JUDGMENT OF THE COURT (Third Chamber)

25 March 2010 *

In Case C-451/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberlandesgericht Düsseldorf (Germany), made by decision of 2 October 2008, received at the Court on 16 October 2008, in the proceedings

Helmut Müller GmbH

v

Bundesanstalt für Immobilienaufgaben,

intervening parties:

Gut Spascher Sand Immobilien GmbH,

* Language of the case: German.

municipality of Wildeshausen,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Second Chamber, acting for the President of the Third Chamber, P. Lindh, A. Rosas, A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: P. Mengozzi,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 23 September 2009,

after considering the observations submitted on behalf of:

— Helmut Müller GmbH, by O. Grübbel, Rechtsanwalt,

— The Bundesanstalt für Immobilienaufgaben, by S. Hertwig, Rechtsanwalt,

— the municipality of Wildeshausen, by J. Lauenroth, Rechtsanwalt,

— the German Government, by M. Lumma and J. Möller, acting as Agents,

— the French Government, by G. de Bergues and J.-S. Pilczer, acting as Agents,

— the Italian Government, by G. Fiengo, avvocato dello Stato,

— the Netherlands Government, by C. Wissels and Y. de Vries, acting as Agents,

— the Austrian Government, by E. Riedl and M. Fruhmann, acting as Agents,

— the Commission of the European Communities, by G. Wilms and C. Zadra, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the concept of 'public works contracts' within the meaning of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The reference has been made in the context of proceedings between Helmut Müller GmbH ('Helmut Müller') and the Bundesanstalt für Immobilienaufgaben (the federal agency responsible for managing public property; 'the Bundesanstalt') concerning the sale by the latter of land on which the purchaser was subsequently to carry out works corresponding to the urban-planning objectives of a local authority, in the present case the municipality of Wildeshausen.

Legal framework

European Union legislation

3 Under recital 2 in the preamble to Directive 2004/18:

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the [EC] Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.'

4 Article 1(2) and (3) of the directive provides as follows:

'2. (a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) "Public works contracts" are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A "work" means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

…

3. "Public works concession" is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.'

5 Article 16(a) of Directive 2004/18 states:

'This Directive shall not apply to public service contracts for:

(a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; …'

National legislation

6 Paragraph 10(1) of the Building Code (Baugesetzbuch) of 23 September 2004 (BGBl. 2004 I, p. 2414; 'the BauGB') provides:

'The municipality shall adopt the development plan by means of a by-law.'

7 Paragraph 12 of the BauGB provides as follows:

'1. The municipality may decide, by means of a building plan for the works, on the admissibility of a project where, on the basis of a plan drawn up in agreement with the municipality for the execution of the works and for the supply of utilities (works and utilities plan), the contractor is ready and able to execute the works and, before the decision under Paragraph 10(1), undertakes to execute them within a prescribed period and to bear the planning costs and the costs relating to the supply of utilities in full or in part (contract to execute works) …

…

3. (a) Where, by determining a zone for construction of the works or by other means, a building plan for the works lays down … a building use … , it must … be provided, with regard to the specified uses, that the only projects which are authorised are those which the contractor undertook to execute in the contract for execution of the works …

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 The Bundesanstalt was owner of a property known as the 'Wittekind barracks', occupying an area of just under 24 hectares in Wildeshausen, Germany.

9 In October 2005, Wildeshausen town council decided, with a view to returning the land concerned — which covers approximately 3% of developed and non-developed areas of the town — to civilian use, to undertake feasibility studies for an urban planning project.

10 In October 2006, the Bundesanstalt indicated in statements made on the internet and in the press that it intended to sell Wittekind barracks.

11 On 2 November 2006, Helmut Müller, a property development company, offered to buy the land for EUR 4 million, subject, however, to the condition that an urban development plan be drawn up on the basis of its project for use of the land.

12 Wittekind barracks were closed at the beginning of 2007.

13 In January 2007 the Bundesanstalt launched a call for tenders with a view to selling the property, in its condition at the time, as quickly as possible.

14 On 9 January 2007, Helmut Müller submitted a tender offer of EUR 400 000, which it increased to EUR 1 million on 15 January 2007.

15 Another property development company, Gut Spascher Sand Immobilien GmbH ('GSSI'), which was at that time in the process of being set up, submitted a tender offer of EUR 2.5 million.

