JUDGMENT OF THE COURT (Fifth Chamber)

10 May 2001 *

In Joined Cases C-223/99 and C-260/99,

REFERENCE to the Court under Article 234 EC by the Tribunale amministrativo regionale per la Lombardia (Italy) for a preliminary ruling in the proceedings pending before that court between

Agorà Srl

and

Ente Autonomo Fiera Internazionale di Milano,

and between

Excelsior Snc di Pedrotti Bruna & C.

and

Ente Autonomo Fiera Internazionale di Milano,

Ciftat soc. coop. arl,

* Language of the case: Italian.

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

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet, D.A.O. Edward, P. Jann (Rapporteur) and L. Sevón, Judges,

Advocate General: S. Alber,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Agorà Srl, by L. Tamos and C. Piana, avvocati,

— Excelsior Snc di Pedrotti Bruna & C., by E. Brambilla, avvocatessa,

— Ente Autonomo Fiera Internazionale di Milano, by M. Bassani and A. Tizzano, avvocati,

— the Commission of the European Communities, by M. Nolin, acting as Agent, and M. Moretto, avvocato,

having regard to the Report for the Hearing,

after hearing the oral observations of Agorà Srl, represented by L. Tamos, Ente Autonomo Fiera Internazionale di Milano, represented by M. Bassani and F. Sciaudone, avvocato, and the Commission, represented by M. Nolin and M. Moretto, at the hearing on 30 November 2000,

after hearing the Opinion of the Advocate General at the sitting on 30 January 2001,

gives the following

Judgment

1 By orders of 26 and 27 November 1998, received at the Court on 10 June and 13 July 1999 respectively, the Tribunale amministrativo regionale (Regional Administrative Court) per la Lombardia referred for a preliminary ruling under Article 234 EC a question on the interpretation of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1, hereinafter 'the Directive').

2 Those questions were raised in proceedings between Agorà Srl (hereinafter 'Agora') and Excelsior Snc di Pedrotti Bruna & C. (hereinafter 'Excelsior'), on the one hand, and the Ente Autonomo Fiera Internazionale di Milano (Governing Board for the Milan International Fair, hereinafter 'Ente Fiera') on the other, concerning, *inter alia*, whether the latter is a body governed by public law for the purposes of the Directive.

Legal background

3 Article 1 of the Directive provides as follows:

'For the purposes of this Directive:

[...]

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

Body governed by public law means any body:

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

— having legal personality and

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

The lists of bodies or of categories of such bodies governed by public law which fulfil the criteria referred to in the second subparagraph of this point are set out in Annex I to Directive 71/305/EEC. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 30(b) of that Directive;

...'

The main proceedings

4 Ente Fiera was founded as a committee at the beginning of the last century and converted into a legal person incorporated under private law in 1922. Article 1 of its articles of association provided, in the version applicable at the time of the facts in the main proceedings, as follows:

'1. The objects of the Ente Autonomo Fiera Internazionale di Milano ... are to carry on and facilitate any activity concerned with the organisation of fairs and

exhibitions and conferences and any other initiative which, by fostering trade relations, promotes the presentation of the production of goods and services and if possible their sale. The Ente is a non-profit-making body and carries on activities in the public interest. Its operations are governed by the principles of the Civil Code.

2. Management of the Ente shall be based on the criteria of performance, efficiency and cost-effectiveness.

3. The Ente may effect any operations not prohibited to it by law or its articles of association, including financial operations, loans and the conclusion of commercial guarantees in respect of movable and immovable property in pursuance of its objects; furthermore, it may form companies or bodies whose objects are similar, related or linked to its own, or acquire stakes or shares in such companies or bodies.'

5 Article 3 of the articles of association, again in the version in force at the time of the facts in the main proceedings, provides that 'the Ente shall pursue the objects for which it was created using the proceeds arising from carrying on its activities, from administration (including special administration) and management of its assets and from contributions by legal or natural persons'.

The factual background to Case C-223/99

6 By a request of 2 December 1997, supplemented on 24 December 1997, Agorà sought disclosure to it by Ente Fiera, under Article 25 of Law No 241 of

7 August 1990 containing new provisions relating to administrative procedure and the right of access to administrative documents (GURI No 192 of 18 August 1990, p. 7), of the documents concerning the award procedure for the hire of fixtures and fittings for reception areas and information points referred to in a notice of tender of 2 August 1997.

7 By decision of 5 January 1998, Ente Fiera refused to disclose those documents on the ground that it was not bound to comply with the requirements of transparency laid down by the public procurement rules.

8 Agorà challenged that decision before the Tribunale amministrativo regionale per la Lombardia which, by judgment of 3 March 1998, upheld its application.

9 Ente Fiera appealed to the Sixth Chamber of the Consiglio di Stato (Council of State) which, by decision of 8 July 1998, found that there was a flaw vitiating the entire procedure at first instance, which led to the case being referred back to the Tribunale amministrativo regionale per la Lombardia.

