OPINION OF ADVOCATE GENERAL LÉGER

delivered on 16 September 1997 *

1. In this case, the Court is asked to give a preliminary ruling on the interpretation of the term 'body governed by public law' used by the Community legislature to define the scope of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [1] (hereinafter 'the Directive').

I — The relevant Community legislation

Directive 93/37/EEC

3. Directive 93/37, which consolidates Council Directive 71/305/EEC, [2] constitutes the basic Community legislation in the field of public works contracts.

2. According to the Directive, a 'body governed by public law' constitutes a 'contracting authority'; when a 'contracting authority' enters into a works contract, the rules in the Directive apply to that contract.

4. The Directive sets out the common rules applicable to the Member States in respect of technical matters, the publicity to be given to contracts which contracting authorities intend to award and the participation of contractors in the procedure. It lays down the types of procedure which must be followed by the contracting authorities when awarding contracts, and the information which must be provided by them to candidates, tenderers and the Commission, or by the Member States to the Commission.

* Original language: French.

1 — OJ 1993 L 199, p. 54. The terms 'contracting authorities' and 'body governed by public law' also appear in 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, Article 1(b)) and Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1, Article 1(b)), which means that the interpretation of those terms has implications beyond the legislation on public works contracts.

2 — Directive of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as last amended by Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1).

5. Article 1 defines the main terms delimiting the scope of the Directive.

6. Article 1(a) thus provides that:

'"public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority'. [3]

7. The first subparagraph of Article 1(b) provides as follows:

'"contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law'.

8. 'Bodies governed by public law', which are thus contracting authorities in the same way as traditional public authorities, are defined by the second subparagraph of Article 1(b) as follows:

'A "body governed by public law" means any body:

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

— having legal personality, and

— financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject

3 — Annex II lists the professional activities in the field of construction and civil engineering. Point (c) defines a 'work' as 'the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic and technical function'.

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'.

9. The last subparagraph of Article 1(b) indicates:

'The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35. To this end, Member States shall periodically notify the Commission of any changes of their lists of bodies and categories of bodies'.

Directive 89/665/EEC

10. 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, [4] required Member States to take 'the measures necessary to ensure that ... decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible ... on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law'. [5] Under Article 5, the measures necessary to comply with that directive were to be brought into force by the Member States before 21 December 1991.

Regulation (EEC) No 2052/88

11. The amended version of Article 7(1), entitled 'compatibility and checks', of Council Regulation (EEC) No 2052/88 of 24 June 1988 [6] (hereinafter 'the Regulation') states that:

'Measures financed by the Structural Funds or receiving assistance from the EIB or from another existing financial instrument shall be in conformity with the provisions of the Treaties, with the instruments adopted

4 — OJ 1989 L 395, p. 33.

5 — Article 1.

6 — Regulation on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9). Article 7(1) was amended to its current form by Article 1 of Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation No 2052/88 (OJ 1993 L 193, p. 5).

pursuant thereto and with Community policies, including those concerning the rules on competition, the award of public contracts and environmental protection and the application of the principle of equal opportunities for men and women'.

II — The national legislation

12. In its order for reference, the Bundesvergabeamt explains that when the Agreement on the European Economic Area entered into force on 1 January 1994 the Republic of Austria was required to transpose into national law the European Community acts specified in Annex XVI to that Agreement. The acts involved at that time were, in particular, Directives 71/305 and 89/665, cited above. [7]

13. It appears from the order for reference that those directives were implemented at federal level by the Bundesvergabegesetz (Federal Procurement Law, hereinafter the 'BVergG'), [8] which entered into force on 1 January 1994. For reasons relating to the division of powers between the *Länder* and the federal State, other implementing laws were also adopted by the *Länder*.

14. A number of directives not mentioned in Annex XVI have since been adopted in the field of public procurement. The national court notes that they have not been transposed into Austrian law but 'assumes, however, that the relevant provisions of the BVergG must now be measured against the provisions of the relevant European directives'. [9] The main provisions of the BVergG are as follows.

15. Paragraph 1(2)(3) provides that:

'This Federal Law shall apply to works contracts for pecuniary interest relating to

...

(3) the execution by third parties, by whatever means, of a work corresponding to the requirements specified by the contracting authority'.

7 — Page 2, point 1.1 of the English translation.

8 — BGBl No 462/1993.

9 — Page 4 of the English translation.

16. Paragraph 3 provides as follows:

'(1) This Federal Law shall apply to the award of works contracts and works concessions whose estimated value net of VAT is not less than ECU 5 million.

...

(3) No works contract ... may be split up with the intention of avoiding the application of this Federal Law'.

17. Paragraph 6(1)(3) provides that:

'This Federal Law shall apply to contracts awarded by contracting authorities which are:

...

(3) (Constitutional provision) undertakings within the meaning of Article 126(b)(2) of the B-VG, [10] in so far as they were established for the purpose of meeting needs in the general interest, not having an industrial or commercial character, and the Federation holds a majority shareholding in those undertakings — as regards other undertakings subject to scrutiny by the Rechnungshof (audit authority), in so far as they were established for the aforementioned purpose, it is for the *Länder* to lay down the rules concerning the award of contracts and to ensure that they are applied'. [11]

18. The BVergG introduced two types of action: a conciliation procedure before the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission) and a review procedure before the Bundesvergabeamt (Federal Procurement Office). An application for review by the Bundesvergabeamt must be preceded by the conciliation procedure. Only if it is not possible to resolve the dispute between the contracting authority and the candidates or tenderers by means of the conciliation procedure may the matter be referred to the Bundesvergabeamt.

