OPINION OF ADVOCATE GENERAL MISCHO

delivered on 18 April 2002 [1]

1. By order of 29 September 2000, the Fourth Chamber of the Bundesvergabeamt (Austria) referred to the Court of Justice for a preliminary ruling four questions concerning the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts. [2]

2. Directive 92/50 distinguishes between 'priority' public service contracts, to which the directive applies in full (Titles III to VI), and 'non-priority' service contracts, to which only Articles 14 and 16 of the directive apply. Non-priority service contracts, which are considered to have little impact on cross-border trade, are thus covered only by the monitoring mechanism introduced by the directive. [3]

3. The priority services are listed in Annex I A to the directive, whilst the non-priority services are listed in Annex I B to the directive. The services are classified by reference to the United Nations Central (or Common) Product Classification ('CPC').

4. In the case of contracts relating both to services listed in Annex I A and to services listed in Annex I B, Article 10 of the directive provides:

'Contracts... shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

5. Directive 92/50 was transposed into Austrian law by the Bundesvergabegesetz (Austrian Federal Procurement Law). [4] Annex III to that federal law corresponds in essence to Annex I A to Directive 92/50,

1 — Original language: French.

2 — OJ 1992 L 209, p. 1, hereinafter also referred to as 'the directive'.

3 — See 21st recital in the preamble to Directive 92/50.

4 — Bundesvergabegesetz 1997, BGBl. I 1997, No 56. Previous versions are in Bundesvergabegesetz 1993, BGBl. I 1993, No 462 and BGBl. I 1996, No 776.

whilst Annex IV corresponds to Annex I B to the directive. The rule laid down in Article 10 of Directive 92/50 is transposed into Paragraph 3(4) of the Bundesvergabegesetz.

6. In the case in the main proceedings the applicant, Felix Swoboda GmbH ('Swoboda') is questioning precisely whether a procedure for the award of a public service contract was lawful as regards Paragraph 3(4) of the Bundesvergabegesetz. It is seeking a declaration from the national court that federal law was infringed because the contract was not awarded to the tenderer which submitted the most favourable bid. The observations of the contracting authority state that Swoboda did not take part in the tendering procedure in question.

7. The Österreichische Nationalbank (the Austrian central bank, 'the ÖNB'), the contracting authority, when moving to new offices located some 200 metres from its original address, awarded a contract 'for removal and transport services'.

8. Apart from the physical removal (dismantling, packing, transporting and unpacking) which, according to the ÖNB, represented only 6.94% of the value of the contract, the main services to be provided were computer-aided logistics, coordination of all the removal activities, and the provision of a storage depot and organisation of the storage. The ÖNB therefore considered that the contract consisted mainly of 'supporting and auxiliary transport services', which are listed in Annex IV to the Bundesvergabegesetz, and not 'land transport services', which are listed in Annex III to the Bundesvergabegesetz and so are covered by the federal law in full. It therefore published only a notice of the contract awarded.

9. Swoboda considers that the contract should have been awarded in accordance with the Bundesvergabegesetz in full, since the value of the services listed in Annex III was in this case, it maintains, greater than the value of those listed in Annex IV.

10. The Bundesvergabeamt therefore considered it necessary, in order to resolve the dispute brought before it, to refer the following questions to the Court of Justice for a preliminary ruling under Article 234 EC:

'(1) Must a service which serves a single purpose, but which could be subdivided into part services, be classified as a single service consisting of a main

service and accessory, supporting services in accordance with the scheme of Directive 92/50/EEC, and in particular the types of services contained in Annex I A and I B, and treated as a service listed in Annex I A or I B to the directive according to its main object, or must each part service instead be considered separately in order to establish whether the service is subject to the directive in full as a priority service or only to individual provisions thereof as a non-priority service?

(2) How far may a service which describes a specific type of service (eg transport services) be broken down into individual services in accordance with the scheme of Directive 92/50/EEC without infringing the provisions on the award of service contracts or undermining the *effet utile* of Directive 92/50/EEC?

