JUDGMENT OF THE COURT (First Chamber)

11 May 2006 *

In Case C-340/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale della Lombardia (Italy), made by decision of 27 May 2004, received at the Court on 9 August 2004, in the proceedings

Carbotermo SpA,

Consorzio Alisei

v

Comune di Busto Arsizio,

AGESP SpA,

intervening party:

Associazione Nazionale Imprese Gestione servizi tecnici integrati (AGESI),

* Language of the case: Italian.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, N. Colneric, J.N. Cunha Rodrigues (Rapporteur) and E. Levits, Judges,

Advocate General: C. Stix-Hackl,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 November 2005,

after considering the observations submitted on behalf of:

— Carbotermo SpA, by A. Sansone and P. Sansone, avvocati,

— Consorzio Alisei, together with AGESI, by B. Becchi and L. Grillo, avvocati,

— the Comune di Busto Arsizio, by C. Caputo, avvocatessa,

— AGESP SpA, by A. Sciumè and D. Tassan Mazzocco, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by G. Fiengo, avvocato dello Stato,

— the German Government, by W.-D. Plessing, acting as Agent,

— the Austrian Government, by M. Fruhmann, acting as Agent,

— the Polish Government, by T. Nowakowski, acting as Agent,

— the United Kingdom Government, by M. Hoskins, acting as Agent,

— the Commission of the European Communities, by X. Lewis and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

2 The reference was made in the context of proceedings between the companies Carbotermo SpA ('Carbotermo') and Consorzio Alisei, on the one hand, and the Comune di Busto Arsizio (municipality of Busto Arsizio) and the company AGESP SpA ('AGESP'), on the other, concerning the award to that company of a contract for the supply of fuel and for the maintenance, modification and upgrading of the heating installations in that municipality's buildings to comply with the relevant regulations.

Legal framework

Community legislation

3 Article 1(a) and (b) of Directive 93/36 provides inter alia:

'For the purposes of this Directive:

(a) "public supply contracts" are contracts for pecuniary interest concluded in writing involving the purchase, lease rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations;

(b) "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.

"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 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;

...'

4 Article 6 of that same directive provides:

'1. In awarding public supply contracts the contracting authorities shall apply the [open procedures, restricted procedures and negotiated procedures] in the cases set out below.

2. The contracting authorities may award their supply contracts by negotiated procedure in the case of ...

3. The contracting authorities may award their supply contracts by negotiated procedure without prior publication of a tender notice, in the following cases:

...

4. In all other cases, the contracting authorities shall award their supply contracts by the open procedure or by the restricted procedure.'

5 Article 1(3) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84) provides inter alia:

'For the purpose of this Directive:

...

(3) "affiliated undertaking" shall mean any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the seventh Council Directive 83/349/EEC of 13 June 1983, based on Article 54(3)(g) of the EEC Treaty on consolidated accounts [OJ 1983 L 193, p. 1] or, in the case of entities not subject to that Directive, any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence within the meaning of paragraph 2, or which may exercise a dominant influence over the contracting entity or which, in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.'

6 Article 13 of the same directive provides:

'1. This Directive shall not apply to service contracts which:

(a) a contracting entity awards to an affiliated undertaking;

(b) are awarded by a joint venture formed by a number of contracting entities for the purpose of carrying out a relevant activity within the meaning of Article 2(2) to one of those contracting entities or to an undertaking which is affiliated with one of these contracting entities,

provided that at least 80% of the average turnover of that undertaking with respect to services arising within the Community for the preceding three years derives from the provision of such services to undertakings with which it is affiliated.

Where more than one undertaking affiliated with the contracting entity provides the same service or similar services, the total turnover deriving from the provision of services by those undertakings shall be taken into account.

2. The contracting entities shall notify to the Commission, at its request, the following information regarding the application of the provisions of paragraph 1:

— the names of the undertakings concerned,

— the nature and value of the service contracts involved,

— such proof as may be deemed necessary by the Commission that the relationship between the undertaking to which the contracts are awarded and the contracting entity is in conformity with the requirements of this Article.'

Italian law

7 By judgment No 5316 of 18 September 2003, the Consiglio di Stato held that a local authority was entitled to award a supply contract to a supplier without issuing a call for tenders in cases where the local authority exercised over the supplier a control similar to that which it exercised over its own departments and the supplier carried out the essential part of its activities with the controlling authority.

The main proceedings and the questions referred for a preliminary ruling

8 Carbotermo in an undertaking which specialises in energy supply and heating management for public and private sector customers.

