OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 19 February 1998 *

I — Introduction

1. The purpose of the questions referred to the Court for a preliminary ruling in the present case is to clarify the concept of a body governed by public law within the meaning of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [1] (hereinafter the 'Directive') and in particular to ascertain the precise meaning of the expression 'body ... established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character'.

II — Facts

2. In July 1994, the two municipalities that are the appellants in the main proceedings (Gemeente Arnhem and Gemeente Rheden, hereinafter the 'municipalities') entrusted the tasks of refuse collection and disposal to a new legal entity, ARA Holding BV (hereinafter 'ARA'), established expressly by them for that purpose. Those tasks had previously been carried out by the relevant municipal services. The two municipalities decided to hive off the work and entrust it to ARA, since, in view of the scale of the service and the cost of providing it, it was considered advisable [2] for the sake of economy to combine the management of those tasks and place it in the hands of a separate body established for that purpose.

3. In particular, the Arnhem Municipal Council's proposal of 25 May 1994 stated at point 10 that: 'The municipalities participating in NV ARA shall grant concessions to ARA in respect of operations in any way connected with their legal obligations regarding refuse disposal and municipal cleansing. Those operations concern the collection of all household refuse and related activities, as well as the cleansing of public highways and marketplaces, gritting, weeding of paved areas, cleaning of street drains and elimination of vermin. In granting those concessions, the Municipality of Arnhem is not bound by the European rules concerning public service tendering with regard to those activities. The public services directive does not therefore apply. A "framework agreement" will be entered into between the Municipality of

* Original language: Italian.

1 — OJ 1992 L 209, p. 1.

2 — The decision to combine their municipal cleansing services and entrust them to a body established for the purpose was also based on the study commissioned by the municipalities from a firm of consultants. The consultants made a number of suggestions, which the municipalities accepted and put into effect.

Arnhem and NV ARA, under which both parties will give an informal commitment to renew the concession.'

4. The Gerechtshof te Arnhem (Regional Court of Appeal, Arnhem) states that, on the basis of that proposal, the Municipal Council of Arnhem decided on 6 June 1994 to establish ARA and in the general interest to grant it 'concessions and impose [on it] obligations concerning certain duties imposed by law with regard to refuse disposal and municipal cleansing ... to be further specified in the contract to be entered into between the Municipality and NV ARA'. On 28 June 1994, the Municipal Council of Rheden passed a resolution in similar terms, except that municipal cleansing was not covered.

5. On 4 July 1994, the Municipality of Arnhem amended Article 2 of its Regulation on Waste as follows:

'The Environment and Public Works Department has hitherto been responsible for the refuse collection service pursuant to the applicable legislation and this regulation. As from 1 July 1994, that responsibility shall be transferred to NV ARA, the independent municipal cleansing agency.'

6. ARA had been established in the meantime on 1 July 1994 and Article 2 of its statutes states that the object of the company is to perform the following operations:

'(a) the performance of all economic operations aimed at collecting (or having collected and, so far as possible, recycling or having recycled), in an efficient, effective and environmentally responsible manner, waste such as household refuse, industrial waste and separable parts thereof, together with performance of activities relating to the cleaning of highways, the elimination of vermin and disinfection;

(b) the (joint) setting up, cooperation with, participation in, the (joint) provision of management and supervision for, as well as the taking over and financing of, other undertakings whose activities have any connection with the objects set out under (a);

(c) the performance of all economic operations which are connected with the foregoing or may be conducive to the operations, activities and action defined above (provided that needs in the general interest are thereby met).'

7. On 21 October 1994, the Municipality of Arnhem and ARA entered into a framework agreement covering the tasks to be performed.

The Municipality of Rheden subsequently entered into a similar agreement with ARA.

Article 8 of those agreements, covering remuneration for the services in question, reads as follows:

'Rheden shall pay ARA remuneration for services rendered, at a rate to be specified.

The remuneration for services referred to in the preceding paragraph shall be defined in a financial clause to be added to the specifications and quality standards for each operation contained in the partial contracts.

The actual remuneration for services rendered will be fixed:

(a) either on the basis of the unit prices agreed beforehand for each operation, result or batch of work;

(b) or on the basis of a fixed price agreed beforehand for a particular task;

(c) or on the basis of an invoice for costs actually incurred.

Once a year, having due regard to the municipal annual planning schedule, ARA will submit in advance:

— in the circumstances described in Article 8(3)(a): a bid stating the cost for each operation, result or batch of work to be performed to the specifications and quality standards laid down for each activity;

— in the circumstances described in Article 8(3)(b): a bid stating the price for the particular task;

— in the circumstances described in Article 8(3)(c): an estimate of expected costs.

