town of Roanne and SEDL a *contract concluded in writing*. The fact that the development agreement is governed by public law and, in some circumstances, permits SEDL to exercise certain public powers, in particular the execution of compulsory purchases, does not preclude it from being classified as a *contract* within the meaning of Article 1(a) of Directive 93/37. [48]

56. The possibility that the transaction at issue here is an *in-house operation* or a *quasi-in-house operation* [49] within the meaning of the *Teckal* case-law [50] is likewise automatically ruled out in this case because SEDL is a semi-public undertaking and it cannot therefore be controlled by the local authorities participating in it in a manner similar to that in which they control their own departments. [51]

57. A contract is *for pecuniary interest* whenever the contracting authority owes consideration for the services to be provided by the contractor. [52] In accordance with the objectives pursued by Directive 93/37 of opening up the markets in the field of public works contracts and contributing towards the attainment of freedom of establishment and freedom to provide services in that field, [53] the term pecuniary interest is to be interpreted broadly. It includes not only consideration in money but also any form of obligation which the contracting authority enters into in return for the execution of the work, for example a commitment to make specific contributions to the financing of the project or to cover any losses incurred in its implementation.

58. In this case, the town of Roanne not only undertook to pay EUR 2 925 000 for the transfer of the public car park. It also committed a contribution towards the financing of all the facilities to be constructed which is estimated at EUR 2 443 103 for the first phase of works and at EUR 3 034 341 for the project as a whole. The agreement also provides that any land and buildings not yet disposed of to third parties at the end of the project will at that point automatically become the property of the town of Roanne, the town then ensuring performance of the contracts still ongoing and taking over fulfilment of the obligations previously entered into by SEDL. Each of those

48 — *La Scala* (cited in footnote 18, paragraph 73).

49 — See in this regard point 2 of my Opinion in Case C-458/03 *Parking Brixen* [2005] ECR I-8585.

50 — *Teckal* (cited in footnote 46, paragraph 50, second sentence), Case C-349/97 *Spain* v *Commission* [2003] ECR I-3851, paragraph 204, fourth sentence, *Stadt Halle and RPL Lochau* (cited in footnote 33, paragraph 49, second sentence), *Commission* v *Spain* (cited in footnote 46, paragraph 38), Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705, paragraph 34) and *Carbotermo* (cited in footnote 31, paragraph 33); see also — as regards situations falling outside the scope of the procurement directives — *Parking Brixen* (cited in footnote 39, paragraphs 58, 59 und 62) and Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 24 et seq.).

51 — *Stadt Halle and RPL Lochau* (cited in footnote 33, paragraph 49), *Commission* v *Austria* (cited in footnote 50, paragraph 46) and *ANAV* (cited in footnote 50, paragraph 31).

52 — See to this effect *La Scala* (cited in footnote 18, paragraph 77).

53 — Second recital and first sentence of the tenth recital in the preamble to Directive 93/37. See also point 43 above.

commitments is in the nature of consideration from the contracting authority for the design and construction of the leisure centre by SEDL. Consequently, a public development agreement such as that in this case is a contract for pecuniary interest.

(c) Interim conclusion

59. A public development agreement such as that at issue in the main proceedings therefore satisfies all the requirements in respect of a public works contract. Accordingly, the first question should be answered as follows:

Where one contracting authority engages another contracting authority to design and build, as an urban development measure, a leisure centre only certain parts of which, when constructed, are intended for the first contracting authority, while other parts are to be disposed of by the second contracting authority directly to third parties, although the first contracting authority is to take over the parts not disposed of at the end of the project and bear the full risk of any losses incurred, there is a public works contract within the meaning of Article 1 of Directive 93/37.

2. The second question: calculation of the thresholds

60. The second question raised by the referring court concerns the value of the contract for the purposes of Article 6 of Directive 93/37 as amended by Directive 97/52.