(3) Must the services referred to in this case (having regard to Article 10 of Directive 92/50/EEC) be classified as services listed in Annex I A to Directive 92/50/EEC (Category 2, Land transport services) and contracts which have as their object such services are to be awarded in accordance with the provisions of Titles III to VI of the directive, or must they be classified as services listed in Annex I B to Directive 92/50/EEC (in particular Category 20, Supporting and auxiliary transport services, and Category 27, Other services) so that contracts which have as their object such services are to be awarded in accordance with Articles 14 and 16, and under which CPC reference number must they be subsumed?

(4) In the event that consideration of the part services leads to the conclusion that a part service listed in Annex I A to the directive which, in principle, is subject in full to the provisions of Directive 92/50/EEC is, by way of an exception, not subject in full to the provisions of the directive on account of the principle of predominance laid down in Article 10 thereof, is there an obligation on the contracting authority to split off non-priority part services and to award contracts for them separately in order to respect the priority nature of the service?'

Admissibility of the questions

11. Since both the Commission and the defendant in the main proceedings have raised objections as to the admissibility of the questions referred for a preliminary ruling, it is appropriate to address those objections first of all.

12. In a preliminary remark, the Commission questions whether the Bundesvergabeamt is actually a 'court or tribunal' within the meaning of Article 234 EC, since that is one of the conditions for the admissibility of the questions.

13. In that regard, I should like to refer directly to Case C-44/96 *Mannesmann Anlagenbau Austria and Others*.[5] In that case the Court of Justice implicitly, but necessarily, recognised the Bundesvergabeamt as a court or tribunal since it agreed to answer the questions the latter had referred to it. There is even less reason to contest that recognition since Advocate General Léger had addressed the issue of whether the Bundesvergabeamt was a court or tribunal in his Opinion. At the end of his reasoning, with which I concur, he concluded that the Austrian Federal Procurement Office was to be regarded as a 'court or tribunal' within the meaning of Article 234 EC. Subsequently, the Court of Justice has on several occasions when answering other questions referred for a preliminary ruling by the Bundesvergabeamt[6] confirmed that the latter is recognised as a 'court or tribunal'.

14. The Commission refers to the case-law of the Court of Justice, which requires that the decisions issued by national courts referring questions to it under Article 234 EC be 'of a judicial character'. The Bundesvergabeamt, as it acknowledges in its order for reference of 9 August 2001 in *Siemens and ARGE Telekom*,[7] currently pending before the Court of Justice, does not have the capacity to issue enforceable directions. The Commission concludes from this that its decisions do not have the necessary judicial character.[8]

15. In that connection, it is clear that an authority may issue decisions of a judicial character even if it does not have the power to issue enforceable directions. The clearest evidence of this is that the Court of Justice of the European Communities itself does not have such a power, except when it is giving a ruling in interlocutory proceedings.[9] No one, however, at least as yet, has ventured to challenge its capacity as a court or tribunal.

16. Although the Bundesvergabeamt does not have that capacity to issue enforceable directions to contracting authorities, it has, at least until the contract is awarded, the power to annul their decisions, which is

5 — [1998] ECR I-73. See also the Opinion of Advocate General Léger in that case.

6 — See Case C-76/97 *Tögel* [1998] ECR I-5357; Case C-111/97 *EvoBus* [1998] ECR I-5411; Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697; Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671; Case C-94/99 *ARGE* [2000] ECR I-11037; and Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745.

7 — Order for reference from the Bundesvergabeamt of 9 August 2001 (Case C-314/01, pp. 24 to 26 of the English translation).

8 — See observations lodged by the Commission in *Siemens and ARGE Telekom*, cited above.

