OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 21 April 2005 [1]

I — Introduction

1. In this case the Commission claims that the Court should declare that the Republic of Austria has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, [2] in that the award of a waste disposal contract entered into by the town of Mödling failed to comply with the procedural and advertising rules laid down in Article 8, in conjunction with Article 11(1) and Article 15(2), of that directive.

1 — Original language: Dutch.

2 — OJ 1992 L 209, p. 1.

II — Legal background

A — *Relevant provisions of the directive*

2. The Commission alleges failure to fulfil obligations under Article 8, in conjunction with Article 11(1) and Article 15(2) of the directive. The definitions contained in Article 1(a), (b) and (c) are also relevant here.

3. Under Article 1(a) of Directive 92/50, 'public service contracts' are to mean 'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority ... .' Under Article 1(b) of that directive, 'contracting authorities' are to 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

...'. Finally, Article 1(c) defines 'service provider' as 'any natural or legal person, including a public body, which offers services ... .'

4. Article 8 of Directive 92/50 provides: 'Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.' These provisions essentially contain the rules on calls for competition and advertising. Under Article 11(1) of Directive 92/50, '[i]n awarding public service contracts, contracting authorities shall apply the procedures defined in Article 1(d), (e) and (f), adapted for the purposes of this directive.' The procedures referred to in these provisions are 'open procedures', 'restricted procedures' and 'negotiated procedures'. Article 15(2) of Directive 92/50 provides that '[c]ontracting authorities who wish to award a public service contract by open, restricted or, under the conditions laid down in Article 11, negotiated procedure, shall make known their intention by means of a notice.'

5. Category 16 of Annex I A to the directive covers '[s]ewage and waste disposal services; sanitation and similar services.'

B — *National provisions*

6. Paragraph 9(3) of the Law on Waste Management of Lower Austria ('the regional law on waste') provides that the municipalities of Lower Austria must ensure that waste is collected and treated and must set up or make available facilities, having regard to the provisions of this law. Under Paragraph 11 of this law, each municipality must ensure that a waste service is provided and functions properly.

III — Facts

7. On 21 May 1999 the municipality of Mödling decided to use an independent body to carry out its statutory duties relating to waste management. A company, AbfallwirtschaftsGmbH ('AbfallGmbH'), was incorporated for this purpose. The minutes of the municipal council meeting state that all the shares in the undertaking are in principle to be held by the municipality of Mödling. The object of AbfallGmbH is to supply services relating to ecological waste management and to engage in related commercial transactions, primarily relating to waste disposal, which include the drafting and development of a waste management plan, primarily for the municipality of Mödling.

8. On 16 June 1999 the instrument of incorporation was drawn up. The whole of the company's share capital was held by one member, namely the municipality of Mödling.

9. On 25 June 1999, the municipality of Mödling decided to transfer to AbfallGmbH responsibility for waste management in the municipality in accordance with the regional law on waste, the federal law on waste management, and the municipal regulations on waste management. The municipality of Mödling also gave it an option to take over contracts relating to waste treatment which had not yet expired at that time. A lease concluded between the municipality of Mödling and AbfallGmbH provided for the equipment and personnel necessary for the treatment of waste.

10. The waste disposal contract, under which the municipality of Mödling transferred exclusive responsibility for the collection and treatment of waste to AbfallGmbH, was entered into on 15 September 1999. The contract was entered into for an unlimited period and came into force with retrospective effect from 1 July 1999. The contract stipulates that the municipality of Mödling is to pay to AbfallGmbH remuneration which consists of a fixed amount per dustbin or container by way of payment for collecting and treating waste, large objects, refuse, biologically degradable waste and hazardous substances. Furthermore, AbfallGmbH entered into no contracts with other municipalities or associations of municipalities. However, the waste transfer centre of the municipality of Mödling does carry out work for other private-law waste disposal companies relating to the transportation and compacting of household waste.

11. On 15 September 1999 the lease relating to the equipment and personnel necessary for the treatment of waste also entered into force for an unlimited period and with retrospective effect from 1 July 1999. AbfallGmbH is required to employ the personnel appointed by the municipality in accordance with the conditions applicable to seconded personnel. The contract states that the municipality of Mödling has transferred to AbfallGmbH the right to issue instructions to the personnel.

