JUDGMENT OF THE COURT (Grand Chamber)

15 July 2010 *

In Case C-271/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 24 June 2008,

European Commission, represented by G. Wilms and D. Kukovec, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by M. Lumma and N. Graf Vitzthum, acting as Agents,

defendant,

* Language of the case: German.

supported by:

Kingdom of Denmark, represented by B. Weis Fogh and C. Pilgaard Zinglersen, acting as Agents,

Kingdom of Sweden, represented by A. Falk and A. Engman, acting as Agents,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts (Rapporteur), J.-C. Bonichot and C. Toader, Presidents of Chambers, K. Schiemann, P. Kūris, E. Juhász, G. Arestis, T. von Danwitz, A. Arabadjiev and J.-J. Kasel, Judges,

Advocate General: V. Trstenjak,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 12 January 2010,

after hearing the Opinion of the Advocate General at the sitting on 14 April 2010,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, because local authorities and local authority undertakings having more than 1 218 employees have awarded service contracts in respect of occupational old-age pensions directly, without a call for tenders at European Union level, to bodies and undertakings referred to in Paragraph 6 of the Collective agreement on the conversion, for local authority employees, of earnings into pension savings (Tarifvertrag zur Entgeltungwandlung für Arbeitnehmer im kommunalen öffentlichen Dienst; 'the TV-EUmw/VKA'), the Federal Republic of Germany has failed to fulfil its obligations, until 31 January 2006 under Article 8, in conjunction with Titles III to VI, 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) and since 1 February 2006 under Article 20, in conjunction with Articles 23 to 55, of 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).

2 In its reply, the Commission redefined the subject-matter of its action by requesting the Court to find a failure to fulfil those obligations because local authorities and local authority undertakings which had more than 2 044 employees, in 2004 and 2005, more than 1 827 employees, in 2006 and 2007, and more than 1 783 employees, in the period from 2008, awarded such contracts directly, without a call for tenders at European Union level, to bodies and undertakings referred to in Paragraph 6 of the TV-EUmw/VKA.

3 At the hearing, the Commission redefined the subject-matter of its action by requesting the Court to find the failure to fulfil its obligations because local authorities and local authority undertakings which had more than 2 697 employees, in 2004 and 2005, and more than 2 402 employees, in 2006 and 2007, had awarded such contracts.

Legal context

European Union law

Directive 92/50

4 The eighth recital in the preamble to Directive 92/50 states that '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'.

5 Under Article 1(a)(viii) of Directive 92/50, 'public service contracts' is to mean, for the purposes of the directive, 'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority', to the exclusion, inter alia, of 'employment contracts'.

6 Article 1(b) of Directive 92/50 provides:

'*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.

…'

7 Article 7(1), (4) and (5) of Directive 92/50 provides:

'1. (a) This Directive shall apply to:

…

— public service contracts concerning the services referred to in Annex I A …:

…

(ii) awarded by the contracting authorities listed in Article 1(b) other than those referred to in Annex I to [Council] Directive 93/36/EEC [of 14 June 1993 coordinating procedures for the award of public

supply contracts (OJ 1993 L 199, p. 1)] and where the estimated value net of VAT is not less than the equivalent in ecus of 200 000 [special drawing rights (SDRs)].

…

4. For the purposes of calculating the estimated contract value for the following types of services, account shall be taken, where appropriate:

— as regards insurance services, of the premium payable,

…

5. In the case of contracts which do not specify a total price, the basis for calculating the estimated contract value shall be:

— in the case of fixed-term contracts, where their term is 48 months or less, the total contract value for its duration;

— in the case of contracts of indefinite duration or with a term of more than 48 months, the monthly instalment multiplied by 48.'

8 German local authorities and local authority undertakings are not referred to in Annex I to Directive 93/36.

9 Under Article 8 of Directive 92/50, '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'.

10 The titles referred to in Article 8 of Directive 92/50 concern the choice of award procedures and rules governing design contests (Title III), common rules in the technical field (Title IV), common advertising rules (Title V) and common rules on participation, criteria for qualitative selection and criteria for the award of contracts (Title VI).

11 The 'services within the meaning of Article 8' that are listed in Annex I A to Directive 92/50 include, in Category No 6, 'financial services', which comprise, in Category No 6(a), 'insurance services' and, in Category No 6(b), 'banking and investment services'.

Directive 2004/18

12 Recital 28 in the preamble to Directive 2004/18 states:

'Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration in society. In this context, sheltered workshops

and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States may reserve the right to participate in award procedures for public contracts to such workshops or reserve performance of contracts to the context of sheltered employment programmes.'

13 Article 1(2)(a) and (d) of Directive 2004/18 defines 'public contracts' as 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive', and 'public service contracts' as 'public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II'.

14 Article 1(5) of Directive 2004/18 defines 'framework agreement' as 'an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged'.

15 Directive 2004/18 includes, in Article 1(9), a definition of 'contracting authorities' largely corresponding to the definition in Article 1(b) of Directive 92/50.