9 — Order of 26 October 1995 in Joined Cases C-199/94 P and C-200/94 P *Pevasa and Inpesca* v *Commission* [1995] ECR I-3709, paragraph 24. See also Case C-21/94 *European Parliament* v *Council* [1995] ECR I-1827, paragraph 33.

sufficient to make it a court or tribunal within the meaning of Article 234 EC. Decisions of the Bundesvergabeamt 'are binding as may be seen, *inter alia*, from the fact that it enjoys a power of annulment under the law'. [10]

17. Naturally, since the contract at issue in this case has already been awarded, the Bundesvergabeamt cannot be led to order an annulment in the main proceedings. This case in fact falls within Paragraph 113(3) of the Bundesvergabegesetz, which provides as follows:

'After the contract has been awarded, or after the procedure for awarding it is closed, the Federal Procurement Office shall have jurisdiction to determine whether a contract has not been awarded to the most favourable tenderer as a result of an infringement of this Federal Law or its implementing regulations. In proceedings of this nature the Federal Procurement Office shall also have jurisdiction to determine, at the request of the contracting authority, whether a potential tenderer or an unsuccessful tenderer has not had a genuine chance of being awarded the contract under a correct application of the provisions of the present Federal Law and its implementing regulations.'

18. This does not mean, however, that the Bundesvergabeamt will not issue a binding decision having the force of *res judicata*. Under Paragraph 125(2) of the Bundesvergabegesetz, an application for damages lodged by an unsuccessful tenderer is admissible only if the Bundesvergabeamt has found earlier that the contract has been awarded unlawfully under Paragraph 113(3). A civil court called upon to rule on that application for damages, and moreover the parties concerned, are bound by that finding.

19. It appears that the doubts expressed by the Commission originate from an unfortunate misunderstanding. From the fact that in the case which gave rise to the reference for a preliminary ruling in *Siemens and ARGE Telekom*, cited above, the Bundesvergabeamt was unsure whether it had sufficient powers with regard to Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, [11] the Commission incorrectly concluded that the Bundesvergabeamt had doubts regarding its capacity as a court or tribunal.

20. I therefore consider that, at any event, in the proceedings instituted by Swoboda the Bundesvergabeamt has the capacity of a court or tribunal, within the meaning of Article 234 EC, enabling it to refer questions to the Court for a preliminary ruling.

10 — See the Opinion of Advocate General Léger in *Mannesmann Anlagenbau Austria*, cited above, point 40.

11 — OJ 1989 L 395, p. 33.

21. The ÖNB questions Swoboda's capacity to bring the case in the main proceedings, contending that it does not have the capacity of tenderer or unsuccessful candidate, which is required under national law in order to bring such an action. Since Swoboda cannot claim damages, the finding that there has been an infringement of Directive 92/50 would be purely declaratory and would have no substantive effect on the case in the main proceedings.

22. In that connection, may I state simply that the matter of the capacity of the defendant in the main proceedings is one which is governed by national procedural rules. It is not for the Court of Justice to rule on such matters. It is for the national court alone to decide on matters of purely national law and to assess the need for a reference for a preliminary ruling. The only questions of interpretation of Community law which the Court of Justice may refuse to answer despite a reference by a national court are those which are hypothetical or submitted to it under a procedural device. [12] The present case is clearly not such an exception.

23. The ÖNB also contends that the Court has already ruled in *Tögel* (cited above) on questions comparable to those which have been referred to it in this case, and that it could therefore simply answer the questions referred to it by a reasoned order containing a reference to that judgment.

24. It should be stressed that Article 104(3) of the Rules of Procedure of the Court of Justice merely enables the Court to answer questions referred for a preliminary ruling by means of a reasoned order. It is under no obligation to do so.

25. Moreover, the facts in the main proceedings and the questions referred to the Court in *Tögel* appear to be significantly different from those we are dealing with in this case. In particular, in *Tögel* the Court was not called upon to answer the main question currently referred by the Bundesvergabeamt, which is whether a contract serving a single purpose, but comprising a number of part services, should be subject to the arrangements for awarding contracts applying to its main object, or should be subject to the arrangements for part services, which represent the predominant part of the contract in terms of value.

26. Lastly, the ÖNB points to the fact that the contract concerned contains no cross-border aspect and is of no interest to a foreign undertaking. Consequently, Community law does not apply to the case at issue since the situation does not have any

12 — See Case 104/79 *Foglia* [1980] ECR 745 and Case 244/80 *Foglia* [1981] ECR 3045.

aspect linking it with a cross-border situation. The ÖNB refers in particular in support of this argument to Case C-108/98 *RI. SAN.*,[13] in which, it maintains, the Court ruled that a tendering procedure was not subject to the application of Community law where it had no foreign aspect to it.

