OPINION OF ADVOCATE GENERAL LENZ
delivered on 9 December 1993 *

Mr President,
Members of the Court,

A — Introduction

1. This request for a preliminary ruling relates in substance to the classification of a mixed contract for the purpose of determining whether Directive 71/305/EEC [1] concerning the coordination of procedures for the award of public works contracts is applicable.

2. The main action concerns the invitation to tender for and the award of a project originating in a cooperation agreement (of 14 July 1989) between the Government of the Canary Islands and the municipality of Las Palmas de Gran Canaria (hereinafter referred to as 'Las Palmas'). It was intended to open and operate a casino and to continue a hotel business in the premises of the Hotel Santa Catalina, which is owned by the municipality of Las Palmas and is regarded as its emblem. The invitation to tender was arranged by the Government of the Canary Islands, the competent authority for awarding the concession for operating a casino. The agreements between the authorities are to the effect that, so far as the operation of the hotel was concerned, the Government of the Canary Islands would arrange the invitation to tender on behalf of the municipality.

3. By order of 17 July 1989 of the Presidential Counsellor to the Government of the Canary Islands, published in the *Boletín Oficial de Canarias* of 19 July 1989, an open invitation to tender was issued concerning, first, the award of the final concession for the installation and opening of a casino in Las Palmas, the conditions of tender being set out in Annex I, and, secondly, participation in an open invitation to tender, to be launched on behalf of the municipality of Las Palmas, concerning the use of the building owned by the municipality and the operation of the Hotel Santa Catalina, the conditions of tender being set out in Annex II.

4. The conditions of tender in Annexes I and II refer to each other. Prospective tenderers must submit their tender simultaneously for both parts of the invitation to tender (*inter alia*, Article 2(i) of Annex I, and Article 2, paragraphs 1 and 3, of Annex II). Article 2 of Annex I, containing the conditions which must be fulfilled by tendering undertakings, states that the sole object of the undertaking must consist in operating casinos. A deroga-

* Original language: German.

1 — Council Directive of 26 July 1971 (OJ, English Special Edition 1971(II), p. 682), as last amended by Directive 93/4/EEC (OJ 1993 L 38, p. 31).

tion from this condition is allowed in so far as additional services may be provided. The list of examples of such additional services expressly mentions the operation of the Hotel Santa Catalina, which is ensured by means of an obligation on the part of the prospective successful tenderer.

5. The conditions of tender in Annex II to the invitation to tender for the award of the operation of the Hotel Santa Catalina, which is intended to house the casino as well as the hotel business, lay down minimum requirements for the award of the contract with regard to the installation and operation of the casino, the use of the buildings and the hotel business (Article 1, Annex II). Article 2, paragraph 2, of Annex II stipulates that the successful tenderer must invest at least 1 000 million pesetas in fitting out the hotel and in its surroundings, excluding the installation of the casino, for the purpose of renovation and conversion so that the hotel can retain its five-star status. Furthermore, Article 2, paragraph 2, of Annex II contains an obligation to pay 1 000 million pesetas as consideration for the use of the entire architectural complex for a term corresponding to the initial 10-year term of the contract. The consideration is then divided into two equal parts for the use of the premises for the hotel on the one hand and the casino on the other, with different conditions of payment for the two establishments.

6. By order of 10 January 1990 the Government of the Canary Islands awarded the contract for the entire project to the commercial company Gran Casino Las Palmas, SA.

7. The lessee of the hotel at the time, and plaintiff in the main action, Gestión Hotelera Internacional, SA, brought proceedings under administrative law against the invitation to tender and against the award of the contract. It contended, *inter alia*, that the contract which is the subject of the invitation to tender is a public works contract within the meaning of Directive 71/305/EEC and therefore the invitation to tender ought to have been published in the *Official Journal of the European Communities*. This was not done.

8. To clarify this point of law, the national court has referred the following questions to the Court of Justice:

1. Is a mixed contract for the performance of works and the assignment of property to be regarded as included in the concept of 'public works contracts' set out in Article 1(a) of Council Directive 71/305/EEC of 26 July 1971?

2. Are, therefore, 'authorities awarding contracts' which wish to award a contract having those characteristics obliged to publish a notice of that contract in the *Official Journal of the European Communities*?

9. The first defendant, the Government of the Canary Islands, and the second defendant, the municipality of Las Palmas, both take the view that there is no reason for requesting a preliminary ruling from the Court of Justice. They contend that Directive 71/305/EEC has been transposed into national law, so that it is only necessary to interpret the law of a Member State.

