ORDER OF THE COURT
26 November 1999 *

In Case C-440/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by Corte dei Conti, Italy, for a preliminary ruling in the *ex post facto* review proceedings pending before it concerning

Radiotelevisione Italiana SpA (RAI)

on the interpretation of Council Directives 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), 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward (Rapporteur), L. Sevón, R. Schintgen, Presidents of Chambers,

* Language of the case: Italian.

P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm, M. Wathelet and V. Skouris, Judges,

Advocate General: G. Cosmas,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General,

makes the following

Order

1 By decision of 30 October 1998, received at the Court on 3 December 1998, the Corte dei Conti (Court of Auditors) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Council Directives 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), 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

2 Those questions arose in the course of the review of the financial management of Radiotelevisione Italiana SpA ('the RAI'), in respect of the financial years 1994 to 1996.

The proceedings before the Corte dei Conti and the questions referred

3 Under the provisions of a decree of the President of the Republic of 20 July 1961, the RAI is subject to the powers of the Corte dei Conti, conferred by Article 100(2) of the Italian Constitution, to review the financial management of undertakings subsidised by the State.

4 In the course of its review of the financial management of the RAI in respect of the financial years 1994 to 1996, the Corte dei Conti — specifically, the division responsible for reviewing the activities of certain undertakings — decided to stay proceedings and to refer the following three questions to the Court of Justice for a preliminary ruling:

'(1) Is the RAI (Radiotelevisione Italiana SpA) required to observe the procedures for the award of contracts laid down in Council Directive 93/38/EEC, as amended and supplemented, in relation to the so-called excluded sectors, having regard also to the fact that Annex 17(h) to the legislative decree which transposed that directive (No 158 of 17 March 1995) excludes from the matters to which that directive applies "persons engaged in radio-broadcasting and television services"?

(2) If the first question is answered in the negative: must the RAI (Radiotelevisione Italiana SpA) be regarded as definitively excluded from the list of persons who are required to observe Community procedures for public contracts or, on the contrary, is it subject to the general rules laid down by Community Directives 93/37/EEC of 14 June 1993 concerning the award of

public works contracts, 92/50/EEC of 18 June 1992 concerning the award of public service contracts and 93/36/EEC of 14 June 1993 concerning the award of public supply contracts, as amended and supplemented?

(3) For the abovementioned purposes, does the RAI (Radiotelevisione Italiana SpA) fall within the Community concept of a "body governed by public law" since, whilst it is true that, in order to meet needs in the general interest relating to the performance of public service tasks, it certainly carries on an "activity of an industrial or commercial nature" which is open to the market, it must nevertheless be observed that the abovementioned entity, as well as being characterised by the special operational and organisational rules referred to in the grounds of this order, enjoys a special system of State financing in the form of the subscription fee?'

The jurisdiction of the Court of Justice

5 The Corte dei Conti maintains that when sitting as a review body in respect of the financial management of certain undertakings, it satisfies all the criteria established by the Court of Justice for classification as 'a court or tribunal of a Member State' within the meaning of Article 177 of the Treaty. It points out that the purpose of such proceedings is twofold: to determine whether the undertakings have been managed lawfully and in accordance with proper procedure, and to evaluate the results in terms of performance, efficacity and sound financial management.

6 In a communication of 6 July 1999, forwarded to the Court by the Italian Government, the Corte dei Conti submits that the decision which it is called upon to make in the proceedings pending before it is judicial in nature. Pursuant to the applicable national legislation — in particular, Article 8 of Law No 259/1958 of 21 March 1958 — proceedings before the bench reviewing the financial management of undertakings are conducted on an *inter partes* basis and

culminate in a decision settling the dispute. That decision is not amenable to appeal and has the authority of *res judicata*.

7 The Italian Government maintains that the questions referred by the Corte dei Conti for a preliminary ruling are inadmissible.

8 It adds that the Italian Constitutional Court has consistently held (notably in Judgment No 335/95, *Rivista della Corte dei Conti*, 1995, 3, II, p. 163) that a distinction must be drawn between the preliminary review of the lawfulness of executive measures and the *ex post facto* review of the financial management of undertakings. Whereas, in the former case, the responsibilities discharged by the Corte dei Conti are in many respects comparable with judicial functions, its *ex post facto* review of financial management, provided for in Article 3(4) of Law No 20/1994 of 14 January 1994 (GURI No 10 of 14 January 1994) 'is not such as to sustain comparison with judicial review, that is to say, with a power directed to the protection of the rules of law, to be exercised solely on the basis of legal criteria'.

9 The Commission maintains that the Corte dei Conti, in the exercise of its powers of *ex post facto* review, cannot be classified as a court or tribunal within the meaning of Article 177 of the Treaty. It argues in particular that, in the main proceedings, the Corte dei Conti is not hearing a dispute which it must settle by a decision which is judicial in nature. Since its powers of *ex post facto* review concern measures which have already been implemented, the task of the Corte dei Conti is to test the results obtained by the administrative department against its initial remit. In so doing, the Corte dei Conti is discharging a duty characteristic of an administrative authority, not a judicial body.

10 The Commission also points out that the Corte dei Conti assesses the acts of the administration not solely by applying rules of law, but also on the basis of other criteria.

11 In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes into account a number of factors, such as whether the body concerned is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, in particular, Case 61/65 *Vaassen-Göbbels* [1966] ECR 261; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; and Case C-416/96 *Eddline El-Yassini* [1999] ECR I-1209, paragraph 17).

12 Moreover, it is settled law that a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see the order in Case 318/85 *Greis Unterweger* [1986] ECR 955, paragraph 4; Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9; and Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14).

13 The question whether a body may refer a question to the Court falls to be determined, therefore, on the basis of criteria relating both to the constitution of that body and to its function. Thus, a national body may be classified as 'a court or tribunal' within the meaning of Article 177 of the Treaty when it is performing judicial functions, but not when exercising other functions — of an administrative nature, for example.

14 It follows that in order to establish whether a national body, entrusted by law with different categories of function, is to be regarded as a court or tribunal within the meaning of Article 177 of the Treaty, it is necessary to determine in what specific capacity it is acting within the particular legal context in which it seeks a ruling from the Court. For the purposes of that analysis, no relevance is to be attributed to the fact that, when otherwise configured — or even when it is the

same, but exercising powers other than those in the context of which the reference was made — the body concerned falls to be classified as a court or tribunal for the purposes of Article 177 of the Treaty.

15 It is clear from the observations submitted to the Court that the powers of *ex post facto* review exercised by the Corte dei Conti in the main proceedings characterise an administrative role consisting in the evaluation and verification of the results of administrative action. Accordingly, in the context in which the present reference to the Court arose, that body is not exercising a judicial function.

16 In those circumstances, the Court has no jurisdiction to reply to the questions referred by the Corte dei Conti for a preliminary ruling.

Costs

17 The costs incurred by the Italian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the Corte dei Conti, the decision on costs is a matter for that body.

On those grounds,

THE COURT

hereby orders:

The Court of Justice does not have jurisdiction to answer the questions raised by the Corte dei Conti in its decision for reference of 30 October 1998.

Luxembourg, 26 November 1999.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President