27. That is a manifestly incorrect interpretation of the Court's judgment. In *RI. SAN.* the Court ruled that Article 55 of the EC Treaty (now Article 45 EC) did not apply in a situation in the main proceedings in which all the facts were confined to within one Member State. However, it did not rule on the applicability of Directive 92/50 with regard to the requirement of a foreign aspect.

28. The purpose of the Community directives concerning the award of public contracts is to establish procedures that are coordinated at Community level, irrespective of whether or not there are any cross-border aspects to the contracts concerned. The fact that the contract to which the case relates is only of limited interest to a foreign tenderer does not constitute adequate grounds for not applying Directive 92/50. Furthermore, to stipulate that the departure and arrival points of the service to be provided should be situated either side of a border is a requirement which is excessive in relation to the directive's objective, which is the opening up of markets, even those located entirely within a single Member State, to potential tenderers established in other Member States.

29. I shall now consider the questions referred by the national court. In order to follow the logical course of my reasoning I shall answer the fourth question before tackling the third.

First question

30. In order to make the answers given to the court making the reference more succinct and to give an appropriate interpretation of Directive 92/50, I consider that in its first question the Bundesvergabeamt is in essence asking the Court how the arrangements for awarding a public service contract are determined where that contract serves a single purpose but could be subdivided into part services. Should the contract be classed as falling within Annex I A or I B to Directive 92/50, that is to say, according to the main object of the contract or according to the part services representing the major share by value of the contract?

13 — [1999] ECR I-5219.

31. In its order for reference the Bundesvergabeamt refers to the judgment in *Gestion Hotelera Internacional*[14] and notes that that judgment laid down a principle of predominance, under which the main object of the contract absorbs the supporting services associated with it for the purpose of determining which of the directives on the award of public contracts is applicable to a particular contract.

32. It does not seem to me that the reference to that judgment is relevant to resolving the question referred to the Court in this case.

33. In *Gestion Hotelera Internacional* the Court was asked to give a ruling on the applicability of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts[15] to a contract whose main object was the assignment of property. The Court held in that case that '... a mixed contract relating both to the performance of works and to the assignment of property does not fall within the scope of Directive 71/305 if the performance of the works is merely incidental to the assignment of property'.[16]

34. The ruling contained in that judgment is corroborated by the 16th recital in the preamble to Directive 92/50:

'... public service contracts, particularly in the field of property management, may from time to time include some works;... it results from Directive 71/305/EEC that, for a contract to be a public works contract, its object must be the achievement of a work;... in so far as these works are incidental rather than the object of the contract, they do not justify treating the contract as a public works contract'.

35. The question referred to the Court appears to be significantly different in the present case. It is not a matter of which directive is applicable to the award of the contract concerned. All the written observations lodged with the Court recognise the applicability of Directive 92/50. It is rather a matter of determining which of the arrangements provided for under the directive apply to the contract. It is clear that nowhere does the directive provide that the main object of the contract can determine which of its annexes is applicable, and hence which arrangements relate to the present proceedings.

36. On the contrary, Article 10 of Directive 92/50 lays down a specific principle for

14 — Case C-331/92 [1994] ECR I-1329.

15 — OJ, English Special Edition 1971 (II), p. 682.

16 — Paragraph 29 of the judgment cited above.

determining which arrangements apply. The relevant arrangements are those described in the annex to which the services having a predominating value within the contract as a whole are assigned. Article 10 makes no reference to the main object of the contract. Directive 92/50 thus appears to be sufficiently clear on that point. There is therefore no need to introduce an additional criterion in respect of the main object of a contract in order to determine which arrangements will apply with regard to award of the contract.

37. The observations submitted by the Austrian Government in this connection do not, to my mind, call that view into question.