10. On the substantive question of classifying the contract concerned, all the parties to the proceedings before the Court, the Spanish Government, the first and second defendants and the Commission, take the view, on different grounds, that the contract is not a public works contract within the meaning of the directive.

11. As none of the parties has made an application for an oral procedure, the Court will give its ruling on the basis of the written procedure.

B — Analysis

12. I. First it is necessary to consider the objections concerning admissibility which the two defendants in the main action have raised against the request for a preliminary ruling. Both the first defendant, the Government of the Canary Islands, and the second defendant, the municipality of Las Palmas, claim that as Directive 71/305/EEC has already been transposed into national law, all that remains is a matter of interpretation of the law of a Member State. Since the directive has been transposed, its provisions are not directly applicable. According to the defendants, direct applicability comes into question only if a directive has either not been transposed at all or has been transposed incorrectly. This is not so in the present case. The second defendant, referring to the judgment in *CILFIT*, [2] contends that there is no reasonable doubt as to the interpretation of Community law. The defendants also take the view that the answer to the question is irrelevant to the decision in the case because the plaintiff has no right to bring proceedings.

13. To take the last argument first, it should be observed that the question of the plaintiff's right to bring proceedings is a question of the procedural law of a Member State which the Court is not competent to answer. According to the Court's settled case-law, problems of domestic law fall within the exclusive jurisdiction of the courts of the Member States. [3] The Court can only provide an interpretation of Community law. [4] The Court may not, under the preliminary rulings procedure, give a ruling on the application of provisions of national law or on the relevance of the request for a preliminary ruling. [5] It is solely for the national court to

2 — Judgment in Case 203/81 *CILFIT* v *Ministry of Health* [1982] ECR 3415, paragraph 16.

3 — See judgment in Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 19; judgment in Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraphs 39-42.

4 — Judgment in Case 295/82 *GIE Rhône Alpes Huiles* v *Syndicat National des Fabricants Raffineurs d'Huile de Graissage* [1984] ECR 575, paragraph 12.

5 — Judgment in Case 232/82 *Baccini* v *ONEM* [1983] ECR 583, paragraph 11.

determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the question which it submits to the Court. [6]

14. Where the national court's request concerns the interpretation of a provision of Community law, the Court is in principle bound to reply to it. [7] It can be otherwise only if the questions are purely hypothetical [8] or if a purely fictitious dispute is taken as an occasion for requesting a preliminary ruling from the Court. [9] There is clearly no such exceptional situation in the present case. On the contrary, the national court has made a detailed examination of the facts and the legal problems of the case, [10] so that there can be no grounds for doubting the admissibility of the reference for a preliminary ruling.

15. The fact that a directive has been transposed into national law does not preclude a reference for a preliminary ruling concerning its interpretation. After a directive has been transposed into national law, individuals are primarily affected by that law. [11] However, the Court has consistently held that 'the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding *on all the authorities of Member States* including, for matters within their jurisdiction, *the courts.* It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement the directive ... , national courts are required *to interpret their national law in the light of* the wording and the purpose of *the directive* ...'. [12] It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law. [13]

16. Consequently, if a national court 'is required to interpret its national law in the light of the wording and the purpose of that directive', [14] it is of course also permissible to request a preliminary ruling from the Court of Justice where there is any doubt as to the interpretation of the directive.

6 — See judgment of 27 October 1993 in Case C-127/92 *Enderby* v *Frenchay Health Authority* [1993] ECR I-5535, paragraphs 10 and 12.

7 — Judgment in Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 24.

8 — Judgment in Case C-83/91 *Meilicke*, cited above, paragraph 25.

9 — Judgment in Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraphs 22 to 24.

10 — See judgment in Case C-83/91 *Meilicke*, cited above, paragraph 26, and judgment in Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo* [1993] ECR I-393.

11 — See judgment in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 51.

12 — My emphasis. Judgment in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26; also judgment in Case 79/83 *Harz* [1984] ECR 1921, paragraph 26; and, to the same effect, judgment in Case 222/84 *Johnston*, cited above, paragraph 53; judgment in Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 12; judgment in Case 31/87 *Bentjees* v *Netherlands* [1988] ECR 4635, paragraph 39.

13 — See Cases 14/83 and 79/83, cited above.

14 — See judgment in Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 13 and operative part.

II.(a) First question

17. The first question put by the national court asks in effect whether the invitation to tender and the award of the contract in question fall within the directive concerning the award of public works contracts.