16 Two other tender offers were submitted.

17 According to an experts' report produced by the Bundesanstalt before the national court, the value of the land concerned, on 1 May 2007, was EUR 2.33 million.

18 The order for reference indicates that the tenderers' plans were submitted to and discussed with the Wildeshausen municipal authorities, in the presence of the Bundesanstalt.

19 In the meantime, the Bundesanstalt had assessed the plans submitted by Helmut Müller and GSSI and expressed a preference for GSSI's project on urban-development grounds, taking the view that it would make Wildeshausen more attractive as a town. It informed the municipal authorities accordingly.

20 It was then agreed that the property should not be sold until after Wildeshausen town council had approved the project. The Bundesanstalt confirmed that it would respect the town council's decision.

21 As is further apparent from the order for reference, Wildeshausen town council decided in favour of GSSI's project and, on 24 May 2007, decided inter alia as follows:

'Wildeshausen town council is prepared to examine the project submitted by Mr R. [GSSI's managing director] and to embark on the procedure of drawing up a corresponding building plan for the area ...

There is no statutory right to obtain a (possibly project-related) building plan.

It is unlawful [for the municipality of Wildeshausen] to give binding undertakings on building use or to restrict its discretion (which is, furthermore, subject to legal constraints) before appropriate urban planning procedures have been concluded.

The abovementioned decisions are therefore in no way binding with respect to any land-use plan of [the municipality of Wildeshausen].

The contractor and the other persons involved in the project are liable in respect of the risks associated with planning and other costs.'

22 Immediately after that decision of 24 May 2007, Wildeshausen town council revoked its decision of October 2005 to undertake preliminary urban planning studies.

23 By notarial deed of 6 June 2007, the Bundesanstalt, with the concurrence of the municipality of Wildeshausen, sold Wittekind barracks to GSSI. It informed Helmut Müller of that sale on 7 June 2007. In January 2008, GSSI was entered in the land register as owner of the property. By notarial deed of 15 May 2008, the Bundesanstalt and GSSI confirmed the sales contract of 6 June 2007.

24 Helmut Müller brought an action before the Vergabekammer (body with jurisdiction at first instance in public procurement cases), arguing that public procurement rules had not been followed even though the sale of the barracks was subject to public procurement law. Helmut Müller claimed that the sales contract was void because it, Helmut Müller, had not been kept properly informed in its capacity as potential purchaser of the land.

25 The Vergabekammer dismissed the action as inadmissible on the ground, essentially, that GSSI had not been awarded a works contract.

26 Helmut Müller appealed against that decision to the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), claiming that, in the light of the circumstances, GSSI was to be regarded as being about to obtain a works contract in the form of a works concession. According to Helmut Müller, the relevant decisions had been taken jointly by the Bundesanstalt and the municipality of Wildeshausen.

27 The Oberlandesgericht Düsseldorf is inclined to agree with that argument. It takes the view that, at some point in the relatively near future — which cannot yet be

determined with precision — the municipality of Wildeshausen will exercise its discretion and draw up a building plan for the works in accordance with Paragraph 12 of the BauGB and award GSSI a contract for execution of works within the meaning of that paragraph, and thus a public works contract.

28 Since the municipality of Wildeshausen is not permitted to pay any remuneration, the Oberlandesgericht Düsseldorf is of the opinion that that public works contract ought to be awarded in the legal form of a public works concession, and that GSSI should bear the economic risk inherent in that transaction. The Oberlandesgericht Düsseldorf also regards the transfer of ownership of the land and the award of a public works contract as forming a whole from the point of view of public procurement law. The steps taken by the Bundesanstalt and by the municipality of Wildeshausen merely occurred at different times.

29 The Oberlandesgericht Düsseldorf adds that it has adopted the same point of view in other cases before it, in particular in its judgment of 13 June 2007 concerning the airport in Ahlhorn (Germany). Its analysis has not, however, met with unanimous approval; German case-law is predominantly at odds with its interpretation. In addition, according to the order for reference, the German Federal Government was about to amend German public-procurement legislation in a manner which runs counter to the position advocated by the Oberlandesgericht.