10 — Bundesverfassungsgesetz (Austrian Federal Constitutional Law).

11 — The national court states that that law 'speaks of undertakings in accordance with Article 126b(2) of B-VG. Those are undertakings in which the Federation, alone or together with other legal entities subject to the jurisdiction of the Rechnungshof holds at least 50% of the ordinary or share capital or which the Federation operates alone or together with such legal entities. The control of undertakings by other financial or other economic or organisational measures is to be equated to such a financial holding. The jurisdiction of the Rechnungshof also extends to undertakings at any other level for which the conditions of that provision are fulfilled' (pp. 11 and 12 of the English translation).

III — The facts and the national proceedings

The Österreichische Staatsdruckerei

19. The Austrian State printing office (Österreichische Staatsdruckerei, hereinafter 'the ÖStDr') was founded in 1804 and was originally a State undertaking. Since 1981, the ÖStDr has had a different status, pursuant to the Bundesgesetz über die Österreichische Staatsdruckerei (Staatsdruckereigesetz) of 1 July 1981 (Federal Law on the Austrian State Printing Office, hereinafter the 'StDrG'). Paragraph 1 of the StDrG reads as follows:

'(1) An independent economic entity is established with the name "Österreichische Staatsdruckerei" (hereinafter "the Staatsdruckerei"). It has its registered office in Vienna and has legal personality.

(2) The Staatsdruckerei is a trader for the purposes of the Commercial Code. It must be registered in Part A of the Commercial Register of the Vienna Commercial Court.

(3) The activities of the Staatsdruckerei are to be pursued in accordance with the rules governing trade.'

20. The tasks to be carried out by the ÖStDr are laid down in Paragraph 2 of the StDrG. According to Paragraph 2(1), they involve sole responsibility for the production, for the federal administration, of printed matter requiring secrecy or security measures, such as passports, driving licences, identity cards, the federal official journal, the federal reports of laws and decisions, forms and the Wiener Zeitung. Those activities are collectively referred to as 'public service obligations' and are monitored by a State control service. [12] Prices are fixed, at the request of the Director-General of the ÖStDr, by the economic council, [13] which is composed of 12 members, eight of whom are appointed by the Federal Chancellery or various ministries and four by the works council, in accordance with the rules governing trade. [14]

21. According to Paragraph 2(2), the ÖStDr may also pursue other activities, such as the production of other printed matter or the publication and distribution of books or newspapers.

12 — Paragraph 13(1) of the StDrG.

13 — Ibid., Paragraph 12. More precisely, the prices are fixed on behalf of that council by a committee composed of three of its members: the President of the economic council, one of the members appointed by the Federal Chancellery and one of the members appointed by the Ministry responsible for finance.

14 — Ibid., Paragraph 12(2).

22. According to Paragraph 3, 'within the framework of its objects, the Staatsdruckerei may acquire holdings in undertakings'.

Strohal Gesellschaft and Strohal Rotationsdruck

23. In February 1995, the ÖStDr acquired the entire share capital of Strohal Gesellschaft (hereinafter 'SG'), which set up Strohal Rotationsdruck (hereinafter 'SRG' or 'the defendant') in October that year, retaining ÖS 999 000 of its share capital of ÖS 1 000 000. [15]

24. It appears from the defendant's written observations that ÖStDr's acquisition of SG was based on the latter's experience in a printing technique not used by ÖStDr and on the existence of a client base situated abroad. [16]

25. SRG adds that it was registered as a company with the Landgericht (Regional Court), Eisenstadt, on 4 November 1995, its registered object being the production of printed matter using the process in question. [17]

The 'Druckzentrum Müllendorf' project

26. In order to reduce the waiting period prior to the 'Druckzentrum Müllendorf' printing works, for which SRG was to be responsible, becoming operational, ÖStDr entered into various contracts on behalf of SRG, which was then still in the process of being set up. [18]

27. On 18 October 1995 ÖStDr issued a call for tenders relating to the non-production technical installations of the 'Druckzentrum Müllendorf', but subsequently withdrew it following a conciliation procedure initiated by the Wirtschaftskammer Österreich (Austrian Chamber of Commerce).

28. A restricted call for tenders was then issued, and ÖStDr informed tenderers that SRG was the firm inviting tenders and awarding the contracts. [19]

15 — ÖS: Austrian schilling.

16 — Point 16.

17 — Ibid., point 17.

18 — Ibid., points 21 to 23. Page 7 of the English translation of the order for reference.

19 — Page 8 of the English translation of the order for reference.