9 Consorzio Alisei is an undertaking which supplies energy products and air-conditioning and heating services for use in buildings.

10 AGESP Holding SpA ('AGESP Holding') is a joint stock company which was created following the restructuring, decided upon on 24 September 1997, of the Azienda per la Gestione dei Servizi Pubblici, a special undertaking of the Comune di Busto Arsizio. Some 99.98% of AGESP Holding's share capital is currently held by the Comune di Busto Arsizio. The other shareholders are the municipalities of Castellanza, Dairago, Fagnano Olona, Gorla Minore, Marnate and Olgiate Olona, each of which hold one share.

11 According to Article 2 of its statutes, AGESP Holding's mission includes the management of public utility services in the gas, water, environmental services, transport, parking areas, public pools, pharmacies, electricity and heating, funeral services and road signage sectors.

12 Article 6 of those statutes provides that:

'... the majority of the shares is reserved for the Comune di Busto Arsizio.

...

Other than the Comune di Busto Arsizio, the following may take up shareholdings in the joint stock company: other local authorities (provinces, municipalities and their associations), economic and financial establishments, territorial and category associations, and private citizens who also wish to pursue the mission as laid down in the statutes ... .'

13 Article 7 of the same statutes provides:

'No private shareholder may hold more than 10% of the total share capital of the company.'

14 According to Article 18 of AGESP Holding's statutes, it is to be managed by a Board of Directors.

15 According to Article 26 of those statutes:

'The Board of Directors shall be vested with the broadest possible scope of powers for the ordinary and extraordinary management of the company, and shall have the power to take any action it deems necessary to implement and achieve the mission of the company, with the sole exception being acts which are formally reserved to the Assembly by law or by these statutes ... .'

16 AGESP is a joint stock company which was established on 12 July 2000 by AGESP Holding, which currently holds 100% of the share capital.

17 According to Article 3 of its statutes, in the amended version, which expanded the mission of the company and was produced before the national court, AGESP's mission covers public utility services in the gas, water, environmental services, transport, parking areas, electricity, heating, air-conditioning, IT, telecommunications, subsoil management and lighting sectors, and also the provision of various services for related companies.

18 Article 7 of AGESP's statutes provides:

'No shareholder, except for the majority shareholder AGESP Holding, may hold more than one tenth of the total share capital of the company ... .'

19 According to Article 17 of those statutes, AGESP is to be managed by a Board.

20 In that connection, Article 19 of the same statutes provides:

'The Board shall be vested with the broadest possible scope of powers, without limitation, for the ordinary and extraordinary management of the company.'

21 On 22 September 2003, the Comune di Busto Arsizio published a call for tenders for the supply of fuel and for the maintenance, modification and upgrading of the heating installations in that municipality's buildings to comply with the relevant regulations. The contract, worth an estimated EUR 8 450 000 plus value added tax (VAT), covered the supply of fuel (four fifths diesel oil and one fifth methane) for EUR 5 700 000, maintenance of the heating installations for EUR 1 000 000, and upgrading and modification of those installations to comply with the relevant regulations for EUR 1 750 000.

22 Carbotermo submitted a tender on 22 November 2003. Consorzio Alisei drew up a tender but did not submit it within the prescribed time-limit.

23 On 21 November 2003, the Comune di Busto Arsizio decided, in the light of judgment No 5316 of the Consiglio di Stato referred to in paragraph 7 of this judgment, to suspend the call for tenders procedure until 10 December 2003.

24 By decision of 10 December 2003, the Comune di Busto Arsizio withdrew the call for tenders, reserving the right to award the contract directly to AGESP at a later time.

25 By decision of 18 December 2003, the Comune di Busto Arsizio awarded the contract in question directly to AGESP. The reasons given for the decision were that AGESP met the conditions laid down in the Community and national courts' case-law regarding the award of public procurement contracts without calls for tenders, namely that the local authority exercises over the entity which received the contract a control similar to that which it exercises over its own departments and that that entity carries out the essential part of its activities with the controlling authority. The preamble in the introduction to that decision states, first, that a relationship of dependency between AGESP and the Comune di Busto Arsizio results from the fact that the latter holds 99.98% of the share capital of AGESP Holding, which holds 100% of the share capital of AGESP. It states, second, that most of AGESP's turnover is derived from activities entrusted to it pursuant to contracts obtained directly from the Comune di Busto Arsizio.