38. The Austrian Government considers that services are to be classified solely according to the CPC nomenclature.[17] The CPC introduced a classification based on types of activity, it maintains, and not on individual services described in detail. A service serving a single purpose should be classified as a single service, since all the public procurement directives operate on the basis of a single type of service, including the various supporting services. Article 10 of Directive 92/50 applies only by way of exception, in cases where the contract in question covers several types of service.

17 — *Tögel*, cited above, paragraph 35.

39. Although I agree with the Austrian Government that the CPC nomenclature alone determines how services are to be classified, it does seem to me that the CPC classification is sufficiently specific to enable Article 10 of Directive 92/50 to be applied in full without any need to refer to the main object of the contract. A contract may well serve a single purpose and be subdivided, for the purpose of determining the arrangements applying to it, into the various part services which comprise it, each of which corresponds to a different CPC code.

40. The claim that 'all the public procurement directives operate on the basis of a single type of service' amounts to a denial that Article 10 of Directive 92/50 has any rationale or *effet utile*.

41. Article 10 applies wherever a contract serves a single purpose but combines several different services corresponding to various CPC codes, where some are listed in Annex I A and others in Annex I B to Directive 92/50.

42. In answer to the first question, I consider therefore that it is appropriate, in order to determine which arrangements apply to a service contract serving a single

purpose, but which could be subdivided into part services, to ascertain which of the annexes to Directive 92/50 each part service is assigned to. Under Article 10 of that directive the contract is to be awarded in accordance with the provisions of Titles III to VI of the directive where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Conversely, if the value of the services listed in Annex I B is greater than the value of those listed in Annex I A, the contract will be awarded in accordance with Articles 14 and 16 only of Directive 92/50. Thus the main purpose of the contract will have no bearing on the choice of the relevant arrangements.

Second question

43. In the light of the explanations given by the Bundesvergabeamt in the grounds of its order for reference, it seems to me that the national court is seeking in its second question to ascertain, for the purpose of determining the arrangements applicable to a particular type of contract, to what extent Directive 92/50 permits the subdivision of that contract into various part services.

44. The Bundesvergabeamt considers that such subdivision would mean in the present case that a contract whose main object was transport would not be subject to the arrangements corresponding to the 'Transport' classification, namely the arrangements for priority services. Subdivision of the contract into part services would result in the application of Article 10 of Directive 92/50 and, hence, in the relevant arrangements being those for supporting transport services, which are the predominant services in terms of value. 'Supporting and auxiliary transport services' have their own classification in the CPC and are listed in Annex I B to Directive 92/50.

45. The national court states in this connection that the provision of those supporting services, although predominant in terms of value, is necessary only because of the existence of the service which it regards as being the main service, that is to say, transport. It also makes the point that the consequence of such subdivision is to make the distance covered by the transport the factor which determines the arrangements to which the overall contract is subject, since that distance directly influences the value of the transport element in the contract. This is detrimental to legal certainty for tenderers since the classification of the contract would depend on an external factor which it is difficult to determine.

46. It seems to me that the answer to the second question is to be found in the considerations set out above in respect of the first question.

47. Whenever a contract is made up of several part services corresponding to dif-

ferent CPC classification codes it is necessary to subdivide the contract in order to determine which arrangements apply to it.

48. This is the direct result both of the binding nature of a CPC classification reference and of the very existence of Article 10 of Directive 92/50.

49. One cannot, on the pretext of seeking to apply the directive in full to a particular contract, disregard the fact that the contract is made up of services corresponding to several different codes in the CPC classification, especially as Directive 92/50, due to the existence of Article 10, offers a clear solution to such a situation.

50. Thus, as the ÖNB correctly states, in *Tögel* which concerned a service comprising the transport of patients, the Court did not consider that transport alone determined the arrangements applicable to the contract on the pretext that the health services were necessary only if the transport had actually taken place. On the contrary, it held in paragraphs 39 and 40 of the judgment that:

'... CPC reference number 93, appearing in Category No 25 (Health and social services) in Annex I B, clearly indicates that this category relates solely to the medical aspects of health services governed by a public contract such as the one at issue in the main proceedings, to the exclusion of the transport aspects, which come under Category No 2 (Land transport services), which have the CPC reference number 712.