30 The draft legislation mentioned by the Oberlandesgericht sought to clarify the definition of the concept of 'public works contracts' in Paragraph 99(3) of the Law against restraints on competition (Gesetz gegen Wettbewerbsbeschränkungen) of 15 July 2005 (BGBl. 2005 I, p. 2114) as follows (the proposed amendments being shown in italics):

'Works contracts are contracts relating to either the execution, or both the design and execution, *for the contracting authority*, of works or of a work which is the outcome of

building or civil engineering works and is intended itself to fulfil an economic or technical function, or of a work *which is of immediate economic benefit to the contracting authority* and is carried out by third parties in accordance with the requirements specified by that authority.'

31 Paragraph 99 was also to be extended by insertion of a new subparagraph 6, containing the following definition of a public works concession:

'A works concession is a contract relating to the execution of a works contract in which the consideration for the works does not consist in payment but in the right to exploit the building concerned for a fixed period or, as the case may be, in that right together with payment.'

32 Shortly after the present reference for a preliminary ruling had been made, amendments in those terms were introduced by the Law on the modernisation of public procurement law (Gesetz zur Modernisierung des Vergaberechts) of 20 April 2009 (BGBl. 2009 I, p. 790).

33 In those circumstances, the Oberlandesgericht Düsseldorf decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is it a requirement, in order for there to be a public works contract under Article 1(2)(b) of … Directive [2004/18] …, that the works be physically carried out for the public contracting authority and bring it an immediate economic benefit?

2. In so far as, according to the definition of a public works contract in Article 1(2)(b) of Directive [2004/18], the element of procurement is indispensable, is procurement to be regarded as having taken place, in accordance with the second variant of the provision, if the intended works for the public contracting authority fulfil a particular public purpose (for example, the development of part of a town) and the public contracting authority has the legal right under the contract to ensure that the public purpose is achieved and that the necessary works will be available?

3. Does the concept of a public works contract in accordance with the first and second variants of Article 1(2)(b) of Directive [2004/18] require that the contractor be directly or indirectly obliged to provide the works? If so, must there be a legally enforceable obligation?

4. Does the concept of a public works contract in accordance with the third variant of Article 1(2)(b) of Directive [2004/18] require that the contractor be obliged to carry out works, or that works form the subject-matter of the contract?

5. Do contracts by which, through the requirements specified by the public contracting authority, it is intended to ensure that the works to be carried out for a particular public purpose be available, and by which (by contractual stipulation) the contracting body is given the legal power to ensure (in its own indirect

interest) the availability of the works for the public purpose, fall within the third variant of Article 1(2)(b) of Directive [2004/18]?

6. Is the concept of "requirements specified by the contracting authority" in Article 1(2)(b) of Directive [2004/18] fulfilled if the works are to be carried out in accordance with plans examined and approved by the public contracting authority?

7. Must there be held to be no public works concession under Article 1(3) of Directive [2004/18] if the concessionaire is, or will become, the owner of the land on which the works are to be carried out, or the concession is granted for an indeterminate period?

8. Does Directive [2004/18] — with the legal consequence of an obligation on the public contracting authority to invite tenders — apply if a sale of land by a third party and the award of a public works contract take place at different times and on the conclusion of the land sale the public works contract has not yet been awarded, but at the last-mentioned time there was, on the part of the public authority, the intention to award such a contract?

9. Are separate but related transactions concerning a sale of land and [the award of] a public works contract to be regarded from the point of view of the law on the awarding of contracts as a unity, if at the time the land sale contract was entered into the award of a public works contract was intended and the participants deliberately created a close connection between the contracts from a substantive — and possibly also temporal — point of view (see Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705)?'

Questions referred for a preliminary ruling

Preliminary observations

34 In most of the language versions of Directive 2004/18, there are three variants to the concept of 'public works contracts' provided for in Article 1(2)(b) of the directive. The first consists in the execution, which may be accompanied by the design, of building works falling within one of the categories listed in Annex I to the directive. The second concerns the execution, which may be accompanied by the design, of a work. The third variant is the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

35 A 'work', within the meaning of that provision, is defined as the 'outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function'.

36 While the majority of the language versions use the term 'work' for both the second and the third variants, the German version uses two different terms, that is to say, 'Bauwerk' (work) for the second variant and 'Bauleistung' (building activity) for the third.

37 In addition, the German version of Article 1(2)(b) is the only one which provides that the activity referred to in the third variant must be realised not only 'by whatever means' but also 'by third parties' ('durch Dritte').