26 By a notice of 23 January 2004, AGESP issued a call for tenders as part of an expedited procedure for the supply of the diesel oil in question and awarded that contract to the undertaking Pezzoli Petroli Srl on 27 February 2004. On 28 April, 18 May, 30 June and 2 September 2004, AGESP awarded contracts to other undertakings for methane processing, technical upgrading, compliance upgrading and the installation of a remote-control monitoring and management system for the heating installations in various municipal buildings. Carbotermo and Consorzio Alisei were not among the successful tenderers for those contracts.

27 Carbotermo and Consorzio Alisei brought actions against the decisions to suspend the call for tenders and to award the contract in question to AGESP before the Tribunale amministrativo regionale della Lombardia.

28 Before that court, the two undertakings stated that the conditions for non-applicability of Directive 93/36 were not met in the present case. First, AGESP is not controlled by the Comune di Busto Arsizio because the latter holds its shares in AGESP only through a holding company in which it is a 99.98% shareholder and AGESP retains the full autonomy of a joint stock company under private law.

Second, AGESP does not carry out the essential part of its activities for the Comune di Busto Arsizio because it achieves much less than 80% of its turnover with that municipality, a criterion which must be retained by analogy with Article 13 of Directive 93/38.

29 The Comune di Busto Arsizio and AGESP replied that the direct award of the contract was permitted in the present case because AGESP was controlled by the Comune di Busto Arsizio by virtue of the latter's shareholding in the former and because AGESP carried out the essential part of its activities with that municipality. In that connection, AGESP stated that more than 28% of its turnover within the territory of the Comune di Busto Arsizio could be attributed to services provided directly to the municipality and that its turnover in the territory of the municipality accounted for 65.59% of its total turnover.

30 In those circumstances, the Tribunale amministrativo regionale della Lombardia decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the direct award of a contract for the supply of fuel for heating appliances in buildings owned by or within the competence of the Municipality, and relating to operation, supervision and maintenance (the main value of which lies in supply), to a joint stock company whose capital is, at present, held entirely by another joint stock company, of which the awarding Municipality is, for its part, the major shareholder (with 99.98% of the shares), or to a company (AGESP) in which a direct holding is owned not by the public authority but by another company (AGESP Holding), 99.98% of whose capital is presently owned by the public administration, compatible with Directive 93/36 ...?

(2) Must the requirement that the undertaking to which the supply contract is awarded directly carry out the essential part of its activities with the controlling authority be ascertained by applying Article 13 of Directive 93/38 ... and can it be concluded that it has been satisfied where that undertaking derives the majority of its turnover from the controlling public authority or, alternatively, in the territory of that authority?'

The questions referred for a preliminary ruling

The first question

31 The Court has held previously that, if a public procurement contract relates both to products within the meaning of Directive 93/36 and to services within the meaning of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public supply contracts (OJ 1992 L 209, p. 1), it will fall within the scope of Directive 93/36 if the value of the products covered by the contract exceeds that of the services (Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 38). A contract such as that at issue in the main proceedings, where the value of the products covered by the contract exceeds that of the services, therefore falls within the scope of Directive 93/36, as the national court, moreover, has already found.

32 For there to be a contract within the meaning of Article 1(a) of Directive 93/36, there must have been an agreement between two separate persons (*Teckal*, paragraph 49).

33 In accordance with Article 1(a) of that directive, it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the

other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities (*Teckal*, paragraph 50).

34 It is apparent from the order for reference and the evidence in the case-file that, at present, the contracting authority holds 99.98% of the share capital in AGESP Holding, with the remaining 0.02% being held by other local authorities. According to AGESP Holding's statutes, private shareholders may acquire holdings in that company, on two conditions: first, the majority of the shares are reserved for the Comune di Busto Arsizio; second, no private shareholder may hold more than one tenth of the share capital of that company.

35 At present, AGESP Holding holds 100% of the share capital in AGESP. According to the latter's statutes, private shareholders may acquire holdings in it subject to only one condition, namely that, with the exception of AGESP Holding, no shareholder may hold more than one tenth of the share capital of that company.

36 In order to determine whether the contracting authority exercises a control similar to that which it exercises over its own departments, it is necessary to take account of all the legislative provisions and relevant circumstances. It must follow from that examination that the successful tenderer is subject to a control enabling the contracting authority to influence that company's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions of that company (see Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 65).

37 The fact that the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer tends to indicate, without being decisive, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments, as contemplated in paragraph 50 of *Teckal*.