61. The difficulty in determining the value of the contract in the present case stems from the fact that SEDL's income from the design and construction of the leisure centre is made up of a number of components. Firstly, the town of Roanne pays it the sum of EUR 2 925 000 for construction of the public car park. Secondly, the town of Roanne makes a lump-sum contribution towards the financing of all the facilities to be constructed which is estimated at EUR 2 443 103 for the first phase of works and EUR 3 034 341 for the project as a whole. Thirdly, SEDL receives income from disposing of those parts of the leisure centre not intended for the town of Roanne to third parties. The potential income from disposing of such assets is calculated at EUR 8 099 000 in the public development agreement.

62. Essentially, the referring court would like to ascertain which of those elements are to be taken into account in calculating the value of the contract. This will determine whether or not the threshold of 5 000 000 SDR was exceeded in this case. The wording of Article 6 of Directive 93/37 is silent in this regard. However, the objectives pursued by that

directive reveal important considerations which must be borne in mind when calculating the value of the contract.

63. As I have already said, the overall purpose of Directive 93/37 is to contribute towards the attainment of freedom of establishment and freedom to provide services and to ensure the development of effective competition in the field of public procurement. [54] The threshold laid down in Article 6 of that directive serves to identify those public works contracts which are of particular interest to contractors from other Member States. [55] After all, it is specifically in order to protect the interests of such contractors and to ensure that they are treated in the same way as domestic suppliers that Directive 93/37 requires that special procurement procedures be followed. [56]

64. The decisive factor in the context of Article 6 of Directive 93/37 is therefore the viewpoint of a potential tenderer. This is the only way of determining whether a public works contract is capable of being of particular interest to contractors originating from outside the national territory, [57] and must therefore, for the purposes of opening up the market and competition, be the subject of the special procurement procedures provided for under that directive.

65. From the point of view of a potential tenderer, the main consideration in this context is the *overall volume* of the public works contract, that is to say the overall turnover achievable by the contractor. [58] In this regard, if a public works contract is such that only parts of the facilities to be constructed are intended for the contracting authority itself, while the work is otherwise to be disposed of directly to third parties, the parts intended for third parties must also be taken into account in the calculation of the value of the contract.

66. On the other hand, it is irrelevant whether the turnover achievable by the contractor will derive in full or only in part from the resources of the contracting authority or whether some of the income will be obtained directly from third parties.

54 — Second recital and first sentence of the tenth recital in the preamble to Directive 93/37. See also point 43 above.

55 — See to this effect the sixth recital in the preamble to Directive 93/37.

56 — Even below the threshold, the fundamental freedoms do require a minimum degree of public disclosure (transparency requirement; see in this regard Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16 to 22, *Parking Brixen* (cited in footnote 39, paragraphs 46 to 50) and *ANAV* (cited in footnote 50, paragraphs 18 to 22)), albeit subject to less stringent requirements than is the case within the scope of the procurement directives (see in this regard my Opinion in *Parking Brixen*, cited in footnote 49, point 37).

57 — This point is also made by the Court in Case C-16/98 *Commission* v *France* [2000] ECR I-8315, paragraphs 44 and 46, in connection with a related problem in the context 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).

58 — The same principle, essentially, also underpins Article 6(3) to (5). Those provisions require an overall assessment of the work or works contract, any splitting-up of that work or contract which would remove it in full or in part from a procurement procedure being prohibited.

So long as the entire project, including any parts intended for third parties, is awarded by the contracting authority and is at least partly financed by that authority, the danger that foreign tenderers will be adversely affected likewise exists in relation to the entire work, with the result that attainment of the objectives of opening up the market and competition is as a whole placed in jeopardy.

67. When applied to a situation such as that in this case, this means that account should certainly not have been taken only of the remuneration payable by the town of Roanne for the public car park, in the amount of EUR 2 925 000, and its anticipated financial contribution in the amount of EUR 3 034 341.[59] Regard should also have been had to all the income which the contractor was expected to obtain from disposing of parts of the leisure centre to third parties, that is to say EUR 8 099 000. This applies all the more in the present case in that even those parts of the leisure centre which were intended for third parties were substantially subsidised through the overall financial contribution from the town of Roanne.