38 It is settled case-law that the wording used in one language version of a provision of European Union law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement for uniform application of European Union law. Where there is divergence between the various language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see Case C-372/88 *Cricket St Thomas* [1990] ECR I-1345, paragraphs 18 and 19; Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 16; and Case C-239/07 *Sabatauskas and Others* [2008] ECR I-7523, paragraphs 38 and 39).

39 The questions submitted by the referring court must be answered in the light of those considerations.

First and second questions

40 By its first two questions, which it is appropriate to consider together, the referring court asks, in essence, whether the concept of 'public works contracts', within the meaning of Article 1(2)(b) of Directive 2004/18, requires that the works which are the subject of the contract be physically carried out for the contracting authority in its immediate economic interest or whether it is sufficient if the works fulfil a public purpose, such as the development of part of a town.

41 It should be noted at the outset that the sale to an undertaking, by a public authority, of undeveloped land or land which has already been built upon does not constitute a public works contract within the meaning of Article 1(2)(b) of Directive 2004/18. First, such a contract requires that the public authority assume the position of purchaser and not seller. Second, the objective of such a contract must be the execution of works.

42 The provisions of Article 16(a) of Directive 2004/18 confirm that analysis.

43 Consequently, a sale, such as the sale in the main proceedings of Wittekind barracks by the Bundesanstalt to GSSI, cannot of itself constitute a public works contract within the meaning Article 1(2)(b) of Directive 2004/18.

44 Those questions submitted by the referring court do not, however, refer to that seller-purchaser relationship, but are directed rather at the relationship between the municipality of Wildeshausen and GSSI, that is to say, to the relationship between the public authority with town-planning powers and the purchaser of Wittekind barracks. The referring court wishes to know whether that relationship may constitute a public works contract within the meaning of that provision.

45 In that regard, it should be pointed out that, under Article 1(2)(a) of Directive 2004/18, 'public contracts' are contracts for pecuniary interest concluded in writing.

46 The concept of a contract is essential for the purpose of defining the scope of Directive 2004/18. As stated in recital 2 in the preamble to that directive, its purpose is to apply the rules of European Union law to the award of contracts concluded on behalf of the State, regional or local authorities and other bodies governed by public law entities. The directive does not refer to other types of activities for which public authorities are responsible.

47 In addition, only a contract concluded for pecuniary interest may constitute a public contract coming within the scope of Directive 2004/18.

48 The pecuniary nature of the contract means that the contracting authority which has concluded a public works contract receives a service pursuant to that contract in return for consideration. That service consists in the realisation of works from which the contracting authority intends to benefit (see Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 77, and Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 45).

49 Such a service, by its nature and in view of the scheme and objectives of Directive 2004/18, must be of direct economic benefit to the contracting authority.

50 That economic benefit is clearly established where it is provided that the public authority is to become owner of the works or work which is the subject of the contract.

51 Such an economic benefit may also be held to exist where it is provided that the contracting authority is to hold a legal right over the use of the works which are the subject of the contract, in order that they can be made available to the public (see, to that effect, *Ordine degli Architetti and Others*, paragraphs 67, 71 and 77).

52 The economic benefit may also lie in the economic advantages which the contracting authority may derive from the future use or transfer of the work, in the fact that it contributed financially to the realisation of the work, or in the assumption of the risks were the work to be an economic failure (see, to that effect, *Auroux and Others*, paragraphs 13, 17, 18 and 45).

53 The Court has already held that an agreement by which a first contracting authority entrusts a second contracting authority with the execution of a work may constitute a public works contract, regardless of whether or not it is anticipated that the first

contracting authority is, or will become, the owner of all or part of that work (*Auroux and Others*, paragraph 47).

54 It follows from the foregoing that the concept of 'public works contracts' within the meaning of Article 1(2)(b) of Directive 2004/18 requires that the works which are the subject of the contract be carried out for the contracting authority's immediate economic benefit; it is not, however, necessary that the service should take the form of the acquisition of a material or physical object.

55 The question arises as to whether those conditions are satisfied where the purpose of the intended works is to fulfil an objective in the public interest, the achievement of which is incumbent on the contracting authority, such as the development or coherent planning of part of an urban district.

56 In the Member States of the European Union, the execution of building projects, at least those of a certain size, is normally subject to prior authorisation by the public authority having urban-planning powers. That authority must assess, in the exercise of its regulatory powers, whether the execution of the works is in the public interest.