38 It is apparent from the case-file that the statutes of AGESP Holding and AGESP confer on the Board of Directors of each of those companies the broadest possible powers for the ordinary and extraordinary management of the company. Those statutes do not reserve for the Comune di Busto Arsizio any control or specific voting powers for restricting the freedom of action conferred on those Boards of Directors. The control exercised by the Comune di Busto Arsizio over those two companies can be described as consisting essentially of the latitude conferred by company law on the majority of the shareholders, which places considerable limits on its power to influence the decisions of those companies.

39 Moreover, any influence which the Comune di Busto Arsizio might have on AGESP's decisions is through a holding company. The intervention of such an intermediary may, depending on the circumstances of the case, weaken any control possibly exercised by the contracting authority over a joint stock company merely because it holds shares in that company.

40 It follows that, in such circumstances, subject to their being verified by a court adjudicating on the substance in the main proceedings, the contracting authority does not exercise over the successful tenderer for the public procurement contract at issue here a control similar to that which it exercises over its own departments.

41 Article 6 of Directive 93/36 requires contracting authorities who conclude public procurement contracts to use the open procedure or the restricted procedure unless

the contract falls within one of the exceptions listed exhaustively in Article 6(2) and (3). The order for reference does not indicate that the public supply contract at issue in the main proceedings falls within one of those exceptions.

42 It follows that Directive 93/36 does not allow for the direct award of a public procurement contract in circumstances such as those in the main proceedings.

43 In response to that finding, the Italian Government states that the fact that AGESP must use a public tendering procedure to purchase the diesel oil in question shows that the Comune di Busto Arsizio, AGESP Holding and AGESP must be regarded as constituting together a 'body governed by public law' within the meaning of Article 1(b) of Directive 93/36 and required to conclude public supply contracts in accordance with the relevant Community and national legislation.

44 That argument cannot be accepted. First, the Comune di Busto Arsizio qualifies as a local authority and not a body governed by public law within the meaning of that provision. Second, the Comune di Busto Arsizio, AGESP Holding and AGESP each have distinct legal personalities.

45 Moreover, as the Court stated in paragraph 43 of *Teckal*, the only permitted exceptions to the application of Directive 93/36 are those which are exhaustively and expressly mentioned therein.

46 Directive 93/36 does not contain any provision comparable to Article 6 of Directive 92/50, which excludes from its scope of application public contracts awarded, under certain conditions, to contracting authorities (*Teckal*, paragraph 44).

47 Accordingly, the answer to the first question must be that Directive 93/36 precludes the direct award of a public supply and service contract, the main value of which lies in supply, to a joint stock company whose Board of Directors has ample managerial powers which it may exercise independently and whose share capital is, at present, held entirely by another joint stock company whose majority shareholder is, in turn, the contracting authority.

The second question

48 The second question comprises two parts.

49 First, the national court asks whether it is necessary to apply Article 13 of Directive 93/38 to assess the requirement that the undertaking to which a supply contract was directly awarded must carry out the essential part of its activities with the controlling authority. Second, it asks whether that requirement may be regarded as being fulfilled when such an undertaking carries out the essential part of its activities with the controlling authority or when it carries out the essential part of its activities in the territory of that authority.

First part of the second question

50 The order for reference indicates that the contract at issue in the main proceedings falls within the scope of Directive 93/36.

51 The issue is thus whether the exception provided for in Article 13 of Directive 93/38 should be applied by analogy in the scope of application of Directive 93/36.

52 The exception provided for in Article 13 relates only to service contracts and does not include supply contracts.

53 Article 13 of Directive 93/38 covers entities, particularly joint ventures and undertakings whose annual accounts are consolidated and whose methods of operating are different from those of the contracting authorities covered by Directive 93/36.

54 That article, moreover, contains a mechanism for notifying the Commission, which cannot be transposed to Directive 93/36 because there is no legal basis for doing so.

55 As exceptions must be interpreted restrictively, the Court does not find it appropriate to extend the application of Article 13 of Directive 93/38 to the scope of application of Directive 93/36.

56 This finding is supported by the fact that, during the reform of the public procurement directives in 2004, the Community legislature, whilst maintaining that exception in Article 23 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), chose not to incorporate an analogous exception in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), which replaced Directive 93/36.

57 In the light of all of the foregoing, the answer to the first part of the second question must be that Article 13 of Directive 93/38 must not be applied in the assessment of the requirement relating to the inapplicability of Directive 93/36, according to which the undertaking to which a supply contract was awarded directly must carry out the essential part of its activities with the controlling authority.