... services consisting in the transport of injured and sick persons with a nurse in attendance come within both Annex I A, Category No 2, and Annex I B, Category No 25, to Directive 92/50, so that a contract for those services is covered by Article 10 of Directive 92/50'.

51. In my view, therefore, as regards services corresponding to different CPC references, it is necessary to separate them in order to determine which arrangements apply to the contract as a whole, even where the result of that subdivision will be to make a priority service subject only to a limited application of Directive 92/50. Far from depriving Directive 92/50 of any *effet utile*, this is in direct accordance with the wishes of the Community legislature expressed in Articles 9 and 10 of that directive.

52. Far from being detrimental to legal certainty for traders, the automatic application of that system and rigorous compliance with CPC references as classifi-

cations contained in Annexes I A and I B to the directive make for transparency and stability in the determination of which arrangements apply for the award of public service contracts.

Fourth question

53. In the fourth question, the Bundesvergabeamt is seeking to know whether Directive 92/50, in order to permit application thereof in full to priority part services, requires the contracting authority for a contract whose predominant value is represented by non-priority part services to divide the contract into two, that is to say, to award one contract for the priority services and another for the non-priority services.

54. In the light of the answers given to the preceding questions, I am of the view that Article 10 of Directive 92/50 precludes any obligation to divide up such contracts.

55. To require the separation of non-priority service contracts from a contract for priority services would in any event mean that Article 10 of Directive 92/50 had no scope at all. It is precisely the case of a contract combining both priority and non-priority services which the directive covers in Article 10. That article, far from requiring the contract to be divided up, introduces a system for determining arrangements that are common to all the services the contract comprises, both priority and non-priority.

56. I am, however, of the view that the contracting authority could be required to make such a division where the unity of the contract concerned appeared to be artificial or illogical and was indeed designed merely to avoid application in full of the directive to priority services.

57. Directive 92/50 does not cover such a situation directly. However, Article 7 of the directive restricts the applicability of the directive to contracts the estimated value of which is not less than ECU 200 000 and, in order to prevent any manipulation of that condition for the directive's applicability, Article 7(3) provides:

'The selection of the valuation method shall not be used with the intention of avoiding the application of this directive, nor shall any procurement requirement for a given amount of services be split up with the intention of avoiding the application of this article.'

58. Although that article refers to efforts to circumvent the directive by means of a dishonest assessment of the value of the contract, it seems to me that the scope of that prohibition on manipulation might be extended to cover a situation in which a contracting authority had, conversely, artificially grouped together various contracts, some priority, others not, with the aim of avoiding application of the directive in full to priority services.

59. That would be the case if the overall contract thus constituted did not serve a single purpose and clearly failed to meet the requirements of technical and economic unity.

60. In *Commission* v *Italy*,[18] the Court ruled that by not separating contracts for the purchase of data-processing equipment, on the one hand, and for the design and operation of a data-processing system, on the other, the Italian Republic had failed to fulfil its obligations. The two elements, the purchase of equipment, on the one hand, and the provision of computer services, on the other, clearly served to achieve a single purpose. However, the Court considered that they could be separated and that the Italian Government was in fact seeking to avoid the application of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts to the contract for the purchase of the equipment.[19]

18 — Case C-3/88 [1989] ECR 4035.
19 — OJ 1977 L 13, p. 1.

61. It would, however, be adopting too broad an interpretation of that judgment to conclude from it that a contracting authority is always required to award separate contracts for priority part services and non-priority part services which all serve to achieve the same purpose.

62. That judgment in fact pre-dated the adoption of Directive 92/50. The rule laid down in Article 2 of the directive, which states that a contract that covers the supply of both services and products falls within the scope of the services directive if the value of the services in question is greater than that of the products, was not yet in force. Thus it was a case in which, by making such an artificial combination of contracts the Italian State was totally avoiding the application of Community law to the contract as a whole. Such a situation can no longer arise, because the contract, which exceeded the threshold of ECU 200 000, would necessarily fall within the scope of either Directive 77/62 or Directive 92/50.