29. A conciliation procedure was initiated at the request, lodged on 15 November 1995, of the Verband der Industriellen Gebäudetechnikunternehmen Österreichs (Association of Industrial Construction Undertakings in Austria), on the ground that the project was a public works contract within the meaning of the BVergG, and thus fell within the scope of that Law. [20]

30. The Bundes-Vergabekontrollkommission concluded that, in the absence of a contracting authority within the meaning of the BVergG, there was no public works contract and that the question therefore did not fall within its jurisdiction. It did not, however, exclude the possibility of the need to comply with the Directive if the entity awarding the contract was in receipt of Community funds, in accordance with Article 7(1), cited above. [21]

31. No amicable settlement having been reached, Mannesmann Anlagenbau Austria AG, J. L. Bacon GesmbH, Haustechnische Gesellschaft für Sanitär-, Wärme- und Luft-Technische Anlagen GesmbH and Sulzer Infra Anlagen- und Gebäudetechnik GesmbH (hereinafter 'the applicants') initiated a review procedure before the Bundesvergabeamt on 7 December 1995 in accordance with Paragraph 92 of the BVergG. [22]

IV — The questions referred for a preliminary ruling

32. The Bundesvergabeamt notes that the relevant provisions of the BVergG were adopted in order to transpose Directive 71/305, as amended, and that, in order to interpret those provisions, it is now necessary to refer to Directive 93/37. It has consequently referred the following questions to the Court for a preliminary ruling:

'1. Can a provision of a national law, such as Paragraph 3 of the Staatsdruckereigesetz in the present case, which confers special and exclusive rights on an undertaking, establish that undertaking as meeting needs in the

20 — Ibid.

21 — Pages 8 and 9 of the English translation of the order for reference.

22 — Ibid., p. 9. The national court states that '[o]n 21 December 1995 the applicants submitted a supplementary pleading in which they alleged that they had been informed by the contracting body on 7 December 1995 that the restricted invitation to tender at issue had been revoked'. It adds that '[a]t the same time the applicants were told that an "accelerated open procedure" would be carried out'. The applicants confirm the facts as set out in the order for reference. However, the defendant states that it initiated a call for tenders using the accelerated open procedure, which was published in the Austrian Official Gazette of 7 -10 December 1995 and that it was in respect of that call for tenders that the applicants brought the proceedings before the Bundesvergabeamt which gave rise to the current reference for a preliminary ruling [p. 15 of the French translation of its observations]. Although there thus appeared to be discrepancies between the descriptions of the national proceedings giving rise to the present case, they do not appear to be such as to impede the Court's task in so far as, on the basis of the information available, the characteristics of the two types of procedure for calls for tenders referred to do not affect the nature of the question referred to the Court by the national court.

general interest not having an industrial or commercial character within the meaning of Article 1(b) of Directive 93/37/EEC and make such an undertaking as a whole fall within the scope of that directive, even if those activities form only part of the undertaking's activity and the undertaking in addition participates in the market as a commercial undertaking?

2. In the event that such an undertaking falls within the scope of Directive 93/37/EEC only with respect to the special and exclusive rights conferred on it, is such an undertaking obliged to take organisational measures to prevent financial means obtained from earnings from those special and exclusive rights being switched to other sectors of activity?

3. If a contracting authority starts a project and that project is therefore to be classified as a public works contract within the meaning of Directive 93/37/EEC, may the intervention of a third party who *prima facie* does not fall within the personal scope of the Directive have the effect of altering the classification of a project as a public works contract, or should such a proceeding be regarded as an evasion of the personal scope of the Directive and incompatible with the aim and purpose of the Directive?

4. If a contracting authority establishes undertakings for carrying on commercial activities and holds majority holdings in them which enable it to exercise economic control over those undertakings, does the classification as a contracting authority then also apply to those associated undertakings?

5. If a contracting authority transfers funds which it has earned from special and exclusive rights conferred on it to purely commercial undertakings in which it owns a majority holding, does that have the effect that, regardless of the legal position of the associated undertaking, that undertaking as a whole must let itself be treated and behave as a contracting authority within the meaning of Directive 93/37/EEC?

6. If a contracting authority which both meets needs in the general interest not having an industrial or commercial character and also carries on commercial activities establishes operating installations which are capable of serving both purposes, is the award of the contract for constructing such operating installations to be classified as a

public works contract within the meaning of Directive 93/37/EEC, or does Community law contain criteria according to which such an operating installation can be classified either as serving public needs or as serving commercial activities, and if so, which criteria?

7. Does Article 7(1) of Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments make the recipients of the Community subsidies subject to the review procedures within the meaning of Directive 89/665/EEC, even if they themselves are not contracting authorities within the meaning of Article 1 of Directive 93/37/EEC?'

33. Before dealing with those questions, it is necessary to consider whether the Bundesvergabeamt has capacity to refer questions for a preliminary ruling.

V — The admissibility of the reference for a preliminary ruling

34. The Bundesvergabeamt has described the characteristics which in its view justify its classification as a 'court or tribunal' within the meaning of Article 177 of the Treaty and, consequently, the admissibility of the reference.

35. Nor is that classification contested by the parties, the intervening Member States or the Commission.

36. Let me recall the criteria to which the Court has referred in its case-law for the purpose of recognising a judicial body: it must be established by law and have a permanent existence, there must be compulsory reference to the body in the event of a dispute, it must apply rules of law and have competence to resolve disputes by adopting a binding decision, its members must be independent and it must be bound by rules of adversary procedure. [23]

37. The Bundesvergabeamt was established under the first sentence of Paragraph 78(1) of the BVergG. According to Paragraph 91 et seq., defining its jurisdiction, it hears

23 — See, in particular, Case 61/65 *Vaassen-Göbbels* [1966] ECR 377, Case C-393/92 *Almelo and Others* [1994] ECR I-1477 and Joined Cases C-74/95 and C-129/95 *Criminal Proceedings against X* [1996] ECR I-6609.

disputes concerning the procedures for the award of public contracts under the BVergG. There is no doubt that it was established by law, nor that it exercises binding jurisdiction.