16 Article 7(b) of Directive 2004/18 states that the directive is to apply to public service contracts which have a value exclusive of value added tax ('VAT') estimated to be equal to or greater than EUR 249 000. This amount was successively reduced to EUR 236 000 by Commission Regulation (EC) No 1874/2004 of 28 October 2004

amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2004 L 326, p. 17) and then to EUR 211 000 by Commission Regulation (EC) No 2083/2005 of 19 December 2005 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2005 L 333, p. 28).

17 Article 9(1), (8) and (9) of Directive 2004/18 provides:

'1. The calculation of the estimated value of a public contract shall be based on the total amount payable, net of VAT, as estimated by the contracting authority. This calculation shall take account of the estimated total amount, including any form of option and any renewals of the contract.

…

8. With regard to public service contracts, the value to be taken as a basis for calculating the estimated contract value shall, where appropriate, be the following:

(a) for the following types of services:

(i) insurance services: the premium payable and other forms of remuneration;

…

(b) for service contracts which do not indicate a total price:

(i) in the case of fixed-term contracts, if that term is less than or equal to 48 months: the total value for their full term;

(ii) in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48.

9. With regard to framework agreements …, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement ...'

18 By virtue of Article 16(e), Directive 2004/18 is not to apply 'to public service contracts for … employment contracts'.

19 As provided in Article 20 of Directive 2004/18, 'contracts which have as their object services listed in Annex II A shall be awarded in accordance with Articles 23 to 55'.

20 Articles 23 to 55 of Directive 2004/18 set out, in turn, specific rules governing specifications and contract documents (Articles 23 to 27), rules relating to the procedures (Articles 28 to 34), rules on advertising and transparency (Articles 35 to 43) and rules relating to the conduct of the procedure (Articles 44 to 55).

21 The services listed in Annex II A to Directive 2004/18 include, in Category No 6, 'financial services', which comprise, in Category No 6(a), 'insurance services' and, in Category No 6(b), 'banking and investment services'.

22 The list of bodies and categories of bodies governed by public law as referred to in the second subparagraph of Article 1(9) of Directive 2004/18, which is set out in Annex III to that directive, refers, in section III which is devoted to the Federal Republic of Germany, to 'authorities, establishments and foundations governed by public law and created by Federal, State or local authorities'.

National law

23 The Law on the enhancement of occupational old-age pensions (Gesetz zur Verbesserung der betrieblichen Altersversorgung) of 19 December 1974 (BGBl. I, p. 3610), as amended by Article 5 of the Law of 21 December 2008 (BGBl. I, p. 2940) ('the BetrAVG'), provides in Paragraph 1, headed 'Employer's guarantee concerning an occupational old-age pension':

'(1) If an employee is given by his employer a guarantee of old-age, invalidity or survivor's pension benefits on grounds of his employment relationship (occupational old-age pension), the provisions of this Law shall apply. A scheme for occupational old-age pensions may be implemented directly by an employer or through the conduit of one of the pension providers mentioned in Paragraph 1b(2) to (4). An employer shall be responsible for ensuring the provision of the benefits he has guaranteed even where he does not implement the scheme directly.

(2) Occupational old-age pension schemes shall also be deemed to exist where:

…

3. future entitlement to earnings is converted into an inchoate right, of equal value, to pension benefits (conversion of earnings), or

4. the employee pays contributions from his pay to a pension fund or into a life assurance policy in order to fund occupational old-age pension benefits and the employer's guarantee also covers the benefits resulting from those contributions; the provisions relating to the conversion of earnings shall be applied in this regard mutatis mutandis, in so far as the guaranteed benefits resulting from those contributions are funded by capitalisation.'

24 Paragraph 1a(1) of the BetrAVG, headed 'Right to an occupational old-age pension funded through conversion of earnings', provides:

'An employee shall have the right to demand from his employer that the future earnings to which he is entitled, to a maximum of 4% of the relevant ceiling for the assessment of contributions to the statutory pension fund, are paid into an occupational old-age pension scheme on the basis of conversion of earnings. The scheme for the implementation of an employee's right shall be determined by agreement. If an employer is willing to allow for implementation through the conduit of a pension fund (Paragraph 1b(3)), the occupational old-age pension scheme shall be implemented by that body; otherwise an employee shall have the right to demand that his employer concludes a life assurance contract in his favour (Paragraph 1b(2)). In so far as this right is exercised, the employee shall apply annually an amount corresponding to at

least a hundred and sixtieth of the basic amount under Paragraph 18(1) of the Fourth Book of the Code of Social Law to his occupational old-age pension. In so far as the employee applies part of his regular earnings to an occupational old-age pension, the employer can require that over a calendar year the monthly amount applied remains the same.'

25 Paragraph 17 of the BetrAVG, headed 'Personal scope and derogation by way of collective agreement', provides:

'(3) Derogations from the provisions of Paragraphs 1a … may be effected by collective agreement. The derogating provisions shall apply between employers and employees not bound by a collective agreement if they agree that the relevant provisions of the collective agreement are to apply between them. As to the remainder, the provisions of this Law cannot be derogated from to the employee's disadvantage.