The amount of the remuneration to be paid pursuant to the financial clauses referred to in paragraph 2 shall thereafter be fixed annually in agreement with the authorities responsible for the budget. Should agreement not be reached with those authorities, an independent expert appointed by the most appropriate trade organisation for the operation in question will deliver a binding opinion on the actual amount of remuneration to be paid.'

8. In the event, it appears from statements made by the municipalities in the course of the proceedings that the procedure by which ARA is in fact paid for services rendered is as follows:

'1. ARA informs the municipal authorities in general terms of developments in the refuse collection sector and the effects they are expected to have on costs and income;

2. the municipal authorities prepare a provisional budget;

3. the municipalities pay ARA quarterly advances based on that budget;

4. ARA submits to the municipalities a monthly statement of costs incurred and income received;

5. a statement for tax purposes is prepared at the end of each financial year, showing costs incurred and income received in connection with the service, together with deductions in respect of the advances paid.'

9. It appears from the municipalities' pleadings that the work plan prepared for ARA by the municipal councils also specified that the remuneration paid to ARA should 'cover the costs of the operations at socially and commercially acceptable rates.'

10. BFI Holding BV (hereinafter 'BFI') is a private undertaking whose activities include the collection and treatment of household refuse and industrial waste. BFI brought an action before the Rechtbank te Arnhem (District Court, Arnhem), contesting the municipalities' decision to entrust the refuse collection and disposal service to ARA. BFI contended that the public services Directive applied to the relationship between the municipalities and ARA, and that the municipalities in question had failed to follow the procedure for the award of contracts laid down in the Directive.

In the proceedings at first instance, the municipalities took issue with BFI's view, con-

tending that their relationship with ARA was in the nature of a concession and the Directive consequently did not apply. They also contended, in the alternative, that in any event the exception provided for in Article 6 of the public services Directive applied in the present case.

11. By judgment of 18 June 1995, the Rechtbank rejected the municipalities' contention that the arrangements at issue were concessions which did not fall within the ambit of the Directive. The court of first instance consequently ruled that the relationship in question constituted a service contract and that the exception referred to in Article 6 of the Directive did not apply in this case.

The municipalities brought an appeal against the decision at first instance before the Gerechtshof te Arnhem claiming that, on the contrary, the exception referred to in Article 6 of the public services Directive ought to apply in the case in question.

The court of appeal considered it necessary, for the purpose of resolving the dispute, to ascertain whether or not ARA was a body governed by public law within the meaning of the public services Directive and whether, in consequence, the municipalities were justified in claiming that Article 6 of the public services Directive exempted them from the obligation to follow the procedure for the award of contracts laid down in the Directive in so far as the task of providing the service at issue had been entrusted to ARA as a 'body governed by public law' within the meaning of the Directive.

12. In order to determine whether ARA fulfils the requirements laid down in the Directive to qualify as a body governed by public law and to enable it thereby to give judgment, the Gerechtshof te Arnhem sought from the Court a preliminary ruling on the following questions:

'1. For the purposes of interpreting Article 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1, hereinafter referred to as "the Directive"), is the first indent of the second subparagraph of Article 1(b) of the Directive, which specifies that "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", to be interpreted as distinguishing

(i) between needs in the general interest and needs having an industrial or commercial character, or

(ii) between needs in the general interest not having an industrial or commercial character and needs in the general

interest having an industrial or commercial character?

2. If the answer to the first question is that the distinction to be drawn is that set out in (i),

(a) is the phrase "needs in the general interest" to be understood as meaning that there can be no question of meeting needs in the general interest where private undertakings meet such needs?

and

(b) if so, is the phrase "needs having an industrial or commercial character" to be understood as meaning that needs having an industrial or commercial character are met whenever private undertakings meet such needs?

3. If the answer to the first question is that the distinction to be drawn is that set out in (ii), is the difference between "needs in the general interest not having an industrial or commercial character" and "needs in the general interest having an industrial or commercial character" to be determined according to whether (competing) private undertakings meet such needs or not?

4. Is the requirement that the body must be established "for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character" to be interpreted as meaning that such a "specific purpose" can exist only where the body was established exclusively to meet such needs?

5. If not, must a body meet needs in the general interest, not having an industrial or commercial character, almost exclusively, substantially, preponderantly or to some other degree in order to be or remain able to meet the requirement that it must be established for the specific purpose of meeting such needs?