38. There is nothing in the BVergG to suggest that the Bundesvergabeamt is in any way temporary. The fact that it was established by the law is evidence of the Republic of Austria's intention to create a lasting body responsible for hearing public procurement disputes with no temporal limits on its powers.

39. Furthermore, it is apparent from Paragraph 78(2), which recalls that the Bundesvergabeamt is to exercise the powers granted to it by the BVergG, and from Paragraph 91 et seq., concerning its jurisdiction, that it applies rules of law in adopting its decisions since it resolves disputes arising as a result of infringement of the BVergG.

40. Under Paragraphs 91 and 92(2) of the BVergG, proceedings may be initiated before the Bundesvergabeamt if the conciliation procedure, which is a compulsory preliminary stage, has been unsuccessful. However, in contrast to the decisions of the Bundes-Vergabekontrollkommission, those of the Bundesvergabeamt are binding as may be seen, *inter alia*, from the fact that it enjoys a power of annulment under the law. [24]

41. The independence of the Bundesvergabeamt and of its members seems indisputable. Its president and deputy president are professional judges, [25] the appointing authority must ensure that its other members represent a fair balance between contracting authorities and tenderers, [26] an exhaustive list is given of the grounds for revocation, which correspond to objective situations or, in the case of serious negligence, to omissions required by the Law to be so serious as to reduce the risk of arbitrary action or interference on the part of the administrative authorities. [27] I would add that the Law states that the members of the Bundesvergabeamt must be independent and may not receive instructions, [28] and that the administration may not vary or annul its decisions. [29]

42. The condition that it must be bound by rules of adversary procedure seems to be less certain, since the Law contains no specific provisions in that respect.

24 — Paragraph 94(1) of the BVergG.
25 — Paragraph 78(4).
26 — Ibid., Paragraph 78(5).
27 — Ibid., Paragraph 79.
28 — Ibid., Paragraph 80(1).
29 — Ibid., Paragraph 78(1).

43. The fact that reference to the Bundesvergabeamt must be preceded by a conciliation stage before the Bundes-Vergabekontrollkommission, which must hear the parties, [30] ensures only that the rules of adversary procedure are observed before that authority and not before the Bundesvergabeamt itself. Furthermore, as drafted, the rule under which the Bundesvergabeamt may obtain any information from the contracting authorities and the contractors [31] does not in any way guarantee the right of each party systematically to be informed of the pleas in law and claims submitted by the other party since, according to its wording, information requested by the Bundesvergabeamt is sent only to that body. Yet in order to be effective, the rules of adversary procedure require the parties to be able to respond to their opponents' arguments.

44. However, in the present case, the order for reference demonstrates that these proceedings are the result of an *inter partes* hearing similar to that before a court or tribunal, since written pleadings were submitted by the parties and, although no mention is made of the exchange of those documents between the parties, a hearing at least took place before the Bundesvergabeamt. [32] Consequently, it seems clear that, in practice, the Bundesvergabeamt acted in every respect as a court or tribunal within the meaning of Article 177 of the Treaty.

45. For those reasons, I conclude that the reference is admissible.

30 — Ibid., Paragraph 88(1).

31 — Ibid., Paragraph 84(1).

32 — Page 10 of the English translation of the order for reference.

VI — The questions

46. Public authorities have a natural tendency, which is difficult to reconcile with the objective of completing the internal market, to favour national undertakings in order to maintain employment and to support economic development in their own Member State.

47. The Community public procurement legislation was developed to ensure, at Community level, respect for the principles of free competition, freedom of establishment and freedom to provide services, which had long been disparaged by the widespread tendency to act in that way. [33] Its purpose is to ensure that traders, of whatever origin, have equal access to contracts put out to tender by public authorities for the execution of their projects, whatever form those authorities may take. [34]

33 — Second recital in the preamble to the directive. See also, on the objectives of the directive — at that time Directive 701/305 — Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 11, and Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 18.

34 — See, as regards the reasons justifying the adoption of public procurement rules, Brunelli, P.: *Marchés Publics et Union Européenne — Nouvelles Règles Communautaires*, 1995, p. 9 et seq. As regards the priority given to matters of fact over matters of form, this Court has held, in a case in which the outcome depended on the meaning of the term State, that the term '[had to] be interpreted in functional terms' and that '[t]he aim of the directive ... would be jeopardised if the provisions of the directive were held to be inapplicable solely because a public works contract is awarded by a body which, although it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration' (*Beentjes*, cited above, paragraph 11).

48. The Directive must be interpreted in the light of that objective.

The first, second and sixth questions

49. In order for a works contract to be a public works contract and, thus, for the Directive to apply, one of the contracting parties must satisfy the definition of 'contracting authority' within the meaning of the Directive.

52. By these questions the national court essentially seeks to ascertain whether an undertaking which devotes part of its activity to meeting needs in the general interest, not having an industrial or commercial character, and the remainder to a commercial activity must apply the provisions of the Directive to all works contracts entered into by it or only to those relating to installations for use exclusively for the purposes of the former.

50. The scope of the Directive *ratione personae* is defined by reference not only to the bodies traditionally considered to be public authorities, such as the State, regional or local authorities and public sector undertakings but also to public or private bodies pursuing an objective in the general interest, not having an industrial or commercial character, which are described as 'bodies governed by public law'.

53. The question is not only whether an undertaking such as ÖStDr exhibits such characteristics as to justify its treatment as a 'body governed by public law' and thus a 'contracting authority' but also, if that is the case, whether all works contracts entered into by it, of whatever nature, are public works contracts and as such subject to the Directive.