…

(5) To the extent that entitlement to earnings is based on a collective agreement, conversion of earnings may be effected in respect of that entitlement only to the extent that a collective agreement provides for or permits such conversion.'

26 On 18 February 2003, the TV-EUmw/VKA was concluded between the Vereinigung der kommunalen Arbeitgeberverbände (Federation of Local Authority Employer Associations; 'the VKA') and the Vereinte Dienstleistungsgewerkschaft eV (ver.di) (United Service Sector Union). The VKA concluded a similar collective agreement with another union, namely dbb tarifunion.

27 Paragraphs 2 and 3 of the TV-EUmw/VKA grant employees covered by one of the collective agreements referred to in Paragraph 1 thereof the right to demand from their employer the partial conversion, within the limits laid down by the BetrAVG, of their future entitlement to earnings into pension savings. Under Paragraph 5 of the TV-EUmw/VKA, such a request must be made to the employer in writing. Paragraph 5 also provides that the employee is to be bound for a period of at least a year by his agreement with his employer concerning the partial conversion of his future earnings.

28 Paragraph 6 of the TV-EUmw/VKA, headed 'Implementation methods', provides:

'Subject to the second and third sentences of this paragraph, conversion of earnings within the framework of the implementation methods provided for by the [BetrAVG] shall be implemented with public bodies offering supplementary pension schemes.

In the case of occupational old-age pension provision referred to in the first sentence, an employer may also adopt implementation methods offered by the Sparkassen finance group or local authority insurance companies.

Should the need arise, a collective agreement at district level may provide for derogations from the first and second sentence of this paragraph.'

29 Under Paragraph 7(1), the TV-EUmw/VKA entered into force on 1 January 2003. Paragraph 7(2) provides that the TV-EUmw/VKA may be terminated, on giving three months' notice, at the end of a calendar year, on 31 December 2008 at the earliest.

Pre-litigation procedure

30 Following receipt of a complaint, the Commission informed the Federal Republic of Germany by letter of formal notice dated 18 October 2005 that, on account of the award, by a number of local authorities and local authority undertakings, of contracts in respect of occupational old-age pensions (pension insurance contracts) to bodies and undertakings referred to in Paragraph 6 of the TV-EUmw/VKA without a call for tenders at European Union level, it could have infringed Article 8, in conjunction with Titles III to VI, of Directive 92/50 and, in any event, the principles of freedom of establishment and freedom to provide services.

31 By letter of 29 March 2006, the Federal Republic of Germany disputed the fact that local authorities and local authority undertakings act as 'contracting authorities" within the meaning of Directive 92/50 when they perform their function of employer in the field of occupational old-age pensions. It also submitted that the pension insurance contracts at issue fall within the employment relationships and do not therefore constitute public contracts, as the local authority employers merely assume the function of a payments office for the purposes of an exchange of consideration between the employees who have opted for partial conversion of their earnings into pension savings and the pension providers. It asserted too that application of public procurement law to the award of the contracts at issue would be contrary to the autonomy of management and labour protected in Article 9(3) of the German Basic Law (Grundgesetz).

32 Since the Commission was not satisfied by this response, it sent the Federal Republic of Germany a reasoned opinion dated 4 July 2006, in which it explained that its complaints had to be understood as concerning also, from 1 February 2006, breach of

Article 20, in conjunction with Articles 23 to 55, of Directive 2004/18, which essentially reproduced the provisions of Directive 92/50 relied upon in the letter of formal notice.

33 In its response of 15 November 2006 to the reasoned opinion, the Federal Republic of Germany adhered to its position, while annexing to the response an expert's report designed to show that the salary conversion measure at issue falls within the concept of earnings. It also maintained that the thresholds for application of European Union public procurement legislation are not reached in the present case, given the need to have regard to each separate contract in itself. Finally, it stated that it would not in any event be able to remedy any breach of European Union law given that it does not have the power to issue instructions to management and labour.

34 By letter of 30 January 2007, the Commission sent the Federal Republic of Germany a request for information for the purpose of determining, in particular, whether grounds of social policy could justify in this instance an exception to European Union public procurement law.

35 Since the Commission took the view that the Federal Republic of Germany did not provide any appropriate justification in its response of 1 March 2007 to that request, it decided to bring the present action.

The action

Applicability of Directives 92/50 and 2004/18 to the awarding of contracts to bodies or undertakings referred to in Paragraph 6 of the TV-EUmw/VKA

36 It is appropriate to examine at the outset whether, as is asserted by the Federal Republic of Germany as well as the Kingdom of Denmark and the Kingdom of Sweden, the awards of contracts to bodies or undertakings referred to in Paragraph 6 of the TV-EUmw/VKA ('the contract awards at issue') fall, because of their nature and subject-matter, outside the field of application of Directives 92/50 and 2004/18. Advocating that the Court's reasoning in Case C-67/96 *Albany* [1999] ECR I-5751 and Case C-222/98 *van der Woude* [2000] ECR I-7111 should be applied to the present context, these Member States base their arguments on the fact that those awards implemented a collective agreement negotiated between management and labour, more specifically Paragraph 6 of the TV-EUmw/VKA.