6. Does it make any difference to the answers to Questions 1 to 5 whether the needs in the general interest, not having an industrial or commercial character, which the body was set up to meet, derive from legislation in the formal sense, from administrative provisions, from acts of the administration or otherwise?

7. Does it make any difference to the answer to Question 4 if responsibility for the commercial activities is entrusted to a separate legal entity forming part of a single group or concern within which activities meeting needs in the general interest are also carried out?'

III — The relevant Community provisions

13. The eighth recital in the preamble to the Directive reads as follows:

'Whereas the provision of services is covered by this Directive only in so far as it is based on contracts; whereas the provision of services on other bases, such as laws or regulations, or employment contracts, is not covered;'.

14. Article 1 of the Directive provides:

'(a) "public service contracts" shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority ...

(b) "contracting authorities" shall mean the State, regional or local authorities, bodies governed by public law ...

"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.

The lists of bodies or of categories of such bodies governed by public law which fulfil the criteria referred to in the second subparagraph of this point are set out in Annex I to Directive 71/305/EEC. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 30b of that Directive.'

15. Article 6 of the Directive provides:

'This Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.'

16. Article 8 of the Directive provides:

'Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.'

17. Article 9 of the Directive provides:

'Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.'

18. Article 10 of the Directive provides:

'Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

19. Annex I A, Services within the meaning of Article 8, lists under item 16:

'Subject: Sewage and refuse disposal services; sanitation and similar services. CPC Reference No: 94'

20. Annex I B, Services within the meaning of Article 9, lists under item 27:

'Subject: Other services. CPC Reference No: —.'

in Annex I A is subject to all the procedural rules laid down in the Directive, whereas under Article 9 the award of contracts for the services listed in Annex I B is merely subject to the principle of non-discrimination and the rules on technical specifications laid down in the Directive. [3] In short, the Directive requires competition notices to be published and the other procedural rules for the award of public service contracts to be followed only in the case of services listed in Annex I A. [4]

IV — Examination of the issues

A — *Matters covered by the Directive*

(a) The concept of *service*

21. The first matter to be considered in connection with the present dispute is the concept of 'service' within the meaning of the Directive and it must be determined first of all whether the services that are the subject of the relationship at issue fall into the category for which the Directive requires the open competitive tendering procedure to be used.

It is scarcely necessary to point out, in this connection, that under Article 8 of the Directive the award of contracts for services listed

The categories of services listed in Annex I A include, under item 16, 'sewage and refuse disposal services; sanitation and similar services.' For details of those services, the Annex refers to the CPC (United Nations common product classification) number quoted in the adjoining column for the category of services in question. The reasons that prompted the Community legislature to adopt this method of identifying the services falling within the ambit of the Directive are given in the seventh recital in the preamble to the Directive. In drafting the Directive, it was considered that 'the field of services is best described, for

3 — The obligation under Article 9 in conjunction with Article 16, to publish a notice of the results of the award procedure after the award has been made, does not apply in the case of the services listed in Annex I B, where publication is purely optional. See Flamme and Flamme, 'Les marchés publics de services et la coordination de leurs procédures de passation', *Revue du Marché Commun et de l'Union Européenne*, 1993, p. 150; Greco, 'Gli appalti pubblici di servizi', *Rivista Italiana di Diritto Pubblico Comunitario*, 1995, p. 1285; La Marca, 'Gli appalti pubblici di servizi e l'attività bancaria', *Rivista di diritto europeo*, 1996, p. 13; Mensi, 'L'ouverture à la concurrence des marchés publics de services', *Revue du Marché Unique Européen*, 1993, p. 59.

4 — Academic writers are unanimous on this point. See Flamme and Flamme, op. cit., La Marca, op. cit.

the purpose of application of procedural rules and for monitoring purposes, by subdividing it into categories corresponding to particular positions of a common classification; ... Annexes I A and I B of this Directive refer to the CPC nomenclature (common product classification) of the United Nations.'

22. Academic writers have already had occasion to draw attention to the various legal limitations and complications caused by this reference to rules originating outside the Community. [5] I should add, in this connection, that the CPC is not available in all the Community languages. This certainly does not help to put Member States' citizens on an equal linguistic footing and it clearly presents a problem for national authorities and national bodies required to apply the Directive when their working language is not the language in which the CPC is framed.

23. Writers on the subject [6] take the view that the list of services given in Annex I A is an exhaustive and restrictive list of the services required to comply fully with the Directive. The list of services in Annex I B also refers to the CPC nomenclature but ends with the generic residual category, 'Other services'. This suggests, first, that the reference to the CPC nomenclature is to be interpreted literally and, second, that the categories listed in Annex I A are not to be interpreted broadly.