68. If, on the other hand, in addition to the actual payment obligations incumbent on the town of Roanne,[60] the calculations did not also include the remuneration to be obtained from disposal to third parties, amounting to EUR 8 099 000, but only the liability risks assumed by the town in this regard,[61] the calculated value of the contract would not fully reflect the turnover achievable or, therefore, the interest of the works contract to potential contractors.

69. Accordingly, the second question should be answered as follows:

In determining the value of the contract for the purposes of Article 6 of Directive 93/37 as amended by Directive 97/52, regard is to be had to the overall volume of the contract as perceived by the contractor. It is not sufficient to take into account only the price of individual parts of a work which have been transferred to the contracting authority, the value of a financial contribution committed by that authority, and any liability risks which it has assumed.

59 — As far as I am aware, the plan from the outset was to confer the execution of both phases of work on the same contractor. The contribution made by the town towards the financing of the entire project is therefore decisive (especially in the light of Article 6(3) of Directive 93/37, under which the value of a number of lots should be aggregated). The EUR 210 000 referred to in footnote 10, which was to be contributed by other parties to the project, should also be taken into account.

60 — That is to say EUR 2 925 000 for the public car park and a contribution towards the financing of the entire project in the amount of EUR 3 034 341 (see footnote 59).

61 — That is to say, the automatic assumption by the town of Roanne of any parts of the leisure centre not yet disposed of to third parties at the end of the project and of all ongoing obligations.

3. The third question: dispensing with a procurement procedure

70. By its third question, the referring court would essentially like to know whether a procurement procedure under Directive 93/37 can be dispensed with where, under national law, the agreement in question may only be concluded with certain legal persons in the first place and those persons would themselves have to carry out procurement procedures if they were to award any follow-up contracts.

71. It is settled case-law that the procurement directives are also applicable where the contractor is itself a contracting authority. [62] Even in those cases, therefore, a procurement procedure must in principle be carried out.

72. It is true that, when performing the role of general contractor for example, a contractor awarded a contract may itself be required to carry out procurement procedures when subsequently selecting subcontractors. However, subsequent procurement procedures such as these usually relate only to individual parts of the overall contract. Moreover, the contracts concluded with subcontractors, by virtue not least of their lower value, might fall below the applicable thresholds and, therefore, outside the scope of the procurement directives. Also, in this way, the coordinating function of general contractors at least would always escape the requirement to carry out a procurement procedure. Any subsequent procurement procedures relating to subcontractors cannot therefore compensate for the initial failure to conduct a procurement procedure to award the work to the general contractor.

73. That is the case here too. The agreement does provide that SEDL will award certain tasks connected with the design and construction of the municipal leisure centre in Roanne to subcontractors and, moreover, will carry out procurement procedures in order to do so. However, this does not by any means include all the tasks taken on by SEDL under the public development agreement, and, in particular, excludes its coordinating function and its overall responsibility for construction of the leisure centre. The contractual subject-matter of the public development agreement between the town of Roanne and SEDL is not therefore the same as that of any follow-up contracts awarded by SEDL to its subcontractors.

74. All of this supports the view that a public development agreement such as that in this

62 — *Teckal* (cited in footnote 46, paragraph 42, second sentence, and paragraph 51) and *ARGE* (cited in footnote 46, paragraph 40); see to the same effect *Commission* v *Germany* (cited in footnote 33, paragraphs 18 and 19) and *Commission* v *Spain* (cited in footnote 46, paragraphs 38 to 40).

case should not have been concluded without a prior procurement procedure.

75. Moreover, the above conclusion is not precluded by the judgment in *La Scala.* In that case, the Court considered that the conduct of procurement procedures under Directive 93/37 by a municipal authority prior to the award of a public works contract could be dispensed with and held that Directive 93/37 is still given full effect if the national legislation allows the municipal authorities concerned to require the developer and permit holder to apply such procedures itself. [63]

76. For, as the Court later made clear, such a view was justified only in the special circumstances obtaining in *La Scala.* The situation in that case was characterised by the fact that the owner of the land to be developed and holder of the building permit was established from the outset, by operation of law, as the person responsible for executing the public works contract, and the municipality, as contracting authority, did not have the choice of awarding the contract to another contractor. [64]

63 — *La Scala* (cited in footnote 18, paragraph 100).