57 However, it is not the purpose of the mere exercise of urban-planning powers, intended to give effect to the public interest, to obtain a contractual service or immediate economic benefit for the contracting authority, as is required under Article 1(2)(a) of Directive 2004/18.

58 Consequently, the answer to the first and second questions is that the concept of 'public works contracts', within the meaning of Article 1(2)(b) of Directive 2004/18, does not require that the works which are the subject of the contract be materially or physically carried out for the contracting authority, provided that they are carried

out for that authority's immediate economic benefit. The latter condition is not satisfied through the exercise by that contracting authority of regulatory urban-planning powers.

Third and fourth questions

59 By its third and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether the concept of 'public works contracts', within the meaning of Article 1(2)(b) of Directive 2004/18, requires that the contractor be under a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation be legally enforceable.

60 As has been pointed out in paragraphs 45 and 47 of the present judgment, Article 1(2)(a) of Directive 2004/18 defines a public works contract as a contract for pecuniary interest. That concept is based on the premise that the contractor undertakes to carry out the service which is the subject of the contract in return for consideration. By concluding a public works contract, the contractor therefore undertakes to carry out, or to have carried out, the works which form the subject of that contract.

61 It is irrelevant whether the contractor carries out the works itself or uses subcontractors for that purpose (see, to that effect, *Ordine degli Architetti and Others*, paragraph 90, and *Auroux and Others*, paragraph 44).

62 Since the obligations under the contract are legally binding, their execution must be legally enforceable. In the absence of rules provided for under European Union law, and in accordance with the principle of procedural autonomy, the detailed rules governing implementation of those obligations are a matter for national law.

63 Consequently, the answer to the third and fourth questions is that the concept of 'public works contracts', within the meaning of Article 1(2)(b) of Directive 2004/18, requires that the contractor assume a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation be legally enforceable in accordance with the procedural rules laid down by national law.

Fifth and sixth questions

64 By its fifth and sixth questions, which it is appropriate to examine together, the referring court asks, in essence, whether the 'requirements specified by the public contracting authority', within the meaning of Article 1(2)(b) of Directive 2004/18, may consist either in the contracting authority's exercise of the power to ensure that the work to be carried out addresses a public interest or in the exercise of the power which it is recognised as having to examine and approve building plans.

65 Those questions arise from the fact that, in the case in the main proceedings, the presumed contracting authority, that is to say, the municipality of Wildeshausen, did not draw up a list of requirements relating to work to be carried out on the land occupied by Wittekind barracks. According to the order for reference, that municipality merely decided that it was minded to examine the project presented by GSSI and to embark on the procedure of drawing up a corresponding building plan.

66 However, the third variant set out in Article 1(2)(b) of Directive 2004/18 provides that the objective of public works contracts is the realisation of a 'work corresponding to the requirements specified by the contracting authority'.

67 In order for it to be possible to establish that a contracting authority has specified its requirements within the meaning of that provision, the authority must have taken measures to define the type of the work or, at the very least, have had a decisive influence on its design.

68 The mere fact that a public authority, in the exercise of its urban-planning powers, examines certain building plans presented to it, or takes a decision applying its powers in that sphere, does not satisfy the obligation that there be 'requirements specified by the contracting authority', within the meaning of that provision.

69 The answer to the fifth and sixth questions is, therefore, that the 'requirements specified by the contracting authority', within the meaning of the third variant set out in Article 1(2)(b) of Directive 2004/18, cannot consist in the mere fact that a public authority examines certain building plans submitted to it or takes a decision in the exercise of its regulatory urban-planning powers.

Seventh question

70 By its seventh question, the referring court asks, in essence, whether a public works concession, within the meaning of Article 1(3) of Directive 2004/18, is excluded in the case where the sole economic operator to which the concession can be granted already owns the land on which the work is to be carried out, or where the concession was granted for an indeterminate period.

71 Under Article 1(3) of Directive 2004/18, a public works concession 'is a contract of the same type as a public works contract except for the fact that the consideration for

the works to be carried out consists either solely in the right to exploit the work or in this right together with payment'.

72 In order for a contracting authority to be able to transfer to the other contracting party the right to exploit a work within the terms of that provision, that contracting authority must be in a position to exploit that work.

73 That will normally not be the case where the only basis for the right of exploitation is the right of ownership of the economic operator concerned.