51. The questions referred to the Court for a preliminary ruling relate to the meaning of that expression. Most of the questions can be grouped together by subject-matter since they are closely related.

54. None of the parties contends that the legislation applies selectively, depending on the activity carried out by the contracting authority. The applicants, the Commission and, in its oral observations on the sixth question, the French Government all consider that if an entity such as ÖStDr pursues commercial activities in addition to those activities for the purposes of which it was established — in the present case, meeting

needs in the general interest, not having an industrial or commercial character — the commercial part of its activities also falls within the scope of the Directive, since only the purpose for which the entity was established is relevant. [35] In the submission of the defendant, the Austrian Government and the Netherlands Government, the criteria referred to in the second subparagraph of Article 1(b) of the Directive do not make it possible to treat ÖStDr as a 'body governed by public law' and to subject any of its activities to the Directive.

The concept of 'body governed by public law': concurrent legislative conditions

55. It must be borne in mind that the Directive applies to public works contracts which it defines as contracts one of the parties to which is a 'contracting authority'; that term includes 'bodies governed by public law'.

56. In its first question the national court uses the concept of 'special and exclusive rights' to describe the special status of ÖStDr.

57. The concept of 'special or exclusive rights', which appears in Article 90(1) of the Treaty, applies to undertakings which have a monopoly or enjoy a privileged situation recognised by, and in exchange for a situation of dependence vis-à-vis, the State. That article requires Member States to withdraw or to refrain from enacting measures contrary to the Community competition rules in respect of such undertakings.

58. Even though, as the Austrian Government states, 'the production and publication of printed matter ... takes place under "privileged" conditions ...' [36] which might justify use of the concept of 'special or exclusive rights' to describe the tasks of ÖStDr, that expression does not determine whether the public works legislation applies, and is therefore not helpful for the purposes of interpreting the Directive.

59. The central concept here is that of a 'body governed by public law' in the sense of a body 'established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character'. [37]

35 — See, in particular, p. 16 of the Commission's written observations.

36 — Page [6 of the French translation of its written observations].

37 — Article 1(a) and (b).

60. There are two further conditions: a 'body governed by public law' must have legal personality and it must be closely dependent on the State, regional or local authorities or other bodies governed by public law. [38]

61. It is clear from the wording of the second subparagraph of Article 1(b) of the Directive that the three conditions set out therein are cumulative.

62. The lists referred to in the third subparagraph of Article 1(b) set out the entities which satisfy the criteria in question.

63. The definition of the relevant Austrian entities refers to 'all bodies subject to budgetary supervision by the "Rechnungshof" (audit authority) not having an industrial or commercial character'. [39] Article 15(6) of the StDrG provides that ÖStDr is subject to supervision by the audit authority. However, the other criterion laid down in that text, which is similar to the first criterion in the second subparagraph of Article 1(b), also needs to be defined.

Meeting needs in the general interest, not having an industrial or commercial character

64. The expression 'needs in the general interest, not having an industrial or commercial character' is not easy to understand.

65. The concept of 'general interest' can be approached in the same way as Advocate General Van Gerven approached that of 'general economic interest', in Article 90(2) of the Treaty, from the point of view of '... activities of direct benefit to the public', rather than the interests of individuals or groups. [40] From that point of view, it is logical to consider that the part of ÖStDr's activity devoted to printing official administrative documents such as passports, identity cards and law reports is intended to meet needs in the general interest.

38 — The nature of that dependency may vary: financial subordination of the body, supervision of its management or appointment of the members of its administrative, managerial or supervisory board (see the third indent of the second subparagraph of Article 1(b), cited above).

39 — Annex I, XI, E.1(b) of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21).

40 — Point 27 of his Opinion in Case C-179/90 [1991] *Merci Convenzionali Porto di Genova* [1991] ECR I-5889. In his article 'La notion de "pouvoir adjudicateur" en matière de marchés de travaux' (the concept of 'contracting authority' in works contracts), P. Valadou gives the following definition: 'Le besoin d'intérêt général peut donc être défini comme l'exigence manifestée par la société (locale ou nationale) dans son intérêt collectif'. (Needs in the general interest may thus be defined as the requirements of a community (local or national) in the interests of its members as a whole.) He adds that 'il y a intérêt général dès l'instant que l'intérêt en cause ne se confond pas avec l'intérêt propre et exclusif d'une personne ou d'un groupement de personnes bien déterminé.' (There is a general interest whenever the interest at issue does not overlap with the specific and exclusive interest of a clearly determined person or group of persons.) *Semaine Juridique*, Éd. E, No 3, 1991, p. 33.

66. In the present case, the greatest difficulty arises in drawing a line between the activities in the general interest which have an industrial or commercial character and those which do not.

67. In a different, although related, legal context (since it concerned relations between the State and public undertakings) the Court has laid down a number of criteria which make an attempt at delineation possible.