It must therefore be determined, first of all, whether the service in question is among those listed in Annex I A. [7] If that is not the case, it will of necessity be among those subject to the rules laid down in the Directive for services listed in Annex I B.

24. As regards the services at issue in the present proceedings, another aspect of the wording used in item 16 of Annex I A requires clarification: refuse collection, which represents no small part of the work the municipalities entrusted to ARA, does not at first sight appear to be among the services listed under item 16, which relate on the contrary — to use the term employed in that item — to refuse disposal. However, in the text supplied to the Court by the Commission, CPC Reference No 94, quoted for the category in question, cites the following services under sub-heading '94020 Refuse disposal services': 'Collection service of garbage, trash, rubbish and waste, whether from households or from industrial and commercial establishments, transport services and disposal services by incinerators or by any other means. Waste reduction services are also included.'

5 — See La Marca, op. cit., notably p. 42.

6 — See La Marca, op. cit., p. 28; Flamme and Flamme, op. cit., p. 152.

7 — Or whether the service falls entirely outside the scope of the Directive, as defined in Article 1 thereof.

From the foregoing considerations, it therefore appears clear that refuse collection and disposal services are among those listed in Annex I A to the Directive and are therefore required to comply fully with its provisions.

(b) The concept of *service contract*

25. The second point to be considered in connection with the scope of the Directive *ratione materiae* is the nature of the relationship between the municipalities and ARA.

The eighth recital in the preamble to the Directive [8] states in that connection that the Directive covers contracts only. The provision of services on other legal bases 'is not covered'. We also know from Article 1(a) that, for the purposes of the Directive, service contracts mean 'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority.'

26. It should also be noted in this connection that the reason for the restriction mentioned in the twelfth recital in the preamble to the Directive is to be found in the origins of the public services Directive. In the version originally proposed by the Commission, [9] the Directive was intended to cover both service contracts and service concessions. In the course of the legislative procedure, the Council subsequently decided that concessions should not come within the scope of the Directive, [10] which consequently — in the version that entered into force — covers only service *contracts*.

The view commonly taken, [11] in the absence of a specific Community definition embodied in legislation, [12] is that the distinction in Community law between service contracts and service concessions is based on a number of criteria. The first concerns the recipient or beneficiary of the service provided. In the case of a contract the beneficiary of the service is deemed to be the contracting authority, whereas in the case of a concession the beneficiary of the service is a third party unconnected with the contractual relationship, usually the community, which receives the service and pays an appropriate sum for the service rendered. Under Community law, the service that is the subject of a service concession must also be in the general interest, so that a public authority is institutionally responsible for providing it. The fact that a third party provides the service means that the concessionaire

8 — See point 13 above.

9 — OJ 1991 C 23, p. 1.

10 — See the statement of reasons in the Council's common position on the Directive, in Doc. 4444/92 ADD1 of 25 February 1992.

11 — See Flamme and Flamme, op. cit., Greco, op. cit.

12 — To be precise, a service concession is defined in the Commission Proposal for a Directive as 'a contract other than a public works concession within the meaning of Article 1(d) of Directive 71/305/EEC, concluded between an authority and another entity of its choice whereby the former transfers the execution of a service to the public lying within its responsibility to the latter and the latter accepts to execute the activity in return for the right to exploit the service or this right together with payment'.

replaces the authority granting the concession in respect of its obligations to ensure that the service is provided for the community. Another characteristic feature of concessions is the remuneration of the concessionaire, which derives wholly or in part from the provision of the service to the beneficiary. This is connected with another important feature of service concessions in the Community context, namely that the concessionaire automatically assumes the economic risk associated with the provision and management of the services that are the subject of the concession.

Those criteria, partly borrowed from the sphere of build-and-manage concessions or to be precise from the Directive on public works contracts, [13] were also mentioned by the Court in its judgment in Case C-272/91 concerning the concession for the lottery computerisation system. [14]

27. Although, as I have just remarked, the definition of the term 'contract' is somewhat defective in respect of the subject of the contract and the purpose of the service, [15] the subject of the contract can nevertheless be identified, purely by deduction, as the activity of providing a service for consideration. On the other hand, the definition the legislature gives in the Directive lays considerable emphasis on the nature of the consideration as an aspect of the legal relationship. Therefore, by virtue of the term used by the Community legislature ('for pecuniary interest'), it must in any event take a pecuniary form: the *pretium*.