63. With regard to the contract at issue in the main proceedings, and in the light of the information available to the Court, it does not appear to constitute an artificial combination of priority and non-priority services. Indeed, as the defendant and the Austrian Government have stated, with sound arguments, it would have been illogical, from both the technical and the economic viewpoint, to award two

contracts in this case: one for the actual transport and the other for all the logistics relating to the move. That would have led to additional coordination costs. However, it is for the national court to assess the cohesion of the contract in the main proceedings as a whole.

64. I therefore suggest that the answer to the fourth question should be as follows:

Where a contract as a whole has a clear economic and technical unity, contracting authorities are by no means required to avoid the application of Article 10 of Directive 92/50 by awarding separate contracts for non-priority part services, on the one hand, and priority part services, on the other, which serve to achieve the same purpose.

Third question

65. By this third question the Bundesvergabeamt is seeking to ascertain which annex to the directive and which CPC reference the services that comprise the contract in the main proceedings should be assigned to.

66. As the Court stated in *Tögel*[20] the assignment of services to Annex I A or Annex I B to Directive 92/50 must be done by reference to the CPC nomenclature.

67. Although the assignment of each service in the main proceedings to a CPC reference constitutes a point of fact, which it is for the national court to assess, I am of the view that the Court could provide guidance in this connection which would help the referring court in exercising its own jurisdiction.

68. I would therefore draw the attention of the national court to some of the CPC reference numbers.

69. Storage, which according to the ÖNB represents 23.91% of the total value of the contract, falls within CPC Division 74 'Supporting and auxiliary transport services', under reference number 742 'Storage services'. In this case, subclass 74290 'Other storage and warehousing services', seems to me to be the relevant one. CPC Division 74 appears in Annex I B to Directive 92/50 (Category 20).

20 — Paragraphs 35 to 37. See also the Opinion of Advocate General Fennelly in that case, paragraphs 32 to 35.

70. Moreover, the coordination and logistics activities, to which the contracting authority attributes 32.13% of the total value of the contract, are probably also to be classified in CPC Division 74, more precisely in subclass 74800 'Freight transport agency services', the explanatory note to which reads:

'Freight brokerage services, freight forwarding services (primarily transport organisation or arrangement services on behalf of the shipper or consignee), ship and aircraft space brokerage services, and freight consolidation and break-bulk services'.

71. Subclass 74900 'Other supporting and auxiliary transport services' seems to me to be the one which, apart from the transport itself, covers the actual activities of moving, to which the ÖNB attributes 5.55% of the value of the contract. That subclass corresponds to the following activities:

'Freight brokerage services; bill auditing and freight rate information services; transportation document preparation services; packing and crating and unpacking and de-crating services; freight inspection, weighing and sampling services; and freight receiving and acceptance services (including local pick-up and delivery)'.

72. In the Commission's view, all the services comprising the contract in the main proceedings, since they constitute a single homogeneous service provision, should be assigned to that subclass. The final note 'including local pick-up and delivery' implies that all the services the ÖNB required of its co-contractor should be included in subclass 74900.

73. I do not share the Commission's view on this point. 'Supporting and auxiliary transport services' cannot, for anyone who has read the rules for the interpretation of the CPC carefully, include the transport itself which, even if it only represents a tiny proportion of the contract, cannot be totally excluded. The rules for the interpretation of the CPC state that classification is to be determined according to the terms of the headings. 'Land transport services', the title of Division 71, could not be more explicit, so that there is no doubt that transport services such as those at issue here cannot be assigned to any other category. Moreover, if there were any doubt, the rule that the more specific category must take priority over categories of a more general scope would apply. There is no doubt that subclass 71234 'Trans-

portation of furniture', for example, corresponds more closely to the services of transport itself than the subclass 'Other supporting and auxiliary transport services'. The words 'local pick-up and delivery' on which the Commission's reasoning is based are added only as a clarification of 'freight receiving and acceptance services'. It therefore refers only to the beginning and the end phases of the transport, namely the pick-up and delivery, which provide the framework for the transport itself, and that may, depending on the case, take place by air or sea rather than by land.