37 In that regard, it should be noted, first, that the right to bargain collectively, which the signatories of the TV-EUmw/VKA have exercised in the present case, is recognised both by the provisions of various international instruments which the Member States have cooperated in or signed, such as Article 6 of the European Social Charter, signed at Turin on 18 October 1961 and revised at Strasbourg on 3 May 1996, and by the provisions of instruments drawn up by the Member States at Community level or in the context of the European Union, such as Article 12 of the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, and Article 28 of the Charter of Fundamental Rights of the European Union ('the Charter'), an instrument to which Article 6 TEU accords the same legal value as the Treaties.

38 It is apparent from Article 28 of the Charter, read in conjunction with Article 52(6) thereof, that protection of the fundamental right to bargain collectively must take full account, in particular, of national laws and practices.

39 Furthermore, by virtue of Article 152 TFEU the European Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems.

40 It is to be noted, second, that, as is common ground between the parties to the dispute, the TV-EUmw/VKA meets, in a general way, a social objective. It is intended to enhance the level of the retirement pensions of the workers concerned, by promoting, in accordance with the BetrAVG, the development of pension saving by means of partial conversion of employees' earnings.

41 However, the fact that the right to bargain collectively is a fundamental right, and the TV-EUmw/VKA's social objective perceived as a whole, cannot, in themselves, mean that local authority employers are automatically excluded from the obligation to comply with the requirements stemming from Directives 92/50 and 2004/18, which implement freedom of establishment and the freedom to provide services in the field of public procurement.

42 The Court has already held that the terms of collective agreements are not excluded from the scope of the provisions on freedom of movement for persons (see Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union*, '*Viking Line*', [2007] ECR I-10779, paragraph 54 and the case-law cited).

43 Furthermore, exercise of a fundamental right such as the right to bargain collectively may be subject to certain restrictions (see, to this effect, *Viking Line*, paragraph 44, and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 91). In particular, while it is true that the right to bargain collectively enjoys in Germany the constitutional protection conferred, generally, by Article 9(3) of the German Basic Law upon the right to form associations to safeguard and promote working and economic conditions, the fact remains that, as provided in Article 28 of the Charter, that right must be exercised in accordance with European Union law.

44 Exercise of the fundamental right to bargain collectively must therefore be reconciled with the requirements stemming from the freedoms protected by the FEU Treaty, which in the present instance Directives 92/50 and 2004/18 are intended to implement, and be in accordance with the principle of proportionality (see, to this effect, *Viking Line*, paragraph 46, and *Laval un Partneri*, paragraph 94).

45 It is admittedly true that, in particular in *Albany* and *van der Woude*, the Court has held that, despite the restrictions of competition inherent in it, a collective agreement between the organisations representing employers and workers which sets up in a particular sector a supplementary pension scheme managed by a pension fund to which affiliation is compulsory does not fall within Article 101(1) TFEU.

46 However, such reasoning does not in any way prejudge the separate question, specific to the present case, of compliance, when designating the pension providers entrusted with implementing the salary conversion measure at issue, with the European Union rules relating to application of freedom of establishment and the freedom to provide services in the field of public procurement, in the context of a collective employment agreement concerning public-sector employers.

47 In that regard, it cannot be considered that it is inherent in the very exercise of the freedom of management and labour and of the right to bargain collectively that the directives which implement freedom of establishment and the freedom to provide services in the field of public procurement will be prejudiced (see, to this effect, *Viking Line*, paragraph 52).

48 Furthermore, the fact that an agreement or an activity is excluded from the scope of the provisions of the Treaty on competition does not automatically mean that that agreement or activity is also excluded from the obligation to comply with the requirements stemming from the provisions of those directives since those two sets of provisions are to be applied in different circumstances (see, to this effect, *Viking Line*, paragraph 53 and the case-law cited).

49 Finally, unlike the objective, agreed between management and labour, of enhancing the level of the pensions of local authority employees, the designation of bodies and undertakings in a collective agreement such as that at issue here does not affect the essence of the right to bargain collectively.

50 In light of the foregoing, the fact that the contract awards at issue follow from the application of a collective agreement does not, in itself, result in the present instance being excluded from the scope of Directives 92/50 and 2004/18.

51 The question therefore arises of reconciliation of the requirements related to attainment of the social objective pursued here by the parties to the collective bargaining with the requirements stemming from Directives 92/50 and 2004/18.

52 Answering this question entails verification, in the light of the material in the file, as to whether, when establishing the content of Paragraph 6 of TV-EUmw/VKA, which is referred to by the Commission in its action inasmuch as that paragraph served as the basis for the contract awards at issue, a fair balance was struck in the account taken of the respective interests involved, namely enhancement of the level of the retirement pensions of the workers concerned, on the one hand, and attainment of freedom of establishment and of the freedom to provide services, and opening-up to competition at European Union level, on the other (see, by analogy, Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraphs 81 and 82).