28. I shall now consider whether those conditions are fulfilled in the present case. The relationship between the municipalities and ARA is characterised by the fact that ARA is under an obligation to provide certain services. The first point to be settled is the identity of the beneficiaries of those services. In that connection, the Gerechtshof te Arnhem mentions the municipalities' decisions to transfer to ARA the activities in question, which they had previously performed, and the contracts concluded between the municipalities and ARA as a result. It is clear from the details given that the beneficiaries of the refuse collection and disposal services, provided initially by the municipalities and subsequently by ARA, remained the same. They continued to be, as they had been in the past, the private individuals and firms living and working within the two municipal districts.

While these considerations as to the identity of the potential beneficiaries of the service in question are not, on the basis of the criteria specified earlier, sufficient to allow it to be determined whether the relationship between the municipalities and ARA can be described as a contract, they do nevertheless cast light on some aspects in which that relationship differs from a genuine service contract.

13 — Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1).

14 — Case C-272/91 *Commission* v *Italy* [1994] ECR I-1409, paragraphs 22 to 25 and 32.

15 — See the remarks on this subject in Flamme and Flamme, op. cit., and La Marca, op. cit.

29. I should also mention in this connection the opinion expressed by the French Government that the relationship in question should, on the contrary, be classified as a service concession.

As we know, if that view were to be upheld, the system established by the Directive could not apply to the dealings between the municipalities and ARA in any case. Having regard to the French Government's viewpoint, the Court asked the parties to define the precise terms of the relationship in question.

30. The United Kingdom Government, in particular, stated its position on this aspect of the case, to the effect that the relationship between the municipalities and ARA cannot be regarded as a contract. In the UK Government's view, that relationship amounts on the contrary to a service concession because a public authority has delegated to a distinct legal entity the performance of certain functions which the authority granting the concession originally performed itself. According to the UK Government, this is one way among many in which the authority may arrange and organise its administrative functions. The relationship between the authority granting the concession and the concessionaire therefore falls outside the normal scope of contracts as such because it is essentially an administrative relationship not a contractual relationship.

31. Incidentally, it should also be noted in this connection that, according to the Gerechtshof te Arnhem, the question whether the relationship is in the nature of a concession is bound up with the procedural question of the stage reached in the proceedings pending before that court. The Gerechtshof te Arnhem states in the order for reference that the question whether the relationship at issue was in the nature of a concession had been decided by the court of first instance, which had held that it was not. That decision was not contested on appeal and the point now under consideration could not therefore be amended by the Gerechtshof te Arnhem, even if the Court itself were to rule against the judgment delivered by the court of first instance.

It is claimed that that view, maintained by BFI Holding and partly adopted by the Commission, [16] is also supported by recent judgments of the Court, notably in *Van Schijndel*. [17] The Court held on that occasion that 'Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim.'

16 — However, the Commission's view is based on the fact that the parties agree that the arrangement in question is not to be regarded as a concession.

17 — Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* v *SPF* [1995] ECR I-4705.

In short, according to BFI, in view of the procedural situation described by the Gerechtshof te Arnhem, that court would be unable to make use of the ruling given by the Court of Justice if the latter were to rule that the relationship in question is in the nature of a concession. The Gerechtshof te Arnhem would be precluded from modifying the uncontested part of the judgment, to the effect that the relationship in question is not in the nature of a concession, as that issue has already been decided and is *res judicata*.

32. I am not, however, convinced by the defendant's arguments in that connection. The Court is required to give a full interpretation of Community provisions, placing them in their legislative context and explaining their connection with the actual situation to which they refer or to which they are to apply. To give an interpretation out of context would be extremely difficult because of its abstract nature and could also mislead the court that had requested it, in that such an interpretation might not take due account of the particular problem to be solved. This view of the matter is supported by a substantial number of judgments delivered by the Court, declaring questions referred by national courts for preliminary ruling to be inadmissible in the absence of an exhaustive statement of the relevant facts and national provisions. [18] Of course, compliance with national rules of procedure sets a limit, which is to some extent inviolable and which the national court and the Community court are required to respect. That point was fully recognised and accepted as a matter of law by the Court in its judgment in *Van Schijndel*, cited above. However, that does not mean that the Court is released from its initial obligation to characterise the legal relationship to which the rules it has been asked to interpret are subsequently to apply. That obligation must, in my view, be fulfilled irrespective of whether the Court subsequently concludes that the rules at issue have no bearing on the case. Indeed, if the national court appeared to have committed an *error in judicando* for which there was no longer any judicial remedy, the Court's role would be precisely to state the limits to which interpretation of the rule in question was subject and to point out, if necessary, that the problem raised by the national court had no bearing, from the point of view of Community law, on the facts of the case. [19]

33. However, it seems to me that the situation in the present case is very different from the one I have just been considering. The problem raised by the defendant is not the same. To my way of thinking, the court of first instance was in fact right about the nature of the relationship at issue when it ruled that it was not a service concession. I have come to the same conclusion despite the fact that the municipalities and ARA frequently employed those terms in their decisions, in the statutes of ARA and in the contracts giving effect to their relationship.