10 By notice served on 19 October 1998, Agorà repeated its request before that court to be sent the documents and argued, on the question of the applicability to Ente Fiera of the rules on public service contracts, that it would be appropriate to make a reference for a preliminary ruling to the Court of Justice.

11 In its order for reference, the Tribunale amministrativo regionale per la Lombardia states that the question whether the duty to comply with the

requirements of transparency relied on by Agorà applies to Ente Fiera depends on whether that body is classified as a contracting authority. In that regard, it refers first of all to Judgment No 353 of 21 April 1995 of the Consiglio di Stato and to Judgment No 1365 of 17 November 1995 of the Tribunale amministrativo regionale per la Lombardia, both of which found that Ente Fiera is a body governed by public law for the purposes of Article 1(b) of the Directive and, secondly, to Judgment No 1267 of 16 September 1998, in which the Consiglio di Stato reversed the case-law in holding that Ente Fiera carries on an economic activity.

The factual background to Case C-260/99

12 By a notice published in the *Official Journal of the European Communities* of 29 July 1997, Ente Fiera launched a restricted invitation to tender for the provision of cleaning services in respect of its exhibition premises for the period 1 January to 31 December 1998, with the possibility of a two-year extension.

13 Excelsior submitted a tender for consideration in respect of four out of the five lots to which the invitation to tender related. At the end of the procedure, the third lot was awarded to the Miles consortium. However, Ente Fiera subsequently cancelled the contract it had entered into with that consortium, alleging a serious breach of contract. The lot in question was then provisionally awarded to Ciftat soc. coop. arl (hereinafter 'Ciftat') for the period 13 February to 30 June 1998. On 7 March 1998, a fresh invitation to tender was published in the *Official Journal of the European Communities* relating to the third lot for the period 1 July to 31 December 1998, with an option to extend for the periods 1 January to 31 December 1999 and 1 January to 31 December 2000.

14 By applications served on 10 and 11 April 1998, Excelsior challenged before the national court the temporary award to Ciftat of the third lot, and the new invitation to tender relating to that lot published in the *Official Journal of the European Communities* on 7 March 1998.

15 In those circumstances, the Tribunale amministrativo regionale per la Lombardia decided to stay proceedings and refer to the Court of Justice for a preliminary ruling the following question, which is identically worded in both cases:

'May the definition of a body governed by public law contained in Article 1(b) of Directive 92/50/EEC of 18 June 1992 be deemed applicable to the Ente Autonomo Fiera di Milano?'

16 By Order of the President of the Court of Justice of 14 September 1999, Cases C-223/99 and C-260/99 were joined for the purposes of the written and oral procedure and the judgment.

Admissibility of the request for a preliminary ruling in Case C-223/99

17 Ente Fiera argues, first of all, that the question referred to the Court in Case C-223/99 is inadmissible because the main proceedings concern the applicability of the Italian legislation on transparency and not the public procurement rules. Thus, whether Ente Fiera is classed as a body governed by public law is irrelevant to the main proceedings which relate to the right of access to administrative documents.

18 In that connection, it is settled case-law that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, 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. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59).

19 In this case, the national court clearly indicated that an interpretation of Article 1(b) of the Directive is necessary in order to enable it to decide whether Ente Fiera is bound to comply with the national rules on transparency to which the main proceedings relate.

20 The Court may not decline to give a ruling on a question referred to it by a national court unless it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, *Bosman*, cited above, paragraph 61).

21 It follows that the reference for a preliminary ruling in Case C-223/99 is admissible.

The question referred

22 It must first of all be observed that the question referred, as formulated by the national court, concerns the definition of a body governed by public law for the purposes of Article 1(b) of the Directive as applied to a particular body, namely Ente Fiera.

23 It must be borne in mind that it is for the national court, by virtue of the division of functions provided for by Article 234 EC, to apply the rules of Community law, as interpreted by the Court, to a specific case (Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraph 11, and Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 31).

24 However, it is for the Court to extract from all the information provided by the national court, and in particular the grounds of the order for reference, the points of Community law which require interpretation, having regard to the subject-matter of the proceedings (Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9).

25 It must first of all be observed, therefore, that the question relates to the interpretation of the second subparagraph of Article 1(b) of the Directive, which provides that a body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, with legal personality and closely dependent on the State, regional or local authorities or other bodies governed by public law.

26 In that regard, it should be noted that the three conditions set out in that provision are cumulative (Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraph 21).

27 Secondly, it is apparent from the two orders for reference that the national court considers that Ente Fiera in any event satisfies two of those three conditions, and that it is uncertain only as to whether the Ente was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.

28 It also appears from Article 1 of its articles of association that Ente Fiera's objects are to carry on and facilitate any activity concerned with the organisation of fairs and exhibitions, conferences and any other initiative which, by fostering trade relations, promotes the presentation of the production of goods and services and, if possible, their sale.