53 While it is true that Paragraph 6 of the TV-EUmw/VKA forms part of a collective agreement which, as noted in paragraph 40 of the present judgment, pursues, in a general way, a social objective, it must however be stated, as the Advocate General has found in point 176 of her Opinion, that that paragraph effectively disapplies the rules stemming from Directives 92/50 and 2004/18 completely, and for an indefinite period, in the field of local authority employees' pension saving, a fact which the Federal Republic of Germany has not denied.

54 The Federal Republic of Germany submits however, first, that Paragraph 6 of the TV-EUmw/VKA reflects a joint solution that takes account of the respective interests of the signatories of that collective agreement. It states that the designation, in the agreement, of the only bodies and undertakings which provide pensions that can be entrusted with implementation of the salary conversion measure introduced in local authorities enables workers to be involved, and their interests to be taken into account, in a better manner than if the pension provider, or providers, were selected by each local authority employer in a procurement procedure.

55 It must nevertheless be stated that it is possible to reconcile application of the procurement procedures with the application of mechanisms, stemming, in particular, from German social law, which ensure that workers or their representatives participate, in the local authority or the local authority undertaking concerned, in the taking of the decision concerning selection of the body or bodies to which implementation

of the salary conversion measure will be entrusted, a fact which the Federal Republic of Germany did not contest at the hearing.

56 Nor can application of the procurement procedures preclude the call for tenders from imposing upon interested tenderers conditions reflecting the interests of the workers concerned.

57 Second, the Federal Republic of Germany, supported on this point by the Kingdom of Denmark, submits that the tenders of the bodies and undertakings referred to in Paragraph 6 of the TV-EUmw/VKA are based on the principle of solidarity. At the hearing, emphasis was placed on the fact that, because of the pooling of risks, an insurance contract enables the 'good' and the 'bad' risks to be offset, in particular where occupational old-age pension benefits are in the form of an annuity paid until the recipient's death. It was also stressed that those bodies and undertakings do not engage in any form of selection of interested applicants based on medical criteria.

58 However, preservation of those elements of solidarity is not inherently irreconcilable with the application of a procurement procedure. The pooling of risks, upon which any insurance activity is based, can be ensured by a body or undertaking that provides pensions which is selected following a call for tenders at European Union level. Nor is there anything in the public procurement directives to preclude a local authority employer from specifying, in the terms of the call for tenders, the conditions to be complied with by tenderers in order to prevent, or place limits on, workers interested in salary conversion being selected on the basis of medical grounds.

59 Third, the Federal Republic of Germany stresses the experience and the financial soundness of the bodies and undertakings referred to in Paragraph 6 of the TV-EUmw/VKA. It adds that the choice made of those bodies and undertakings is such as to ensure that the salary conversion measure is attractive to local authority employees.

60 However, apart from the fact that the European Union public procurement directives contain rules enabling contracting authorities to satisfy themselves as to the professional ability and financial standing of tenderers, it cannot be presumed that these factors of experience and financial soundness are generally lacking in the case of bodies and undertakings providing pensions other than those referred to in Paragraph 6 of the TV-EUmw/VKA.

61 In particular, under Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ 2002 L 345, p. 1), private undertakings engaging in group insurance are subject to prudential supervision rules coordinated at European Union level, which are intended, in particular, to guarantee their financial soundness.

62 Institutions for occupational retirement provision are subject to rules of the same kind by virtue of Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ 2003 L 235, p. 10). These rules, coordinated at European Union level, are designed to ensure a high degree of security for future pensioners who are to enjoy the benefits of those institutions (see, to this effect, Case C-343/08 *Commission* v *Czech Republic* [2010] ECR I-275, paragraph 45).

63 Also, according to the particulars provided by the Federal Republic of Germany, pension insurance contracts have, on the basis of the third sentence of Paragraph 6 of the TV-EUmw/VKA, been awarded directly by local authority employers to bodies other than those referred to in the first and second sentences of that paragraph. It has not in any way been established, or even asserted, in the course of the present proceedings that that solution reduced the interest of the workers concerned in the salary conversion measure.

64 Fourth, the Federal Republic of Germany states that Paragraph 6 of the TV-EUmw/VKA enables local authority employers to do without an individual procedure for selecting the body or bodies to be entrusted with implementing the salary conversion measure at the level of their own authority or undertaking. Furthermore, the management costs charged by the bodies and undertakings referred to in Paragraph 6 are low.

65 However, such considerations cannot justify not applying provisions and procedures that are supposed to guarantee, in the interest of local authority employers and their employees, access to a broadened offer of services at European Union level.

66 In light of the considerations set out in paragraphs 53 to 65 of the present judgment, it is to be concluded that compliance with the directives concerning public service contracts does not prove irreconcilable with attainment of the social objective pursued by the signatories of the TV-EUmw/VKA in the exercise of their right to bargain collectively.

67 It must therefore be examined whether the contract awards at issue fall within the conditions for application of Directives 92/50 and 2004/18.

Classification of the contracts at issue as public service contracts within the meaning of Directives 92/50 and 2004/18

68 It should be noted first of all that it is common ground between the parties to the present proceedings that the contracts at issue concern insurance services within the meaning of Category No 6(a) of Annex I A to Directive 92/50 or Annex II A to Directive 2004/18.