68. It has held that '... the State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market'. [41] In another judgment it noted that '... private undertakings determine their industrial and commercial strategy by taking into account in particular requirements of profitability. Decisions of public undertakings, on the other hand, may be affected by factors of a different kind within the framework of the pursuit of objectives of public interest by public authorities which may exercise an influence over those decisions'. [42]

69. That description of public and private activities makes it easier to understand the type of area covered by the 'bodies governed by public law' referred to by the Directive. The Community legislature intended it to apply to entities meeting needs in the general interest whose activities escape market forces, in whole or in part. Certain activities which by their nature fall within the fundamental tasks of the public authorities cannot be subject to a requirement of profitability and therefore are not intended to generate a profit. [43] It is possible that the reason why, in drawing a distinction between bodies whose activity is subject to the public procurement legislation and other bodies, the legislature used the criterion of 'needs in the general interest, not having an industrial or commercial character' is that those of the second type are subject to competition from other traders which discourages them from selecting their contractual partners on the basis of discriminatory criteria. For that reason, the constraints imposed by the legislation therefore prove to be less useful.

41 — Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7. The distinction between activities which relate to public authority and those which, although carried out by public persons, fall within the private domain results is drawn most clearly from the judgments of the Court concerning the applicability of the competition rules of the Treaty to certain activities. See, for example, Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43 and Case C-343/95 *Diego Cali and Figli* [1997] ECR I-1547.

42 — Joined Cases 188/80, 189/80 and 190/80 *France, Italy and United Kingdom* v *Commission* [1982] ECR 2545, paragraph 21.

43 — On this point, see in particular the article by P. Valadou, cited at point 12 above; M.-A. Flamme, P. Flamme, 'Enfin l'Europe des Marchés Publics', *Actualité Juridique — Droit Administratif*, 20 November 1989, p. 653; P. Lee, *Public Procurement*, 1992, pp. 56 and 57.

70. In this case, the activity for which ÖStDr is responsible under the StDrG comprises the production of official administrative documents, some of which serve to identify persons and others to disseminate State legislation, regulations and administrative material; such documents are thus closely linked to matters of public order and to the institutional operation of the Republic of Austria. The specific nature of the needs which ÖStDr is responsible for meeting, which are thus linked to the exercise of prerogatives of public authority, explains the fact that its activities take place under conditions which largely escape competition since, on the one hand, it is in the form of a monopoly [44] and, on the other, even though they are fixed according to the rules governing trade, its prices are set by an authority which essentially forms part of the public authority. [45] The State must be able to enjoy both guaranteed supply and production conditions which ensure that standards of confidentiality and security are observed and which avert the risk of illegal reproduction of the printed documents.

71. I therefore consider that ÖStDr meets 'needs in the general interest, not having an industrial or commercial character', within the meaning of the Directive.

The criterion of the purpose for which the body was established

72. Next it is necessary to determine whether the ÖStDr was established 'for the specific purpose of meeting' the needs which it is responsible for fulfilling.

73. According to the wording, only the purpose for which the body was established is relevant in determining whether it should be considered to be a 'body governed by public law', within the meaning of the Directive. What counts is, naturally, the objective actually pursued. A stated aim of meeting industrial or commercial needs, concealing activities in the general interest in order to avoid the restrictive rules of the law, could not be accepted by the national court.

74. That condition means that the pursuit of such an activity must have been the reason behind the establishment of the body.

75. It is true that 'specific' does not mean 'exclusive', so that the body can carry out other activities without escaping classification as 'a body governed by public law'. However, it seems necessary to establish that the body does indeed owe its existence to the pursuit of that specific objective.

44 — Page 6 of the French translation of the Austrian Government's written observations.

45 — See point 20 above. The setting of prices is therefore an administrative measure and prices cannot be modified without a formal decision by the public authority. Furthermore, it appears that the decision fixing the prices must take account of factors relating to the specific task of ÖStDr. Thus, somewhat enigmatically, the StDrG states that prices take account of 'necessary availability of capacity', which suggests that their level includes the costs incurred as a result of maintaining a sufficiently high production capacity to meet the State's needs, even if those production facilities sometimes remain underused.

76. If that is so, there will be evidence of the specific nature of its task, which justifies subjecting the contracts entered into by it to Community law.

77. Apart from the fact that it is not stated in the Directive, a criterion based on the relative proportion of the entity's activities devoted to meeting needs not having an industrial or commercial nature, as advocated by the Austrian and Netherlands Governments, [46] would appear to facilitate circumvention of the law. A body may very well have been established for the purpose of meeting public needs but in fact pursue activities of a purely industrial or commercial nature. If they are dominant in its activity, the suggested interpretation would mean that the body as a whole would no longer be subject to the rules of the Directive. It would therefore suffice for public authorities systematically to resort to such a practice to avoid application of the Community legislation to any public works contracts.

78. One must certainly not neglect the argument that extension of the application of that legislation to activities of a purely industrial or commercial nature is an onerous constraint and may seem unjustified since it does not apply to bodies established in order to carry out identical activities.

79. That disadvantage can be avoided by selecting the appropriate legal instrument for the objectives pursued by the public authorities. Since the reason given for the creation of the body determines the legal rules which apply to contracts entered into by it, those responsible for setting it up must restrict its objects if they wish to avoid the undesirable effects of those rules on activities outside their scope. They must also ensure that it evolves if, as in the present case, application of the public procurement legislation to those activities of the undertaking which are purely industrial or commercial in nature is considered too restrictive.

The legal nature of ÖStDr and the applicable rules

80. ÖStDr was created in order to satisfy the State's requirements for printed matter. [47] It has legal personality. [48] Furthermore, it is monitored by a State control service [49] and is subject to scrutiny by the audit authority [50]

46 — In support of its contention that ÖStDr is not a 'body governed by public law' the Austrian Government states, in particular, that 'the proportion of "privileged" activities of ÖStDr represents no more than 15-20% of its overall activity' (p. 7 of the French translation of its written observations).