12. On 1 October 1999 the municipal council of Mödling decided that the municipality, as sole member of AbfallGmbH, should transfer 49% of its shares in the company to a private undertaking, namely Saubermacher Dienstleistungs Aktiengesellschaft ('Saubermacher AG'). The minutes of the meeting of 1 October 1999 stated that following the decision of the municipal council on 25 June 1999 a series of talks were held with undertakings, primarily Saubermacher AG, which were interested in acquiring a holding. The companies' proposals were finally submitted to KPMG which identified the Saubermacher AG

proposal as the one which guaranteed best operation.

13. On 6 October 1999 the instrument of incorporation was amended so that the vast majority of decisions could be adopted by a simple majority. In addition, the quorum for the general assembly was set at 51% of the share capital. The undertaking is represented in respect of internal and external relations by at least two managing directors who are jointly authorised to sign.

14. On 13 October 1999 the municipality of Mödling transferred 49% of its shares to Saubermacher AG by means of a transfer agreement.

15. AbfallGmbH became operational as from 1 December 1999, that is to say after Saubermacher AG had acquired its shares in this undertaking.

16. From 1 December 1999 to 31 March 2000 AbfallGmbH worked exclusively for the municipality of Mödling. After the waste transfer centre had been commissioned, it also worked for third parties. In the first financial year beginning 1 April 2000 AbfallGmbH's work for the municipality of Mödling accounted for 70 to 80% of its turnover.

IV — Pre-litigation procedure

17. On 20 March 2002 the Commission sent a letter of formal notice to the Republic of Austria contending that the municipality of Mödling had not arranged a call for tenders for the waste collection and treatment contract despite the fact that it was a public service contract which came within the scope of Directive 92/50. By letter of 23 June 2002 the Republic of Austria disputed this contention. It takes the view that the award of the waste collection and treatment contract to AbfallGmbH does not come under the directives on public contracts because in legal terms it involves a so-called 'in-house' transaction.

18. Since it deemed this reply unsatisfactory, the Commission sent the Republic of Austria a reasoned opinion on 3 April 2003. Since in its reply to the reasoned opinion the Republic of Austria merely reiterated the arguments which it put forward in its reply to the letter of formal notice, the Commission brought the present action on 28 January 2004.

19. The Commission claims that the Court should:

— declare that the Republic of Austria has failed to fulfil its obligations under

Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, in that award of the waste disposal contract entered into by the town of Mödling failed to comply with the procedural and advertising rules laid down in Article 8, in conjunction with Article 11(1) and Article 15(2), of that directive;

— order the Republic of Austria to pay the costs.

20. The Republic of Austria contends that the action should be dismissed as inadmissible and, in the alternative, as unfounded.

V — Arguments of the parties and appraisal

A — *Admissibility*

1. Views of the parties

21. In its defence the Republic of Austria disputes the admissibility of the action. It claims that the Commission firstly failed to set out clearly why it regards the conclusion of the waste disposal contract as an infringement of Directive 92/50. Consequently, it failed to observe the principle that the subject-matter of an action must be set out clearly. Thus, the Commission failed to appreciate the purpose of the pre-litigation procedure, namely to give the Member State concerned an opportunity to defend itself. Secondly, the Commission infringed the basic rule that evidence of failure to fulfil obligations must be furnished. Thirdly, the action brought by the Commission rested on an incorrect legal basis.

22. In the view of the Austrian Government, the events which led to the award of the contract to AbfallGmbH must be assessed independently of one another. If such an assessment is made, it leads to the conclusion that Directive 92/50 is not applicable. The first stage — the incorporation of AbfallGmbH, which is 100%-owned by the municipality of Mödling — is not an act which comes within the scope of the provisions on the award of public contracts. The second stage too — the conclusion of the waste disposal contract between the municipality of Mödling and AbfallGmbH — does not constitute an infringement of Directive 92/50 since it involves a so-called 'in-house' transaction. The third stage — the sale of 49% of the shares in AbfallGmbH by the municipality of Mödling to a private company — likewise does not come within the scope of provisions on the award of

public contracts. Therefore, in the present case there is no infringement of Directive 92/50 and the award of the contract to AbfallGmbH should have been examined directly in the light of the provisions of the EC Treaty (the provisions on aid).