74 The owner of land has the right to exploit that land in compliance with the applicable statutory rules. As long as an economic operator enjoys the right to exploit the land which he owns, it is in principle impossible for a public authority to grant a concession relating to that exploitation.

75 It should, in addition, be pointed out that the essential characteristic of the concession is that it is the concessionaire himself who bears the main, or at least the substantial, operating risk (see to that effect, with regard to concessions relating to public services, Case C-206/08 *Eurawasser* [2009] ECR I-8377, paragraphs 59 and 77).

76 The Commission of the European Communities submits that that risk may lie in the concessionaire's uncertainty as to whether the urban-planning service of the local authority concerned will, or will not, approve its plans.

77 That argument cannot be accepted.

78 In the type of scenario referred to by the Commission, the risk would be linked to the contracting authority's regulatory powers in respect of urban planning and not to the contractual relationship arising from the concession. Consequently, the risk is not linked to exploitation.

79 In any event, with regard to the duration of concessions, there are serious grounds, including the need to guarantee competition, for holding the grant of concessions of unlimited duration to be contrary to the European Union legal order, as stated by the Advocate General in points 96 and 97 of his Opinion (see, to the same effect, Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 73).

80 Consequently, the answer to the seventh question is that, in circumstances such as those of the case in the main proceedings, there is no public works concession within the meaning of Article 1(3) of Directive 2004/18.

Eighth and ninth questions

81 The eighth and ninth questions submitted by the referring court should be examined together. By its eighth question, the referring court asks, in essence, whether the provisions of Directive 2004/18 apply to a situation in which one public authority sells land to an undertaking, even though another public authority intends to award a works contract in respect of that land without yet having formally decided to award that contract. The ninth question concerns the possibility of regarding as a unity, from a legal point of view, the sale of the land and the subsequent award of a works contract in respect of that land.

82 In that regard, it is prudent not to exclude from the outset the application of Directive 2004/18 to a two-phase award procedure in the form of the sale of land which will subsequently form the subject of a works contract, by considering those transactions as a unity.

83 However, there is nothing in the circumstances of the case in the main proceedings to confirm that the prerequisites for such an application of that directive exist.

84 As submitted by the French Government in its written observations, the parties to the main proceedings did not assume any legally binding contractual obligations.

85 First, the municipality of Wildeshausen and GSSI did not assume any obligations of such a nature.

86 Second, GSSI did not give any undertaking to carry out the plans for the economic development of the land which it had purchased.

87 Finally, there is no evidence in the notarial deeds of sale to indicate that the award of a public works contract was imminent.

88 The intentions revealed by the documents in the case-file do not constitute binding obligations and cannot in any way satisfy the requirement of a written contract which is inherent in the very concept of a public contract set out in Article 1(2)(a) of Directive 2004/18.

89 The answer to the eighth and ninth questions is therefore that, in circumstances such as those of the case in the main proceedings, the provisions of Directive 2004/18 do not apply to a situation in which one public authority sells land to an undertaking, even though another public authority intends to award a works contract in respect of that land but has not yet formally decided to award that contract.

Costs

90 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 (Third Chamber) hereby rules:

1. **The concept of 'public works contracts', within the meaning of Article 1(2)(b) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, does not require that the works which are the subject of the contract be materially or physically carried out for the contracting authority, provided that they are carried out for that authority's immediate economic benefit. The latter condition is not satisfied by the exercise by that contracting authority of regulatory urban-planning powers.**

2. **The concept of 'public works contracts', within the meaning of Article 1(2)(b) of Directive 2004/18, requires that the contractor assume a direct or indirect obligation to carry out the works which are the subject of the contract and**

that that obligation be legally enforceable in accordance with the procedural rules laid down by national law.

3. **The 'requirements specified by the contracting authority', within the meaning of the third variant set out in Article 1(2)(b) of Directive 2004/18, cannot consist in the mere fact that a public authority examines certain building plans submitted to it or takes a decision in the exercise of its regulatory urban-planning powers.**

4. **In circumstances such as those of the case in the main proceedings, there is no public works concession within the meaning of Article 1(3) of Directive 2004/18.**

5. **In circumstances such as those of the case in the main proceedings, the provisions of Directive 2004/18 do not apply to a situation in which one public authority sells land to an undertaking, even though another public authority intends to award a works contract in respect of that land but has not yet formally decided to award that contract.**

[Signatures]