18 — See, in that connection, the Court document of October 1996: 'Note for guidance on references by the national courts for preliminary rulings' and the case-law cited in the note. For a brief commentary on that notice, see Manzella, 'Giudice nazionale e diritto comunitario', *Giornale di Diritto Amministrativo*, 1996, p. 1084; Condinanzi, 'Istruzioni per l'uso dell'art. 177: la nota informativa della Corte di Giustizia sulla proposizione delle domande di pronuncia pregiudiziale da parte dei giudici nazionali', *Il Diritto dell'Unione Europea*, 1996, p. 883.

19 — See, for example, the judgment of 16 December 1997 in Case C-104/96 *Rabobank* v *Minderhoud* [1997] ECR I-7211.

The key factor, which would allow the relationship at issue to be classified as a concession and which is missing in this case, is the assumption of the risk associated with the management of the service. It is absolutely and undeniably clear from the documents before the Court that the remuneration for the work done by ARA was not 'fixed in abstract terms'. [20] Those documents in fact provide for payment of a consideration but the actual amount to be paid is not a function of certain factors decided in advance, such as the unit cost of each operation, nor is it a flat-rate payment. In either of the latter hypotheses, the economic responsibility for the management of the service would rest with the body providing the service. But in this case, on the contrary, the consideration paid for the work performed by ARA is a direct function of the total cost incurred by that company in providing the service required of it. It appears from the documents before the Court that that consideration is paid on the basis of regular statements of account designed simply to show the total income and expenditure associated with the management of the service and thus enable the municipalities to balance ARA's budget. Nor do the rates paid by the community for the services rendered give any indication of the criterion on the basis of which ARA's operations are paid for: the rates are altered as and when necessary to achieve a substantial balance between income and expenditure having due regard also to the important requirement that the service provided must not cost the beneficiaries too much.

In my opinion, the situation I have just described precludes the relationship at issue in this case from being qualified as a service concession within the meaning of Community law. However, that does not necessarily mean that it can be qualified as a service contract.

34. As I have already explained, the definition of that concept contained in the Directive turns on the fact that the relevant services are performed for pecuniary interest. For the relationship to be defined as a contract, the consideration to which the contractor is entitled must therefore be decided in advance and in abstract terms. The Court, as we have seen, clearly described this defining characteristic of contracts in its judgment in Case C-272/91, *Commission* v *Italy*, cited above. [21]

In the present case, as I have said, the consideration to be paid for the services was not in the Court's phrase 'fixed in abstract terms' [22] by the municipalities, precisely because, as I have explained, their financial dealings with ARA are determined by the particular needs that arise from time to time in the course of its activities. In the present case, there is consequently no actual or potential set 'price' that could be used as a reference. Nor is there any element of profit in the remuneration received by ARA. What is involved here is therefore remuneration for the service in question based solely on an economic approach to management, without any element of risk. These characteristics mean that, in view of the

20 — Case C-272/91 *Commission* v *Italy*, cited above.

21 — Judgment in Case C-272/91 *Commission* v *Italy*, cited above, paragraph 26.

22 — Judgment in Case C-272/91 *Commission* v *Italy*, cited above.

manner in which they are paid for, the tasks performed by ARA cannot be classified as activities of an industrial or commercial character and cannot therefore be the subject of a genuine call for tenders.

35. But that is not all. If we look at the financial arrangements on which the relationship between the municipalities and ARA is based, the key economic factor in the relationship is the municipalities' own budget. ARA's economic survival essentially depends not on the volume of its refuse collection and disposal operations or the efficiency with which it manages them but is based solely on the municipalities' willingness to provide it with the necessary resources by transferring funds from their budgets and setting acceptable rates for the services it provides. In short, the terms in the contract that concern ARA's remuneration are based on an 'entirely potestative' condition whereby the municipalities have absolute authority to decide whether funds are to be transferred to ARA and in what amount, thus exercising an effective power of life and death over that body.