23. The Commission could have demonstrated an infringement of Directive 92/50 only if it had taken as a basis one of the following two premisses, namely either that the various stages which led to the incorporation of AbfallGmbH and subsequently to the acquisition by a private party of a holding in AbfallGmbH had de facto been chosen so as to circumvent application of Directive 92/50, or that the share sale conceals the award to a private party of a contract which should be classified as a public contract. However, the Commission has at no point made any statement regarding these premisses.

24. Furthermore, at no point in the pre-litigation procedure did the Commission state that it considered that the award of the waste disposal contract, on the one hand, and the transfer of 49% of the shares and the amendment to the statutes, on the other, constituted the same act. Moreover, the Commission furnished no evidence in support of its pleas and in particular did not demonstrate that the municipality of Mödling sought to circumvent the law. Finally, it raised this complaint for the first time in its reply.

25. The Commission disputes the view of the Austrian Government. It considers that the award of the waste disposal contract to AbfallGmbH with the acquisition of a holding by Saubermacher AG cannot be divided artificially into three stages. In this respect it recalls that in its letter of formal notice (point 13) it stated that the award of the contract to AbfallGmbH, which was initially 100%-owned by the municipality of Mödling, was merely a transitional stage in creating a semi-public undertaking following the transfer of 49% of the shares to a private undertaking. This is clear from the fact that following the municipal council meeting on 25 June 1999 talks were held with undertakings interested in acquiring a holding. The brief period between the conclusion of the contract with AbfallGmbH and the decision to transfer the shares — two weeks — showed that the intention of the municipality of Mödling was from the outset to entrust the service to an undertaking in which a private undertaking held a large number of shares. Therefore, the Austrian Government cannot claim that it was unaware of the subject-matter of the action.

2. Appraisal

26. According to the Court's settled case-law, the Commission must indicate, in any application made under Article 226 EC, the specific complaints on which the Court is asked to rule and, at the very least in

summary form, the legal and factual particulars on which those complaints are based.

27. Like the formal notice addressed by the Commission to the Member State, and like the reasoned opinion issued by the Commission, which defines the subject-matter of the dispute, the application must enable the Member State concerned to put forward its defence and to contest all of the complaints raised against it by the Commission.

28. That case-law precludes infringement proceedings from being initiated by an application that prejudices the rights of the defence, because the complaints raised are insufficiently precise, or for lack of legal or factual reasons. [3]

29. In this case the Commission set out clearly in the pre-litigation procedure why it considers that the Austrian Government failed to comply with the procedural rules laid down in Directive 92/50 in concluding the waste disposal contract. It examined in great depth the factual circumstances which led to the award of the waste disposal contract and the legal grounds on which it based the infringement.

3 — See, inter alia, Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 55; and Case C-340/96 *Commission* v *United Kingdom* [1999] ECR I-2023, paragraph 36.

30. In particular the Commission deduced from the facts relating to the conclusion of the contract and the circumstances under which Saubermacher AG acquired a holding in AbfallGmbH that in this case there was a contract to which Directive 92/50 applied. Therefore, the subject-matter of the action was adequately defined.

31. Consequently, the Austrian Government's complaint that the Commission failed to define the subject-matter of the action is unfounded.

32. The Austrian Government's other complaints regarding admissibility are of a substantive nature. I will examine them in my appraisal of the substance of the action below.

33. It follows from the foregoing that the Austrian Government's objection of inadmissibility must be dismissed.

B — *Substance*

1. Views of the parties

34. In its application the Commission observes that the municipality of Mödling

must, in its capacity as a local authority, be regarded as a contracting authority within the meaning of Article 1(b) of Directive 92/50. Waste disposal is a service which comes within Category 16 of Annex I A to the directive. Therefore, the contract to supply this service must be awarded in accordance with the provisions of Titles III to VI. In addition, the waste disposal contract exceeds the threshold of 200 000 special drawing rights (SDRs), as provided in Article 7(1)(a)(ii) of Directive 92/50, as amended by Article 1(1) of 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. [4] Consequently, the rules on procedure laid down in Article 11(1) and the rules on advertising laid down in Article 15(2) of Directive 92/50 are applicable in their entirety.