69 It is also common ground between those parties that the contracts were concluded in writing within the meaning of Article 1(a) of Directive 92/50 or Article 1(2)(a) of Directive 2004/18.

70 On the other hand, the Federal Republic of Germany, supported by the Kingdom of Sweden, contests, first, that the other conditions required by those provisions for classification as 'public contracts' within the meaning of Directives 92/50 and 2004/18 are met in the present case.

71 The Federal Republic of Germany asserts that local authority employers do not act as contracting authorities when they merely implement, in the field of occupational old-age pensions, a choice predetermined by a collective agreement, without having any decision-making autonomy which may lead them to prefer, of their own accord, such or such a tenderer.

72 It further contends that the contracts at issue are not contracts for pecuniary interest. A relationship of economic exchange exists only between the pension provider and the worker who has opted for salary conversion. The employer merely forwards to the pension provider, on the worker's behalf, the premiums deducted for the purposes of conversion from his earnings. Those contracts concern implementation of a measure

benefiting the employees and not the award of a contract to the benefit of the public authorities.

73 As to those submissions, first of all, neither Article 1(b) of Directive 92/50 nor Article 1(9) of Directive 2004/18 makes a distinction between public contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest and those which are unrelated to that task. The fact that no such distinction is made is explained by the aim of those directives to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities (see, by analogy, Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraphs 32 and 33).

74 Next, the TV-EUmw/VKA, in particular Paragraph 6, was negotiated by, amongst others, representatives of the local authority employers. Those employers consequently exerted influence, at least indirectly, on the content of that paragraph.

75 Finally, the condition requiring the contracts at issue to be for pecuniary interest entails determining whether those contracts are of direct economic benefit to the local authority employers which conclude them (see, by analogy, Case C-451/08 *Helmut Müller* [2010] ECR I-2673, paragraphs 48 and 49).

76 In that regard, it should be noted that, in the field of local authority employment, it is apparent from Paragraph 6 of the TV-EUmw/VKA that the employer must implement the salary conversion measure with the public bodies referred to in the first sentence

of that paragraph or, failing that, adopt methods for implementing that measure that are proposed by undertakings referred to in the second sentence thereof.

77 According to Paragraph 1(1) of the BetrAVG, an employer 'shall be responsible for ensuring the provision of the benefits he has guaranteed even where he does not implement the scheme directly'.

78 Thus, the local authority employer negotiates the terms of a group insurance contract with a professional insurer that is subject to specific prudential constraints guaranteeing its financial soundness. The services supplied by it enable the employer to take on its obligation of being responsible for the proper execution of this form of deferred earnings resulting from the salary conversion measure. The services also relieve the employer of management of that measure.

79 Under such a contract, the local authority employer pays to the body or undertaking at issue premiums deducted from the earnings to which the persons concerned are entitled from it, in return for receiving services that are inherent in its obligation, laid down in Paragraph 1(1) of the BetrAVG, of being responsible for ensuring the provision of the retirement benefits in favour of the workers who have opted, with its guarantee, for the salary conversion measure.

80 The fact that the ultimate recipients of the retirement benefits are the workers who have participated in that measure cannot call into question the fact that such a contract is for pecuniary interest.

81 The Federal Republic of Germany, supported on this point by the Kingdom of Denmark and the Kingdom of Sweden, submits, second, that the exception laid down for employment contracts in Article 1(a)(viii) of Directive 92/50 and Article 16(e) of Directive 2004/18 extends to any provision of services the basis of which lies, as here, in a contract of that nature or in a collective agreement forming an integral part thereof and which, by its subject-matter, is covered by labour law.

82 However, having regard to the statements set out in paragraphs 4 and 12 of the present judgment, this exception, which as a derogation from application of the directives concerning public service contracts must be interpreted strictly, cannot extend to a provision of services which, as in the present case, is founded not on an employment contract but on a contract between an employer and an undertaking providing pensions and which is, moreover, unrelated to the particular concern expressed by the European Union legislature in recital 28 in the preamble to Directive 2004/18.

Determination of the value of the contract and exceeding of the application thresholds for Directives 92/50 and 2004/18

83 A preliminary point to note is that the Federal Republic of Germany has not contested the correctness of the thresholds of EUR 236 000 and EUR 211 000 applied by the

Commission for the period of 2004 and 2005 and the period of 2006 and 2007 respectively for the purpose of defining, in the present case, the contracts which, because of their value, fall within the scope of Directive 92/50 or Directive 2004/18.

84 The Federal Republic of Germany contests, on the other hand, the correctness of the method of calculation adopted by the Commission in order to determine the critical size, in terms of the number of employees, beyond which local authority employers are considered to have concluded pension insurance contracts whose value equals or exceeds the relevant threshold for the purposes of the application of Directive 92/50 or of Directive 2004/18.

85 First, the Federal Republic of Germany maintains that the calculation of the value of the contract, within the meaning of those directives, must, in the present instance, be based exclusively on the amount of the management costs claimed by the undertaking in respect of payment for the services provided, and not on the total amount of the premiums paid in the context of salary conversion, as the latter amount is impossible to determine precisely at the time when the pension insurance contract is concluded.