18. With regard to the interpretation needed for classifying the contract in question, it is necessary in the first place to proceed on the basis that Directive 71/305/EEC in its original version, i. e. before it was amended by Directive 89/440/EEC, is the relevant text. [15] Directive 89/440/EEC was notified to the Member States on 10 July 1989, [16] the same day as that on which the notice of the invitation to tender for the project at issue was published in the regional Official Journal. Article 3 of Directive 89/440/EEC gives the Member States one year in which to adopt the measures necessary to comply with the directive. Consequently at the relevant date, that of the invitation to tender, the provisions of Directive 89/440/EEC were not yet to be taken into account.

19. It is common ground that the contract at issue is of a mixed character. The findings of the national court and the submissions of all the parties to the proceedings before this Court agree on this point. The formulation of the question on which a preliminary ruling is sought is therefore ambiguous in that the contract to be appraised is placed in a legal category, and the emphasis is laid on the contract for works that is to be performed. Whether the obligation to carry out building works characterizes the contract is, however, precisely the subject of the question. I therefore propose to take the question in wider terms, in the light of the request for a preliminary ruling, as asking whether an open invitation to tender and the award of a concession to open and operate a casino, and a concession to operate a hotel in conjunction with a lease of the premises necessary for that purpose, in the framework of which an obligation must be entered into for carrying out conversion work, must be regarded as a public works contract within the meaning of Directive 71/305/EEC.

20. In the final analysis, the answer to the question turns solely on whether the project at issue is to be regarded as a works contract within the meaning of Directive 71/305/EEC, and not on positive classification in another category of legal transactions, in particular service contracts. [17] Considerations falling within that perspective are purely hypothetical and can only serve as criteria for demarcation.

15 — Council Directive of 18 July 1989 amending Directive 71/305/EEC (OJ 1989 L 210, p. 1).

16 — See footnote to the first sentence of Article 3(1) of Directive 89/440/EEC.

17 — Within the meaning of Council Directive 92/50/EEC of 18 June 1992 on the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

21. Regarding the classification of the contract, the participants in the proceedings before the Court have reached the same conclusions on differing grounds.

22. The *Commission* considers that the contract is mixed in nature and consists, firstly, of a service concession involving permission to use buildings and installations owned by the municipality for opening and operating a casino, and also for a hotel and restaurant business, for a consideration of 1 000 million pesetas. Secondly, there is an assignment of works to be carried out by the tenderer, at his expense, to the value of 1 000 million pesetas. According to the Commission, the services in question are services within the meaning of Directive 92/50/EEC, [18] in accordance with Annex I B, Nos 17 and 26. Directives 92/50/EEC and 71/305/EEC are mutually exclusive. There can only be a works contract if it forms an essential part of a contract, but not if it is incidental to the service contract. The Commission refers to the 16th recital of Directive 92/50/EEC, which reads as follows:

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

23. Consequently it is necessary to ascertain whether the works contract is the main object of the contract or whether it is only incidental and is therefore severable from the other part of the contract. The Commission takes the view that the works contract cannot be severed from the remainder of the contract. This follows, according to the Commission, from the object of the contract. The works are a necessary prerequisite for the opening of the casino, but they are secondary in comparison with the service. From the economic viewpoint the works are also secondary. Alternatively, if the objects are found to be severable, the Commission submits that the works are the consideration for the concession, so that Article 3 of the original version of Directive 71/305/EEC is applicable, which means that the directive does not apply to this concession contract. Finally, the Commission expresses reservations with regard to its classification of the contract as a public service contract within the meaning of Directive 92/50/EEC. It is indeed a service concession which would, according to the proposal for Directive 92/50/EEC, have fallen within its ambit, but the Council did not accept this wording when adopting the directive.

24. The *Municipality of Las Palmas* states that the licence to operate a casino was issued on 10 January 1990. It proves this by

18 — See footnote 17.

citing at length the text of the order. It contends that the contract is not a works contract but a concession for the operation of a casino and a hotel. The tenderer was given the responsibility for the works and the municipality merely retained rights of supervision and inspection.

25. The *Regional Government* first entertains doubts as to the initial classification of the contract by the national court when formulating the question referred to this Court for a preliminary ruling. The true nature of the contract consists in the use and management of a building owned by the municipality and in the award of the operation of the hotel business. The fact that the invitation to tender requires a secondary, incidental, service does not alter its object. The building works are inseparable from the licence for the opening and operation of the casino, not only because of the voluntary agreement of the authorities concerned, but also because of the special circumstances. The grant of the concession is characterized by the special feature that the premises do not belong to the tenderer but to the municipality. The agreement that the work is to be carried out at the expense of the lessee does not alter the fact that the contract is in the nature of a lease. According to the specifications in Annex II, the works could be influenced by the licensing authority for gaming. The works entail adapting the premises for the proposed use. Furthermore, the building works are not extensive. The lessee can certainly provide for additional structural alterations.