35. In the present case the Commission takes the view that there is no internal relationship between the municipality of Mödling and AbfallGmbH. In support of this view it refers to the judgment in *Teckal*. [5] In that judgment the Court held that the directives on the award of public contracts do not apply in the case where 'the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments.' Where a contracting authority did not intend to entrust the tasks assigned to it to a third party but merely to redistribute those tasks internally, the directives on the award of public service are not applicable. However, as soon as a private undertaking holds shares in the contractor, the contracting authority is no longer able to exercise a control which is similar to that which it exercises over its own departments. A minority holding of a private undertaking is sufficient to rule out the existence of an internal relationship.

36. The Commission contends, furthermore, that Saubermacher AG's minority holding means that this undertaking has acquired considerable rights of veto and the power to appoint one of the two managing directors having identical rights:

— Saubermacher AG enjoys a right of veto over important decisions concerning AbfallGmbH, such as increasing or reducing the share capital, amending its object as defined in its statutes, merging or selling shares, or splitting shares in the company;

— by appointing one of the two managing directors, Saubermacher AG exercises influence over AbfallGmbH since the two managing directors jointly manage and represent the undertaking in its internal and external relations and are

4 — OJ 1997 L 328, p. 1.

5 — See Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50.

jointly authorised to sign. Furthermore, the operational activities of the managing directors do not require prior decisions of the general assembly.

37. The Austrian Government takes the view that the conclusion of the waste disposal contract with AbfallGmbH does not fall within the scope of Directive 92/50/EEC because it involves a so-called 'in-house' transaction. In its view, the holding of a private person in an undertaking does not mean that there can be no internal relationship. The decisive element is the 'degree of autonomy' of the contractual partner, that is to say AbfallGmbH, and not the possible influence of a private partner within that undertaking. In the present case AbfallGmbH did not and does not have autonomous decision-making powers, either at the time the contract was entered into or at present.

38. In the view of the Austrian Government, the contract concluded between the contracting authority and the service provider is not really a contract at all for the purposes of Article 1(a) of Directive 92/50 since the contracting authority is able to influence the way in which the service provider operates and the latter consequently lacks autonomy. [6]

39. Moreover, the requirement laid down in *Teckal*, [7] namely 'exercising a control which is similar to that which a local authority exercises over its own departments', requires comparable and not identical control. A global assessment of the legal and factual circumstances is necessary to ascertain whether or not there is comparable control. When all the relevant factors are taken into account, it is clear that the municipality of Mödling is able to exercise such 'comparable' control even after the transfer of 49% of the shares. In this respect the following factors are relevant:

— because it has the majority of votes in the general assembly the municipality of Mödling is able at any time to rescind the waste disposal contract with AbfallGmbH or to dissolve AbfallGmbH itself;

— the operations of AbfallGmbH can be determined in any respect by the municipality of Mödling alone since the two managing directors are subject to the limits laid down by the general assembly;

6 — See also the Opinion of Advocate General Léger in Case C-94/99 *ARGE* [2000] ECR I-11037, point 59.

7 — Cited in footnote 5 above.

— under the agreement determining the legal relationship between the parties, all decisions on the operations of AbfallGmbH can be taken by a simple majority (that is to say by the municipality of Mödling alone);

— by virtue of the simple majority of shares and voting rights which it possesses the municipality of Mödling can at any time and without giving reasons remove the managing director of AbfallGmbH from his post and also remove the managing director proposed by the private undertaking from his post. In addition, it can also decide at the general assembly to reduce the remuneration of the managing directors.

40. In the reply the Commission dismisses the Austrian Government's view that it is necessary to ascertain whether or not there is an internal control relationship on a case-by-case basis and having regard to all the circumstances. Such an examination would lead to legal uncertainty as regards the applicability of Community directives relating to public contracts. On the other hand, the scope of Directive 92/50 can be defined simply and predictably by the criterion applied by the Commission, that is to say the influence of a third party on the contractor.