64 — *Commission* v *France* (cited in footnote 15, paragraph 57).

77. There is nothing in this case to indicate that the town of Roanne had such a limited choice of contractual partners and that SEDL was established from the outset, by operation of law, as the person responsible for executing the contract.

78. It is true that, under French law at the material time, public development agreements could be concluded with only a restricted group of persons. The old Article L. 300-4(2) of the Code de l'urbanisme shows that, at that time, only French public entities and certain French semi-public companies were capable of being contractual partners. This does not mean, however, that — as in the case of *La Scala* — the contract could, by operation of law, be awarded only to a single contractor established as such from the outset.

79. There is a further reason why the existence of a provision such as the old Article L. 300-4(2) of the Code de l'urbanisme cannot justify dispensing with a procurement procedure under Directive 93/37. By restricting the group of potential contractors to a small number of legal persons characterised by being either French public entities or by being controlled by them, such a provision automatically prevents contracting authorities from considering foreign contractors as potential suppliers in the context of public development agree-

ments. As a result, it would be impossible to open up the market in respect of a number of important works contracts. This would be at odds with the objective pursued by the directive of abolishing the restrictions on freedom of establishment and freedom to provide services in the field of public works contracts and of ensuring that the markets concerned are opened up to effective competition. [65]

80. Only Article 6 of Directive 92/50 makes it permissible to dispense with a procurement procedure where an entity which is itself a contracting authority is awarded public service contracts in exercise of certain exclusive rights which it enjoys. However, as an exception, that provision must be interpreted restrictively [66] and cannot be transposed by analogy to other procurement directives. [67] Moreover, as far as I am aware, semi-public urban development companies such as SEDL do not in any event have an exclusive right within the meaning of the above provision to design and construct municipal leisure centres.

81. The question whether, under Article 11 of Directive 2004/18, the position might be different in future can remain unanswered in this case because the facts of the main proceedings do not fall within the temporal scope of that directive.

82. The third question should therefore be answered as follows:

A procurement procedure under Directive 93/37 cannot be dispensed with solely because, under national law, the agreement in question can only be concluded with certain legal persons in the first place and those persons would themselves have to carry out procurement procedures if they were to award any follow-up contracts.

65 — See in particular the second and tenth recitals in the preamble to Directive 93/37 and the prohibition on discrimination contained in Article 6(6). See also to the same effect *Commission* v *France* (cited in footnote 15, paragraphs 60, 61 and 68).

66 — On the principle of the restrictive interpretation of exceptions to the principles of procurement law, see *Commission* v *Spain* (cited in footnote 50, paragraph 48), *Stadt Halle and RPL Lochau* (cited in footnote 33, paragraph 46), and *ANAV* (cited in footnote 50, paragraph 26).

67 — See to this effect *Teckal* (cited in footnote 46, paragraph 44) and *Carbotermo* (cited in footnote 31, paragraph 33).

VI — Conclusion

83. In the light of the foregoing considerations, I propose that the Court should give the following answer to the Tribunal administratif de Lyon:

(1) Where one contracting authority engages another contracting authority to design and build, as an urban development measure, a leisure centre only certain parts of which, when constructed, are intended for the first contracting authority, while other parts are to be disposed of by the second contracting authority directly to third parties, although the first contracting authority is to take over the parts not disposed of at the end of the project and to bear the full risk of any losses incurred, then is a public works contract within the meaning of Article 1 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts.

(2) In determining the value of the contract for the purposes of Article 6 of Directive 93/37 as amended by Directive 97/52, regard is to be had to the overall volume of the contract as perceived by the contractor. It is not sufficient to take into account only the price of individual parts of a work which have been transferred to the contracting authority, the value of a financial contribution committed by that authority, and any liability risks which it has assumed.

(3) A procurement procedure under Directive 93/37 cannot be dispensed with solely because, under national law, the agreement in question can only be concluded with certain legal persons in the first place and those persons would themselves have to carry out procurement procedures if they were to award any follow-up contracts.