26. With regard to the classification of public-law contracts, the Regional Government observes that, in the case of mixed contracts, sometimes the absorption theory is propounded, which means that the preponderant part of the contract determines the legal classification of the entire contract, and sometimes the combination theory, which means that each part of the contract is governed by the special rules for the type of contract in question. Practice has decided in favour of the absorption theory, which must be applied in this instance also. In any case it is for the Spanish court to classify the contract.

27. In its written observations the *Spanish Government* reproduces the relevant parts of the conditions of tender to illustrate the mutual dependence of the various objects of the contract and their ranking with respect to each other. It takes the view that the part of the contract relating to the building works has a supplementary, instrumental character. The works are an indispensable condition for attaining the main object of the contract. The fact that they are secondary to the other parts of the contract is shown by the provision that the execution of the works can be assigned to a third party. The definition of the objects of the tenderer undertaking precludes that undertaking from the outset from carrying out the building works. The main object of the contract, the opening and operation of a casino, cannot be assigned.

28. The Spanish Government adds that the contract constitutes a lease, the obligation to carry out a minimum volume of building works representing part of the consideration

for the use of the premises and the licence for the businesses established there. The tenderer is responsible for carrying out the works and must also pay for them. However, he is certainly not an awarding authority. The public authorities did not offer the tenderer a price for the works. The extent of the works was not specified either. Prior specification was not possible because of the object of the invitation to tender. In this connection the Spanish Government refers to the derogation laid down in Article 9(h) of the directive, which states that the directive need not be applied to cases where the nature of the works does not permit prior overall pricing.

29. The project in question, for the classification of which the Court of Justice must provide the national court with the necessary guidance on interpretation, is characterized by the fact that the administrations of various regional and local authorities had to cooperate in implementing the proposed plan. Neither the Regional Government nor the municipality could have carried out the project on their own account. The Regional Government alone has power to grant a concession to operate the casino business. As the idea of the responsible authorities was to establish the casino in the Hotel Santa Catalina which has symbolic status, the cooperation of the municipality was indisputable. Up to then, the municipality, as owner of the building, was also actively involved as the lessor of the hotel.

30. The award of a single contract for the operation of the casino and the hotel businesses is an obvious course of action as they were to be housed in the same group of buildings. Therefore it was open to the municipality not to award a contract independently for the hotel and the conversion works necessary for that purpose, but to do so in collaboration with the Regional Government. It appears from the observations submitted to the Court that the structural alterations are necessary both for installing the casino and for renovating and converting the hotel premises. The execution of the works, which in the final analysis are also for the owner's benefit, in a single operation is therefore something that obviously suggests itself.

31. However, it was not the primary concern either of the municipality or the Regional Government to carry out the building alterations. The specifications annexed to the invitation to tender indicate that, on the contrary, the intention was to find an operator for the casino and the hotel. It is questionable whether the obligation to carry out building alterations is nevertheless a public works contract within the meaning of Directive 71/305/EEC.

32. The starting point is the definition given in Article 1(a) of the directive. According to that provision, '"public works contracts" are contracts for pecuniary consideration concluded in writing between a contractor (a

natural or legal person) and an authority awarding contracts as defined under (b), which have as their object one of the activities referred to in Article 2 of the Council Directive of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts ...'.

Article 2 of Directive 71/304/EEC,[19] to which reference is made, is worded as follows:

'1. The provisions of this Directive shall apply to activities of self-employed persons which are covered by Major Group 40 in Annex I to the General Programme for the abolition of restrictions on freedom of establishment. Such activities correspond to those which fall within Major Group 40 of the "Nomenclature of Industries in the European Communities" (NICE); they are given in the Annex to this Directive.

2. The Directive shall not apply to ...'.

33. The Annex to the directive lists a number of activities which are classified under the heading 'construction'.

19 — Council Directive of 26 July 1971 (OJ, English Special Edition 1971(II), p. 678).