47 — Point 2 et seq. of the defendant's written observations.

48 — See point 19 above.

49 — See point 20 above.

50 — See point 63 above.

which, according to the statements made by the defendant at the hearing, can be accounted for by the fact that the majority of shares are still held by the Austrian State. Consequently, I consider that ÖStDr should be considered to be 'a body governed by public law'.

81. Since the undertaking falls within that definition, all works contracts entered into by it are subject to the provisions of the Directive. Article 1(a) does not define public works contracts, and therefore does not determine the scope of the Directive according to the activity in respect of which contracts are awarded but rather by reference to the characteristics of the body entering into the contract with the contractor. I consider that this should form the basis for the answer to the first and sixth questions.

82. Consequently, the second question, which was raised in the event that ÖStDr was subject to the Directive only as regards its activities of a public nature, requires no answer.

The third, fourth and fifth questions

83. These questions relate essentially to the conditions to be satisfied by subsidiaries of a 'contracting authority' in order to be considered to be 'contracting authorities' in their own right and to the relevance of the involvement of a subsidiary which does not satisfy those conditions for the classification of a proposed public works contract commenced by a 'contracting authority'.

84. More specifically, the national court wishes to ascertain, first, whether Article 1(b) of the Directive can be interpreted as meaning that entities falling within one of the following categories can be considered to be 'bodies governed by public law':

— undertakings established by a 'body governed by public law' for the purpose of meeting needs of an industrial or commercial nature, and in which that body holds more than half of the share capital;

— undertakings carrying out commercial activities, in which a 'body governed by public law' holds more than half of the share capital and which receive from it financial resources derived from activities meeting needs in the general interest, not having an industrial or commercial character.

85. In defining 'bodies governed by public law' the wording of the Directive already

takes into account a situation in which a legal person is financed, for the most part, by a public authority or by a 'body governed by public law'. However, as we have seen, the three conditions set out in the second subparagraph of Article 1(b) are cumulative and it is therefore not sufficient that an undertaking has legal personality and is financed, for the most part, by 'a body governed by public law' for it to be regarded as a 'body governed by public law'. It must also have been established for the purpose of meeting needs in the general interest, not having an industrial or commercial character.

86. The concept of 'contracting authority' acquired a broader meaning in 1989 in order that the Community rules should not be restricted to legal persons governed by public law, [51] when numerous legal entities with powers traditionally forming part of the tasks of the public authorities in fact failed to satisfy that formal criterion. The Community legislature thus confirmed the approach in the case-law of the Court, which inclines towards a functional interpretation of the concept of 'contracting authority'. [52] On the same basis, it does not include bodies which, although dependent on such an authority, carry out purely private activities. [53]

87. Consequently, neither the fact that the 'contracting authority' contributes financial resources to an undertaking, nor economic control of the undertaking by a 'contracting authority' renders it subject to the public procurement legislation, provided that its activities remain purely commercial. As the Austrian Government rightly points out, such a contribution falls rather within the field of the Community law on State aids. [54]

88. The Austrian court also asks whether the classification of a works project as a public works contract can be changed as a result of the intervention of a third party which is not a 'contracting authority' within the meaning of the Directive, with the risk that such an approach might provide a means of avoiding application of the Directive.

51 — Directive 71/305 defined as 'authorities awarding contracts', the State, regional or local authorities and certain legal persons governed by public law. Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC (OJ 1989 L 210, p. 1) substituted, in particular, the concept of 'bodies governed by public law', as referred to in Directive 93/37, for that of 'legal persons governed by public law'.

52 — *Beentjes*, cited above.

53 — See point 64 et seq. above.

54 — Page 11 of the French translation of the written observations. I would add, however, for the sake of completeness, that, pursuant to Article 2 of the Directive, bodies which are not 'contracting authorities' may be subject to the provisions of the Directive if the contracts awarded by them are more than 50% subsidised by a 'contracting authority'. The contract at issue must also be 'covered by class 50, group 502, of the general industrial classification of economic activities within the European Communities (NACE) nomenclature' or 'relat[e] to building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes' (Article 2(2)). That amounts to a derogation from the principle that the Directive applies to works contracts awarded by a 'contracting authority'. If it intends to rule on the application of that provision to the case before it, the national court must consider whether the works contract at issue which clearly does not relate to the construction of buildings of the type listed in Article 2(2) falls within group 502 of the NACE, which includes, in particular, civil engineering undertakings. It must also establish the level of any subsidies paid by ÖStDr to SRG.

89. The answer to that question requires the precise circumstances of the third party's 'appearance' ('Eintritt') — the word used by the national court — in the execution of the project to be made clear.

90. It appears from the order for reference that the call for tenders at the origin of this case was initiated by the defendant, following ÖStDr's withdrawal of the previous call for tenders.

91. SRG is thus the contracting entity responsible for awarding the works contract in question. According to the national court, however, it does not exhibit the characteristics of a 'contracting authority', which means that the Directive cannot apply.

92. As already stated, the fact that ÖStDr had already entered into previous contracts in the context of the same project was based on the desire to reduce the waiting period prior to SRG's printing works becoming operational, while SRG was still in the process of being set up. Furthermore, ÖStDr required the incorporation 'into each works contract of a clause reserving the right ... to assign all its rights and obligations under those contracts for services to a third party of its choice at any time'. [55]

93. The foregoing suggests that the project in question fell within the scope of SRG's activities from the outset, which casts a different light on ÖStDr's conduct since it was probably participating in the realisation of a project which fell entirely within the objects of its subsidiary.