86 However, in the case of contracts concerning insurance services within the meaning of Category No 6(a) of Annex I A to Directive 92/50 or Annex II A to Directive 2004/18, both the first indent of Article 7(4) of Directive 92/50 and Article 9(8)(a)(i) of Directive 2004/18 refer to the 'premium payable' as the element forming the basis for calculation of the estimated value of the contract in question.

87 In the case of occupational old-age pension services, the 'estimated contract value', within the meaning of the provisions referred to in the preceding paragraph of the present judgment, consequently corresponds, as the Commission has correctly considered, to the estimated value of the premiums, in the present instance, the estimated value of the contributions deducted, under salary conversion, from the earnings of the relevant workers in the local authority or local authority undertaking concerned and used to finance the ultimate occupational old-age pension benefits. Those premiums

constitute, in the present instance, the principal consideration for the services provided by the body or undertaking concerned to the local authority employer in the context of the provision of those benefits.

88 In a context, such as that here, where it is not possible to indicate the total value of those premiums precisely at the time when the contract in question is awarded because of the choice left to each employee as to whether to participate in the salary conversion measure, and in the light of the duration of such a contract, which is long, or even indefinite, as the submissions at the hearing have confirmed, the second indent of Article 7(5) of Directive 92/50 and Article 9(8)(b)(ii) of Directive 2004/18 respectively require 'the monthly [instalment/value] multiplied by 48' to be taken as the basis for calculating the estimated value of that contract.

89 As the Advocate General has stated in point 150 of her Opinion, in the present case the Commission therefore acted correctly in – as the local authority employers concerned should have done – first basing its calculation on an estimate of the average monthly amount subject to earnings conversion per employee, multiplied by 48, then determining, in the light of the result of that multiplication, the number of employees individually participating in salary conversion needed in order to reach the relevant threshold for application of the European Union public procurement rules, and finally – on the basis of an estimate of the percentage of local authority employees participating in the salary conversion measure – defining the critical size, in terms of the number of employees, beyond which local authority employers awarded contracts reaching or exceeding that threshold.

90 Second, the Federal Republic of Germany contends that the Commission wrongly omitted in its calculations to take account of the fact, already highlighted at the stage of the pre-litigation procedure, that a number of local authority employers concluded,

in implementing the salary conversion measure at the level of their own authority or undertaking, a number of contracts with separate bodies or undertakings. In its submission, this fact should have led the Commission to calculate the estimated contract value on the basis of each separate pension insurance contract entered into by the local authority employer.

91 However, whatever the grounds may be that led local authority employers to have recourse to that practice, and irrespective of whether the separate contracts at issue constitute – as the Commission asserts but the Federal Republic of Germany denies – framework agreements within the meaning of Article 1(5) of Directive 2004/18, it is apparent from the very wording of Article 9(1) of that directive, which lays down the general rule for calculating the estimated value of a public contract, that that calculation is based on the 'total amount' of the contract, as estimated by the contracting authority.

92 In the present instance, the relevant calculation must, therefore, be based on the estimated total amount of the contract for occupational old-age pensions at the level of the authority or undertaking concerned, calculated in terms of premiums connected with salary conversion.

93 As the Commission has submitted, in the case of such a contract, which inherently concerns a single matter, a calculation that depends, as the Federal Republic of Germany advocates, on the number of separate pension insurance contracts concluded by the local authority employer concerned would result in an artificial splitting of the contract, liable to remove it from the field of application of European Union public procurement legislation even though its total estimated value would be equal to or above the relevant threshold for application of that legislation.

94 Furthermore, such a calculation would fail to observe the principle of legal certainty as, at the time when these various potential separate contracts are concluded, their individual value cannot even be estimated, in light of the impossibility of forecasting, even approximately, the proportion of employees wishing to participate in the salary conversion measure who will subsequently choose each of the undertakings concerned. Such a calculation, based on a purely mathematical division of the estimated total value of the contract by the number of separate pension insurance contracts envisaged, might thus result in all of those pension insurance contracts being removed from the field of application of European Union public procurement rules whilst it would subsequently turn out that the value of some of them reaches or exceeds the relevant application threshold because of the number of participating employees and the amount of the premiums paid to the undertaking concerned.

95 Third, throughout the proceedings before the Court the Federal Republic of Germany has contested the correctness of the figures adopted by the Commission relating to the participation rate of local authority employees in the salary conversion measure.

96 At each stage of the proceedings before the Court, the Commission has sought to base its calculation on the most reliable figures provided by the Federal Republic of Germany so far as concerns the participation rate of local authority employees in the salary conversion measure, and this led it ultimately to restrict the subject-matter of its action to the effect indicated in paragraph 3 of the present judgment in relation to the period covering 2004 to 2007.