74. That interpretation is confirmed, moreover, by the explanatory note to CPC subclass 71234 'Transportation of furniture', which covers road transport services 'Over any distance'. So, whether the distance covered by the transport is short or long, it is still a transport service that is involved, which has its own CPC reference and cannot come under 'Supporting and auxiliary transport services'.

75. Road transport services under CPC reference number 712 are assigned to Annex I A of Directive 92/50 (Category 2). It is possible to include the transport services carried out in performance of the contract at issue in the main proceedings under subclass 71234 'Transportation of furniture' and subclass 71239 'Transportation of other freight'.

76. I would also draw the attention of the national court to two other CPC references which are relevant to some of the services mentioned in the order for reference:

— CPC Class 8129 'Non-life insurance services', subclasses 81294 'Freight insurance services', 81295 'Fire and other property damage insurance services' and 81299 'Other insurance services n.e.c.' appear to me to be relevant. Insurance services are listed in Annex I A to Directive 92/50 (Category 6);

— CPC Division 94, more particularly, subclass No 94020 'Refuse disposal services' which includes *inter alia* collection, transport and disposal of industrial or commercial waste. That CPC reference also comes under Annex I A to Directive 92/50 (Category 16).

77. Lastly, I am of the view that the wages of the staff of the service providers should be included in the services to which they correspond and of which they form an integral part. Indeed, it would be difficult

to imagine dissociating, for example, the activity of packing from the wages of the packers without rendering the activity of packing meaningless. Thus, to take the example of the wages of packers, those wages, like the activity of packing itself, come under subclass 74900 'Other supporting and auxiliary transport services'.

78. In that connection, it seems to me generally that to over-subdivide services would, on the one hand, be likely to render some services meaningless and, on the other hand, to produce a theoretical description of the contract that was too complex and did not correspond to its actual nature.

79. In answer to the third question, I consider therefore that some of the services mentioned in the statement of facts come under Annex I A and others under Annex I B to Directive 92/50. In the light of the allocation of those services as described in the order for reference, it seems to me that the services covered by CPC reference number 74 'Supporting and auxiliary transport services' represent the greater share of the contract in terms of value. Since that reference appears in Annex I B to Directive 92/50 (Category 20), it would appear that the whole contract should, according to Article 10 of Directive 92/50, be awarded in accordance with Articles 14 and 16 of that directive, subject to the assessments to be made by the national court.

Conclusion

80. In the light of the above considerations, I suggest that the Court should answer the questions referred for a preliminary ruling by the Bundesvergabeamt as follows:

(1) It is appropriate, in order to determine which arrangements apply to a service contract serving a single purpose, but which could be subdivided into part services, to ascertain to which of the annexes to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts each part service is to be assigned. Under Article 10 of

that directive the contract is to be awarded in accordance with the provisions of Titles III to VI of the directive where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Conversely, if the value of the services listed in Annex I B is greater than the value of the services listed in Annex I A, the contract is to be awarded in accordance only with Articles 14 and 16 of the directive.

(2) As regards services corresponding to different CPC references, it is necessary to separate them in order to determine which arrangements apply to the contract as a whole, even where the consequence of such separation would be to make a priority service subject only to a limited application of Directive 92/50.

(3) Some of the services mentioned in the statement of facts come under Annex I A and others under Annex I B to Directive 92/50. In the light of the allocation of those services as described in the order for reference, the services assigned to CPC reference number 74 'Supporting and auxiliary transport services' appear to represent the greater share of the contract in terms of value. Since that reference number appears in Annex I B to Directive 92/50 (Category 20) the whole contract should, under Article 10 of the directive, be awarded in accordance with Articles 14 and 16 of that directive, subject to the assessments to be made by the national court.

(4) Where a contract as a whole has a clear economic and technical unity, contracting authorities are by no means required to avoid the application of Article 10 of Directive 92/50 by awarding separate contracts for non-priority part services, on the one hand, and priority part services, on the other, which serve to achieve the same purpose.