36. As regards the connection between the municipalities and ARA, it is therefore clear that the relationship between them arose from the need to merge municipal refuse collection and disposal services in order to deal with a demand which, in terms of scale and quality, the existing structures of the two municipalities could no longer handle on their own.

The intention in establishing ARA and entrusting it with the tasks previously performed by the municipalities was thus to consolidate the services in question, not to transfer them to an outside body and so remove them from the ambit of municipal responsibility. The solution adopted by the municipalities, namely to combine their respective refuse collection and disposal services and entrust them to the entity they had agreed to establish, is also reflected in the structure of the company established for that purpose. The two municipalities are the sole shareholders of ARA. Consequently, despite the fact that it was established as a company with share capital, ARA is not in my opinion essentially separate from the municipalities' administrative structure. The form of the company is such that it may be regarded as an organ [23] of the public authority, albeit in a broad and indirect sense. [24] This view is clearly confirmed by all that I have just said about the characteristics of ARA, the manner in which it is remunerated and the fact that it is completely dependent on the municipalities, as regards not only its economic resources but also the membership of its governing body (a majority, at least, of the members of its supervisory board are municipal nominees).

23 — For further observations on this concept, see Greco, op. cit., id., 'Appalti di lavori affidati da SpA in mano pubblica: un revirement giurisprudenziale non privo di qualche paradosso', *Rivista Italiana di Diritto Pubblico Comunitario*, 1995, p. 1062.

24 — On this point, see Greco, op. cit., Righi, 'La nozione di organismo di diritto pubblico nella disciplina comunitaria degli appalti: società in mano pubblica e appalti di servizi', *Rivista Italiana di Diritto Pubblico Comunitario*, 1996, p. 347.

37. The question of a public authority's freedom to organise itself in the way best suited to meet the community's requirements need not, I think, detain us. The organisational arrangements chosen by a public authority must not allow the application of provisions designed to govern the quite different and well-defined situation in which a private individual provides a service for a public authority in return for remuneration. This is clear from the wording of the Directive. The Community legislature not only refused to allow forms of administrative organisation such as the one at issue in this case and other similar or comparable forms of organisation such as concessions to be included in the scope of the Directive: it also took the further step of exempting even genuine contracts concluded between two contracting authorities from the obligation to follow the procedures laid down in the Directive.

38. To sum up, I consider that there is no 'third party' element, that is to say no essential distinction between ARA and the two municipalities, in the present case. What is involved here is a form of inter-departmental delegation that remains within the administrative ambit of the municipalities. In assigning the activities in question to ARA, the municipalities had absolutely no intention of *privatising* the functions they themselves had previously performed in this sector. In short, I take the view that the relationship between the municipalities and ARA cannot be regarded as a contract within the meaning of the Directive.

B — *Persons covered by the Directive*

39. It automatically follows from that conclusion that the Directive does not apply to the relationship between the municipalities and ARA. To complete my examination of the case referred to the Court, I shall now consider whether ARA can be included among the persons required to comply with the Directive.

In the light of what has already been said, it now falls to be determined in particular which of the categories mentioned in the Directive as contracting authorities for the purposes of the Directive might include the body in question.

40. The French Government has argued that ARA is not so much a public body as simply an association between municipalities within the meaning of Article 1(b) of the Directive. This view is based on the fact, mentioned above, that the municipalities are the only two shareholders of ARA.

The French Government's opinion must be accorded due consideration. In particular, it must be considered in this connection whether, for the purposes of the definition of 'contracting authority' referred to in Article 1 of

the Directive, the terms 'body governed by public law' and 'association' refer to two separate and mutually exclusive concepts or whether on the contrary the Directive may include in that definition entities that fall into both categories at once.

The answer to that question is, in my view, that the abovementioned categories cannot overlap. The Community legislature intended the rules on contracts to apply also to those forms of public association that give rise to entities which, even if not possessing legal personality of their own, are nevertheless quite clearly among the forms of public authority cooperation or organisation falling within the ambit of the Directive. I refer, for example, precisely to forms of association such as groups of local authorities or similar kinds of group, which, although lacking legal personality, nevertheless perform tasks of a public nature and to which the Community legislature intended the Directive to apply for typically functional reasons. I should add that, to be included in that category, such entities must also in my view be non-profit-making.

41. According to that approach, the category comprising associations has a residual function. In other words, it covers all those forms of public cooperation which, as I have said, give rise to entities that have no legal personality but are also not local authorities and cannot be regarded as bodies governed by public law.