94. It therefore appears that the works contract was not entered into for ÖStDr itself but, on the contrary, on behalf of SRG, which would justify such a contract falling outside the scope of the Directive.

95. The Bundesvergabeamt suggests that there is a risk that recourse may be had to a third party in order to avoid the Community public procurement rules, thus circumventing the law.

96. In so far as the scope of the Community legislation on public works contracts is defined with reference, in particular, to the status of the contracting parties, such a risk cannot entirely be excluded.

55 — Page 7 of the English translation of the order for reference.

97. As already pointed out, however, it is for the court before which the dispute is brought to ascertain the truth of the reasons given for the creation of the body entering into the contract in question. Its assessment of the facts will determine the relevant legal classification. [56]

98. It is thus for that court to establish *in concreto* whether an undertaking was formed by a 'contracting authority' in order to enter into works contracts for the sole purpose of avoiding application of the Community rules. The actual purpose for which the undertaking was established — in this case to enter into public works contracts — can thus lead the court to decide that the contract in question was entered into on behalf of the 'contracting authority', which would justify application of the Directive.

99. The 'contracting authority' may also opt to approach an existing undertaking. In this case, it appears to be more difficult to identify the illegal conduct if, as is likely, the undertaking selected is one not set up to pursue an activity designed to meet needs in the general interest not having an industrial or commercial nature, since contracts entered into by such an undertaking are traditionally not covered by the Community rules.

100. The court will verify that there is indeed a connection between the works envisaged and the undertaking's objects. It is clear that an undertaking which enters into a contract for the realisation of works which do not contribute to its own activities must be presumed to be acting on behalf of another. If a 'contracting authority' can be identified as the beneficiary, the Community rules on public procurement will logically apply.

The seventh question

101. By this question, the national court is seeking to ascertain whether Community funding of a works project is conditional upon the recipient undertaking complying with the Community public procurement legislation even if that undertaking, in the present case SRG, is not a 'body governed by public law' and is therefore not a 'contracting authority'.

102. The wording of Article 7(1) of the Regulation might be interpreted in two ways. Either the Community must ensure that recipients of aid comply with the

56 — See points 72 and 73 above.

relevant Community legislation when it provides funding, or the Community legislation referred to in that paragraph becomes applicable to operators receiving those funds even though, in different circumstances, they would not be covered by it.

103. I consider only the first interpretation to be possible.

104. As worded, it does not state that the Community provisions relating to public procurement are to apply to all operators wishing to receive Community funding for the implementation of measures falling within the scope of the Regulation.

105. It refers to the 'compatibility' and 'conformity' with Community procurement legislation of measures in respect of which Community funding is sought. The requirement that the measures must be in conformity with Community law presupposes that they fall within the scope of each of the relevant Community acts. Measures taken by a body which does not exhibit the legal characteristics of a 'body governed by public law' within the meaning of the Directive are clearly compatible with it since they are not subject to the rules contained therein.

106. The extremely general nature of the reference also supports that view. There is a risk that extension of the legislation to apply without distinction to all operators acting within the framework of action financed by the Community could result in difficulties in interpreting the texts which would be inconsistent with the principle of legal certainty.

107. Above all, application of the public procurement directives to bodies whose activities are purely industrial or commercial would be difficult to justify in the light of the purpose of that legislation which, it must be remembered, is to give economic operators equal access to contracts offered by public authorities or by bodies carrying out activities of a public nature.

108. The legislature's intention seems to be, rather, to ensure that expenditure incurred by the Community in the context of structural policies is strictly limited to operators who comply with the rules of Community law and does not sanction conduct contrary thereto.

109. Therefore, a body in receipt of Community funding which is not a 'body governed by public law', within the meaning of Directive 93/37, is not bound by the provisions of the Directive relating to review procedures in public procurement.

Conclusion

110. In view of the foregoing I propose that the following answer be given to the national court's questions:

(1) Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts is to be interpreted as meaning that:

— a printing works having legal personality and established in order to have sole responsibility for the production of official administrative documents for the State, which controls it in particular by holding more than half of its share capital and which sets the prices for printing those documents, constitutes 'a body governed by public law' within the meaning of Article 1(b) of that directive, even if those activities have come to form only a small part of its overall activity;

— it applies to all works contracts entered into by a 'body governed by public law' within the meaning of Article 1(b) of that directive.

(2) Article 1(b) of Directive 93/37 is to be interpreted as meaning that an undertaking established by a 'body governed by public law', which holds more than half of its share capital, for the sole purpose of meeting needs of an industrial or commercial character does not itself constitute a 'body governed by public law' even if it receives from that body financial resources derived from activities meeting needs in the general interest, not having an industrial or

commercial character. The fact that such an undertaking enters into a works contract within the framework of a larger project originally led by a 'body governed by public law' does not mean that that contract is subject to the requirements of Directive 93/37 unless the contract was entered into on behalf of the 'body governed by public law'.

(3) Article 7(1) of Council Regulation (EEC) No 2052/88 of 24 June 1998 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Article 1 of Council Regulation (EEC) No 2081/93 of 20 July 1993 is to be interpreted as meaning that undertakings in receipt of Community funding are not subject to the review procedures laid down by 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 if they are not themselves 'bodies governed by public law' within the meaning of Article 1(b) of Directive 93/37.