34. In the final analysis it is impossible to ascertain whether the conversion works to be carried out fall within those fields of activity because the specifications manifestly give no details of the nature and extent of the works. In my opinion, the decisive factor in this connection is not an appraisal of the individual activities, but the fact that the authorities inviting tenders did not specify precisely the volume of the works to be carried out. An obligation was merely imposed on the tenderer to have conversion works carried out up to a certain financial minimum. The architectural planning and development of the project were to take place at a later date in partial coordination with the authority.

35. In so far as the tenderer, and future tenant and concessionaire for the commercial activities, was to act as the promoter, the contract would not have been placed by an 'authority awarding a contract', which is the characteristic of a public works contract. Article 1(b) of Directive 71/305/EEC defines 'authorities awarding contracts' as 'the State, regional or local authorities and the legal persons governed by public law specified in Annex 1'.

36. No other criteria for demarcation can be derived directly from Directive 71/305/EEC or Directive 71/304/EEC. On the other hand, the 16th recital in the preamble to Directive 92/50/EEC contains a clear statement to the effect that a contract is a public

works contract only if the building works are the main object of the contract.

37. As already stated, the aim of the project for which, by the joint action of the two authorities, tenders were invited was to find a suitable operator for the casino and the hotel. The fact that this primary obligation is non-assignable also shows that it is the main object of the contract. In contrast, when drafting the conditions of tender, the authorities proceeded on the assumption that the conversion works were to be carried out by another undertaking on behalf and at the expense of the potential tenderer.

38. The conclusion is the same if the matter is approached from the economic point of view. It is true that the cash consideration for an initial 10-year term is the same as the stipulated minimum volume of the future works. However, it must be borne in mind that the specifications contain rent-review clauses and an option to renew the contract for a further 10 years, so that the framework of the investment to be made is considerably extended.

39. The final question to be considered is whether the contract could have been severed, so that the building works could be regarded as an independent contract. Firstly it should be noted that the parties concerned are almost unanimous in claiming that the conversion works were a necessary prerequisite for the award of the concession. The obligation to be undertaken is, in substance and by reference to its position in the structure of the conditions of tender, to be understood as constituting partial consideration for the lease and the concession for commercial use.

40. However, in my opinion the decisive factor is that the contract could not have been severed without altering its legal structure. It was precisely not the authority's intention to award a works contract on its own account, but to find a company which would have the building works carried out in the framework of its obligations to the authority.

41. Even if the obligation to carry out conversion works is considered in isolation, there can, in my view, be no question of a public works contract. This is due to the following decisive factors: there are no specifications for the work to be carried out. The authorities offer no prospect of payment for the work. The prospective tenderer cannot by definition [20] be a building contractor. The tenderer is under only an indirect obligation to have building works carried out to a certain minimum volume (1 000 million pesetas) and of a certain minimum quality (five-star

20 — See the definition of the prospective tenderer's objects in the tender documents.

hotel). According to the conditions of tender, in the future planning of the conversion works the authority stipulated for itself merely a right of participation, either as owner or as building supervision authority.

42. As, in my opinion, this is not a public works contract within the meaning of the directive, the following considerations are put forward only in the alternative. The Commission contends that, if the contract were found to be a public works contract, Article 3 of the original version of Directive 71/305/EEC would apply. Article 3(1) was worded as follows:

'In the event of the authorities awarding contracts concluding a contract of the same type as that indicated in Article 1(a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment, the provisions of the Directive shall not apply to this so-called "concession" contract ...'.

43. This provision was deleted as a result of amendment by Directive 89/440/EEC. Nevertheless, it applied at the material time.

44. In my opinion, the obligation to carry out building works is not a concession contract within the meaning of Article 3. Apart from the fact that, according to the definition of the contract in Article 3, the public authority awards the concession and possibly makes a payment by way of consideration for the building works, although in the present case the building works form only part of what the concessionaire undertakes to do, it seems to me that the decisive factor is that the concessionaire has no direct obligation to carry out the building works.

II.(b) Second question

45. In so far as an open invitation to tender cannot be classified as a public works contract within the meaning of Directive 71/305/EEC, it is unnecessary to comply with the publication requirements of the directive.

C — Conclusion

46. In the result, I propose that the questions referred to the Court for a preliminary ruling be answered as follows:

1. An obligation to have building works carried out by third parties, which is agreed within the framework of a public contract concerning the award of a

concession for a casino and a hotel business in conjunction with a lease of the premises necessary for those purposes, does not constitute a public works contract within the meaning of Directive 71/305/EEC.

2. Consequently there is no requirement for publication of the invitation to tender in accordance with Directive 71/305/EEC.