29 As the Commission states, this activity is pursued at international level by a number of different operators established in large cities in the various Member States who are in competition with each other.

30 In addition, although Ente Fiera is a non-profit-making organisation, it is managed according to the criteria of performance, efficiency and cost-effectiveness.

31 It follows from the foregoing that the question referred for a preliminary ruling must be understood as asking essentially whether a body whose object is to carry on activities relating to the organisation of fairs, exhibitions and other similar initiatives, which is non-profit-making, but managed according to the criteria of performance, efficiency and cost-effectiveness, and which operates in a competitive environment, meets needs in the general interest, not having an industrial or commercial character within the meaning of the first indent of the second subparagraph of Article 1(b) of the Directive.

32 In order to reply to the question thus reformulated, it must be borne in mind that the Court has already held that the second subparagraph of Article 1(b) of Directive 92/50 draws a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character (Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraph 36).

33 In that regard, it is clear, first of all, that activities relating to the organisation of fairs, exhibitions and other similar initiatives meet needs in the general interest.

34 An organiser of such events, in bringing together manufacturers and traders in one geographical location, is not acting solely in the individual interest of those manufacturers and traders, who are thereby afforded an opportunity to promote their goods and merchandise, but is also providing consumers who attend the events with information that enables them to make choices in optimum conditions. The stimulus to trade which results may be considered to fall within the general interest.

35 Secondly, the question arises whether, in the light of the information on the file, the needs in question are lacking an industrial or commercial character.

36 In that regard, it is useful to refer to the list of bodies governed by public law contained in Annex I to Directive 71/305/EEC of the Council of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as amended by Council Directive 93/37/EEC of 14 June 1993 (OJ 1993 L 199, p. 54), to which Article 1(b) of Directive 92/50 refers. Though not exhaustive, that list is intended to be as complete as possible.

37 Analysis of the list reveals that the needs in question are generally, first, those which are met otherwise than by the availability of goods or services in the market place and, secondly, those which, for reasons associated with the general interest, the State itself chooses to provide or over which it wishes to retain a decisive influence (see to that effect *BFI Holding*, cited above, paragraphs 50 and 51).

38 Furthermore, although the Court has held that the term 'needs in the general interest, not having an industrial or commercial character' does not exclude needs which are or can be satisfied by private undertakings as well (*BFI Holding*, cited above, paragraph 53), it has also found that the existence of significant competition, and in particular the fact that the entity concerned is faced with competition in the market place, may be indicative of the absence of a need in the general interest, not having an industrial or commercial character (*BFI Holding*, cited above, paragraph 49).

39 It must first of all be observed that the organisation of fairs, exhibitions and other similar initiatives is an economic activity which involves offering services on the market place. In this case, it is clear from the file that the body in question provides such services to exhibitors in consideration for payment. By its activity, it meets the commercial needs of, first of all, exhibitors who benefit from being able to promote the goods or services which they exhibit, and, on the other hand, visitors who wish to gather information with a view to making purchasing decisions.

40 Next, even if the body in question is non-profit-making, it does operate, as it clear from Article 1 of its articles of association, according to criteria of performance, efficiency and cost-effectiveness. Since there is no mechanism for offsetting any financial losses, it bears the economic risk of its activities itself.

41 Furthermore, the Commission's interpretative communication concerning the application of the Single Market rules to the sector of fairs and exhibitions (OJ 1998 C 143, p. 2) also gives an indication serving to confirm that holding fairs and exhibitions constitutes an industrial or commercial activity. That communication is intended, *inter alia*, to explain the manner in which freedom of establishment and the free movement of services benefit the organisers of fairs and exhibitions. It is clear that this does not involve needs which the State generally chooses to meet itself or over which it wishes to retain a decisive influence.

42 Lastly, the fact that a body such as that in issue in the main proceedings operates in a competitive environment — which it is for the national court to verify, having regard to all its activities at the international, national and regional levels — tends to confirm the view that the activity of organising fairs and exhibitions does not meet the criterion laid down by the first indent of the second subparagraph of Article 1(b) of the Directive.

43 The answer to the question referred must therefore be that a body

— whose object is to carry on activities relating to the organisation of fairs, exhibitions and other similar initiatives;

— which is non-profit-making but is managed according to the criteria of performance, efficiency and cost-effectiveness; and

— which operates in a competitive environment

does not constitute a body governed by public law for the purposes of the second subparagraph of Article 1(b) of the Directive.

Costs

44 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Tribunale amministrativo regionale per la Lombardia by orders of 26 and 27 November 1998, hereby rules:

A body

— whose object is to carry on activities relating to the organisation of fairs, exhibitions and other similar initiatives;

— which is non-profit-making but is administered according to the criteria of performance, efficiency and cost-effectiveness; and

— which operates in a competitive environment

does not constitute a body governed by public law for the purposes of the second subparagraph of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 10 May 2001.

R. Grass A. La Pergola

Registrar President of the Fifth Chamber