97 It should be stated first of all that the subject-matter of the present dispute may be extended to contract awards at issue that occurred after the date upon which the time-limit set in the reasoned opinion expired, namely 4 September 2006, given that those awards stem from conduct of the same kind as the awards referred to in the reasoned opinion (see, to this effect, Case 42/82 *Commission* v *France* [1983] ECR 1013, paragraph 20; Case 113/86 *Commission* v *Italy* [1988] ECR 607, paragraph 11; and Case C-236/05 *Commission* v *United Kingdom* [2006] ECR I-10819, paragraph 12).

98 On the other hand, the choice on the part of the Commission, in the calculations made by it in the present proceedings, to apply to the entire period concerned by its action the figures relating to 2006, the year in the course of which the time-limit set in the reasoned opinion expired, fails to have regard to the fact that the local authority employers which awarded disputed contracts in 2004 and 2005 could themselves have assessed the contract in question only on the basis of estimates relating to one or other of those two years. It was therefore incumbent upon the Commission to take account, in its calculations concerning, respectively, 2004 and 2005, of the figures relating to the corresponding year.

99 It is apparent from the particulars provided by the Federal Republic of Germany in its rejoinder that those figures are as follows, as regards, respectively, the average monthly amount subject to earnings conversion per employee and the percentage of local authority employees participating in the salary conversion measure:

— for 2004: EUR 77.95 and 1.4%;

— for 2005: EUR 89.14 and 1.76%.

100 In light of these data and having regard to the method of calculation which, as has been stated in paragraph 89 of the present judgment, is applicable in the context of the present case, it must be found that the Federal Republic of Germany has failed to fulfil its obligations as alleged in so far as pension insurance contracts were awarded directly, without a call for tenders at European Union level, to bodies or undertakings referred to in Paragraph 6 of the TV-EUmw/VKA:

— in 2004 by local authorities or local authority undertakings which then had more than 4 505 employees;

— in 2005 by local authorities or local authority undertakings which then had more than 3 133 employees; and

— in 2006 and in 2007 by local authorities or local authority undertakings which then had more than 2 402 employees.

101 Fourth, the Federal Republic of Germany contends that the cities of Berlin, Bremen and Hamburg were wrongly considered to be members of a regional association of the VKA and, therefore, included within the field of application of the TV-EUmw/VKA.

102 In that regard, it is to be noted that, following explanations provided by the Federal Republic of Germany in the course of the present proceedings, the Commission withdrew the city of Berlin from the subject-matter of its action.

103 On the other hand, in the case of the cities of Bremen and Hamburg, the Federal Republic of Germany accepted that, as was apparent from the particulars provided by the Commission in its reply, these two cities were members, respectively, of the Kommunaler Arbeitgeberverband Bremen eV (Bremen Association of Local Authority Employers) and the Arbeitsrechtliche Vereinigung Hamburg eV (Hamburg Labour Law Association), which are members of the VKA.

104 Nor has the Federal Republic of Germany supported with any specific details the assertion in its rejoinder that the public service employees of those two cities do not fall within the field of application of TV-EUmw/VKA because of the special status of the members of each of the two regional associations referred to in the previous paragraph of the present judgment.

105 In view of all the foregoing considerations, it must be held that, in so far as service contracts in respect of occupational old-age pensions were awarded directly, without a call for tenders at European Union level, to bodies or undertakings referred to in Paragraph 6 of the TV-EUmw/VKA, in 2004 by local authorities or local authority undertakings which then had more than 4 505 employees, in 2005 by local authorities or local authority undertakings which then had more than 3 133 employees and in 2006 and in 2007 by local authorities or local authority undertakings which then had more than 2 402 employees, the Federal Republic of Germany failed to fulfil its obligations, until 31 January 2006 under Article 8, in conjunction with Titles III to VI, of Directive 92/50 and from 1 February 2006 under Article 20, in conjunction with Articles 23 to 55, of Directive 2004/18.

106 The action is dismissed as to the remainder.

Costs

107 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3) of those rules, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs. In the present case, since the Commission and the Federal Republic of Germany have each been unsuccessful in respect of certain complaints, they must bear their own costs.

108 In accordance with the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of Denmark and the Kingdom of Sweden, which have intervened in the present proceedings, must bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Declares that, in so far as service contracts in respect of occupational old-age pensions were awarded directly, without a call for tenders at European Union level, to bodies or undertakings referred to in Paragraph 6 of the Collective agreement on the conversion, for local authority employees, of earnings into pension savings (Tarifvertrag zur Entgeltungwandlung für Arbeitnehmer im kommunalen öffentlichen Dienst), in 2004 by local authorities or local authority undertakings which then had more than 4 505 employees, in 2005 by local authorities or local authority undertakings which then had more than 3 133 employees and in 2006 and in 2007 by local authorities or local authority undertakings which then had more than 2 402 employees, the Federal Republic of Germany failed to fulfil its obligations, until 31 January 2006 under Article 8, in conjunction with Titles III to VI, of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and from 1 February 2006 under Article 20, in conjunction with Articles 23 to 55, of 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;**

2. **Dismisses the action as to the remainder;**

3. **Orders the European Commission, the Federal Republic of Germany, the Kingdom of Denmark and the Kingdom of Sweden to bear their own costs.**

[Signatures]