Second part of the second question

58 It should be borne in mind that the principal objective of the Community rules in the field of public procurement is the free movement of services and the opening-up to undistorted competition in all the Member States (see, to that effect, Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 44).

59 The conditions laid down in *Teckal* for a finding that Directive 93/36 is inapplicable to the contracts concluded between a local authority and a person legally distinct from it, according to which the local authority must exercise over the person in question a control similar to that which it exercises over its own departments and that person must carry out the essential part of its activities with the controlling authority or authorities, are aimed precisely at preventing distortions of competition.

60 The requirement that the person in question must carry out the essential part of its activities with the controlling authority or authorities is aimed precisely at ensuring that Directive 93/36 remains applicable in the event that an undertaking controlled by one or more authorities is active in the market and therefore likely to be in competition with other undertakings.

61 An undertaking is not necessarily deprived of freedom of action merely because the decisions concerning it are controlled by the controlling authority, if it can still carry out a large part of its economic activities with other operators.

62 It is still necessary that that undertaking's services be intended mostly for that authority alone. Within such limits, it appears justified that that undertaking is not subject to the restrictions of Directive 93/36, since they are in place to preserve a state of competition which, in that case, no longer has any *raison d'être*.

63 In applying those principles, the undertaking in question can be viewed as carrying out the essential part of its activities with the controlling authority within the meaning of *Teckal* only if that undertaking's activities are devoted principally to that authority and any other activities are only of marginal significance.

64 In order to determine if that is the case, the competent court must take into account all the facts of the case, both qualitative and quantitative.

65 As to the issue of whether it is necessary to take into account in that context only the turnover achieved with the supervisory authority or that achieved within its territory, it should be held that the decisive turnover is that which the undertaking in question achieves pursuant to decisions to award contracts taken by the supervisory authority, including the turnover achieved with users in the implementation of such decisions.

66 The activities of a successful undertaking which must be taken into account are all those activities which that undertaking carries out as part of a contract awarded by the contracting authority, regardless of who the beneficiary is: the contracting authority itself or the user of the services.

67 It is also irrelevant who pays the undertaking in question, whether it be the controlling authority or third-party users of the services provided under concessions or other legal relationships established by that authority. The issue of in which territory those services are provided is also irrelevant.

68 If, in the main proceedings, the share capital of the successful undertaking is held indirectly by several authorities, it may be relevant to consider whether the activities to be taken into account are those which the successful undertaking carries out with all of the controlling authorities or only the activities carried out with the authority which in the present case acts as the contracting authority.

69 It should be borne in mind in this connection that the Court has stated that the legally distinct person in question must carry out the essential part of its activities with 'the controlling local authority or authorities' (*Teckal*, paragraph 50). It thus envisaged the possibility that the exception provided for could apply not only in cases where a single authority controls such a legal person, but also where several authorities do so.

70 Where several authorities control an undertaking, the condition relating to the essential part of its activities may be met if that undertaking carries out the essential part of its activities, not necessarily with one of those authorities, but with all of those authorities together.

71 Accordingly, the activities to be taken into account in the case of an undertaking controlled by one or more authorities are those which that undertaking carries out with all of those authorities together.

72 It follows from the foregoing that the answer to the second part of the second question must be that, in order to determine whether an undertaking carries out the essential part of its activities with the controlling authority, for the purpose of deciding on the applicability of Directive 93/36, account must be taken of all the activities which that undertaking carries out on the basis of an award made by the contracting authority, regardless of who pays for those activities, whether it be the contracting authority itself or the user of the services provided; the territory where the activities are carried out is irrelevant.

Costs

73 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts precludes the direct award of a public supply and service contract, the main value of which lies in supply, to a joint stock company whose Board of Directors has ample managerial**

powers which it may exercise independently and whose share capital is, at present, held entirely by another joint stock company whose majority shareholder is, in turn, the contracting authority.

2. **Article 13 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors must not be applied in the assessment of the requirement relating to the inapplicability of Directive 93/36, according to which the undertaking to which a supply contract was awarded directly must carry out the essential part of its activities with the controlling authority.**

3. **In order to determine whether an undertaking carries out the essential part of its activities with the controlling authority, for the purpose of deciding on the applicability of Directive 93/36, account must be taken of all the activities which that undertaking carries out on the basis of an award made by the contracting authority, regardless of who pays for those activities, whether it be the contracting authority itself or the user of the services provided; the territory where the activities are carried out is irrelevant.**

[Signatures]