2. Appraisal

41. In order to determine whether the present action brought by the Commission is well founded, the following two questions must be examined:

(a) must AbfallGmbH, in which Saubermacher holds 49% of the shares, be regarded as a legal entity which, although it has, in legal terms, been hived off as a separate legal person, remains an integral part of the organisation which the municipality of Mödling has to perform its public duties, including the disposal of waste? If the answer to this question is in the affirmative, the waste disposal contract given to AbfallGmbH by the municipality of Mödling must be regarded as a contract awarded within the organisation of the municipality. In that case there is no contract to which the rules on the award of contracts laid down in Directive 92/50 would apply;

(b) and, if it is assumed that AbfallGmbH in its present legal form, that is to say with the acquisition of a holding by Saubermacher AG and the provisions of the statutes and the law applicable thereto,

must be regarded as an entity outside the organisation of the municipality of Mödling, is there proper compliance with the relevant provisions of Directive 92/50?

42. As I have explained above, the action brought by the Commission raises the question of what is to be understood by a contract which is not awarded within a local authority's power structure. According to settled case-law, Directive 92/50 is applicable where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary interest. [8] It therefore follows that a contractor is not regarded as coming under the same power structure as the contracting authority where it is legally distinct from it. However, even where the contractor is an entity legally distinct from the contracting authority, there may be other circumstances in which a call for tenders is not mandatory. [9] In this respect *Teckal* provides two cumulative criteria which are used to ascertain whether or not there is an internal power structure. This is the case where the criterion is satisfied that 'the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities'. [10]

43. In the abovementioned *Teckal* judgment the distinct body was fully owned by a public corporation. The judgment in *Stadt Halle*, [11] which was given after the written procedure in the present case had ended, related to whether a contracting authority could exercise over a so-called 'semi-public company', that is to say a company in which private companies also have a holding, a control which is similar to that which it exercises over its own departments. The Court ruled that 'the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments.'

44. In that case one of the factors on the basis of which the Court reached its judgment was the fact that the award of a public contract to a semi-public company without calling for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, in particular in that such a procedure would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors. [12]

8 — See *ARGE*, cited in footnote 6 above, paragraph 40, and *Teckal*, cited in footnote 5 above.

9 — See Case C-26/03 *Stadt Halle* [2005] ECR I-1, paragraph 49.

10 — See *Teckal*, cited in footnote 5 above

11 — See *Stadt Halle*, cited in footnote 9 above.

12 — *Stadt Halle*, cited in footnote 9 above.

45. In brief, a legal entity which has been hived off, in legal terms, as a separate legal person cannot be regarded as forming part of a contracting authority where a private undertaking also has a capital presence in that undertaking.

46. The following is clear from the facts set out in points 7 to 16 above and the information taken from the statutes which was cited by the Commission and has gone unchallenged, as reproduced in point 36 above:

— Saubermacher AG has a share holding of 49% in AbfallGmbH;

— attached to this holding is the right to appoint one of the managing directors;

— these directors are responsible for the business operations of AbfallGmbH;

— a qualified majority of the general assembly of shareholders is necessary for important decisions concerning the structure and organisation of the undertaking.

47. On the basis of these facts it is justified to conclude that the relationship between the municipality of Mödling and AbfallGmbH is not an internal relationship in which the municipality of Mödling can exercise control which is similar to that which it exercises over its own departments. This finding is not altered by the fact that the municipality can decide to end its cooperative link with Saubermacher AG. However, in this respect it is bound by the general and specific rules of national law on natural and legal persons which govern relations between parties working together in a company, which means that it must in any event take account of the legitimate interests of Saubermacher AG. It seems unlikely that Saubermacher AG would have been prepared, by taking a — considerable — interest in AbfallGmbH, to establish a cooperative link with the municipality of Mödling, as another major shareholder, if the continuity of that cooperative link were entirely at the discretion of the municipality.

48. In the present case the conversion of an internal department of the municipality of Mödling into a private undertaking cannot be regarded as an 'in-house' transaction in view of the hiving-off process and the activity of AbfallGmbH itself.

49. Immediately after AbfallGmbH had been incorporated by the municipality of Mödling on 16 June 1999, it started, following the

decision of the municipal council of 25 June, to look for a private partner for the undertaking that had been set up. With Saubermacher AG's involvement the municipality of Mödling acquired the expertise necessary for the commercial operation of AbfallGmbH.

50. This interpretation of the facts is further confirmed by the following facts:

— a start was made on implementing the waste disposal contract between the municipality of Mödling and AbfallGmbH only after Saubermacher AG had acquired a holding in AbfallGmbH;

— third parties account for 20 to 30% of AbfallGmbH's operations (see point 16 above).

51. Since AbfallGmbH, in its present legal form, that is to say with the acquisition of a holding by Saubermacher AG and the provisions of the statutes and the law applicable thereto, must be regarded as an entity outside the organisation of the municipality of Mödling, it is necessary to examine whether the waste disposal contract, by which the municipality of Mödling transferred responsibility for the collection and treatment of waste exclusively to AbfallGmbH, comes within the scope of Directive 92/50 and whether there has been proper compliance with the relevant provisions.

52. I would observe first of all that the municipality of Mödling is a local authority. Moreover, this fact is not contested by the Austrian Government. Article 1(b) of Directive 92/50 provides that contracting authorities are to 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. As a local authority, the municipality of Mödling is, therefore, a contracting authority and comes within the scope ratione personae of the directive.

53. Secondly, the services which form the subject-matter of the relationship at issue come within the scope of the directive. Annex I A to the directive lists among the categories of services referred to therein Category 16 relating to '[s]ewage and waste disposal services; sanitation and similar services'. As regards the specific content of the services, Annex I A refers to the CPC reference number (Central Product Classification of the United Nations) which is indicated alongside the category in question. The core operations of AbfallGmbH comprise the collection and treatment of waste, large objects, refuse, biologically degradable waste and hazardous substances. Therefore,

it follows that AbfallGmbH's core operations are among the services listed in Annex I A to the directive and that the provisions of the directive are applicable thereto.

54. The next aspect which must be examined is the nature of the relationship between the municipality of Mödling and AbfallGmbH. The eighth recital in the preamble states 'the provision of services is covered by this directive only in so far as it is based on contracts; ... the provision of services on other bases, such as law or regulations, or employment contracts, is not covered.' Article 1(a) provides a definition of the term 'public services contract' for the purposes of the directive, namely 'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority.'

55. In order to be able to describe the relationship as a public contract, it is necessary to examine whether the contract was concluded in the form of a contract and whether a monetary consideration was agreed. This is so in the present case. It is an undisputed fact that the waste disposal contract, by which the municipality of Mödling transferred responsibility for waste collection and treatment exclusively to AbfallGmbH, provides that the municipality of Mödling is to pay remuneration to AbfallGmbH which consists of a fixed amount per dustbin or container by way of payment for collecting and treating waste.

56. In addition, the two legal persons which have entered into the contract must be legally distinct from one another, otherwise there is an 'in-house' service. I stated earlier in points 46 to 50, that AbfallGmbH must not be regarded as an internal department of the municipality of Mödling either in law or in fact.

57. The fact that the decision to enter into a contract between the municipality of Mödling and AbfallGmbH was adopted while AbfallGmbH was still fully owned by the municipality of Mödling does not alter the finding that the public contract concerned should, under Article 8, in conjunction with Article 11(1) and Article 15(2) of the directive, have been awarded in accordance with the provisions of Titles III to VI thereof. The certainty that AbfallGmbH would gain the contract from the municipality of Mödling made the acquisition of a holding in that undertaking attractive to a private tenderer. However, such forms of external hiving-off in which the hived-off entity is made appealing

to private tenderers by means of a contract for an unlimited period acquired in advance by way of a 'dowry' may not undermine the effectiveness of Directive 92/50. The directive is also applicable to such arrangements.

58. In the light of the foregoing I conclude that the Commission has demonstrated an infringement of Article 8 of the directive, in conjunction with Article 11(1) and Article 15 (2) thereof.

VI — Conclusion

59. On the basis of the foregoing I propose that the Court should:

— declare that, by virtue of the fact that the award of the waste disposal contract entered into by the town of Mödling failed to comply with the procedural and advertising rules laid down in Article 8, in conjunction with Article 11(1) and Article 15(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, the Republic of Austria has failed to fulfil its obligations under that directive;

— order the Republic of Austria to pay the costs.