The conclusion I have reached presupposes that the Community legislature intended the concept of a contracting authority to have a very broad meaning, including all the various embodiments through which the public authorities might exercise their powers. Nor do I think they could possibly have used meaningless or misleadingly overlapping concepts that could give rise to difficulties of interpretation in classifying the entities required to comply with the Directive.

This view is lent considerable weight by the judgment in *Beentjes*, [25] in which the Court held that, for the purposes of the public works directive, a body which has no legal personality of its own but depends in many respects on the public authorities 'must be regarded as falling within the notion of the State ... even though it is not part of the State administration in formal terms'. It should be noted however that the Community provision that was being interpreted in that case was Article 1 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts. [26] The interpretation was therefore concerned with the Community definition in the Directive of the measures taken by 'contracting authorities', which at that time did not

25 — Judgment in Case 31/87 *Beentjes* v *Netherlands* [1988] ECR 4635.

26 — OJ, English Special Edition 1971 (II), p. 682.

yet include 'associations', a category inserted later in the amended versions of the 'contracts directives.' I also think the Court wished to fill a gap in the legislation by bringing within the personal scope of the Directive, to quote Advocate General Darmon, 'organs outside the traditional structures of the administration which have no legal personality of their own but carry out functions which normally fall within the competence of the State or local authorities'. In amending and reformulating the concept of contracting authority, the Community legislature specifically decided to include associations, on the one hand, and bodies governed by public law, on the other. Thus, it expressly brought within the ambit of the 'public contracts' directives not only bodies with no legal personality of their own, often forms of association between public authorities of various kinds whose characteristics and legal nature are hard to define a priori, but also bodies governed by public law which on the contrary are specifically required to have their own legal personality. The fact that ARA has its own legal personality therefore means that it cannot be classified as an 'association.'

42. As regards the concept of 'needs in the general interest, not having an industrial or commercial character', the answer to be given to the national court cannot in my view leave the particular features of each individual situation out of account. Thus, in the present case, I do not think the Court can establish general criteria for interpreting the provision at issue that do not take this particular case into account. We have here a provision that does not really lend itself to general and abstract interpretation precisely because, as I mentioned earlier, the Community legislature intended it to have a distinctly functional character. This principle of interpretation was stated, adopted and applied by the Court, first in its judgment in *Beentjes* [27] and more recently in *Mannesmann*. [28] I believe I should abide by that criterion in the present case too.

43. However, the concept in question should certainly be interpreted in the light of the earlier case-law of the Court, [29] which has attached considerable importance to the absence of risk which must be a feature of the management of the activities of the body in question if it is to be included among the public authorities covered by the Directive. This interpretation may perhaps place more emphasis on the commercial or industrial character of the activity than on the fact that it must meet needs in the general interest. The latter is a concept that varies appreciably from one Member State to another and also depends on the historical context in which it is considered. Needs in the general interest, once identified, have in their turn a commercial or industrial character closely connected with the way in which the State is organised. The commercial or industrial connotation of such

27 — Judgment in Case 31/87 *Beentjes* v *Netherlands*, cited above.

28 — Case C-44/96 *Mannesmann Anlagenbau Austria and Others* v *Strohal Rotationsdruck* [1998] ECR I-73.

29 — Judgments in *Beentjes*, *Commission* v *Italy* and *Mannesmann*, cited above.

needs differs considerably, for example, depending on the priority accorded at national level to privatisation of the public services designed to meet those needs. Moreover, the Directive was not intended to cover uniform Community-wide categories. Remember that it confines itself to coordinating — not harmonising — the various national provisions relating to contracts. I do not think, therefore, that the Directive established a Community category by means of the definition in question. It was simply referring to the provisions on the subject contained in the legislation of the Member States.

44. Within the framework I have described, it is very difficult — if not impossible — to define the needs that are relevant for the purposes of the Directive. For the purposes of interpretation, therefore, the only general criterion that can properly apply in this area is the link between the satisfaction of the needs and the structure of the State (understood in the broad sense, of course) and especially the factor of economic dependence on the State.

A clear sign of dependence on the State sector is precisely that the absence of any risk associated with the activities the body in question is required to perform. If, on the other hand, the activities of such a body involve even a remote prospect of profit or if the management of the activities is based on principles of economy and financial autonomy, then in my view the activities fall outside the framework I have described and there will be no reason to include the body in question among the bodies covered by the Directive. I should just like to say that this interpretation of the provisions at issue is also fully in line with the Court's judgments on the subject of public undertakings [30] and with the relevant Community legislation. [31]

I therefore take the view that the concept of a body governed by public law within the meaning of the Directive includes bodies that meet general needs 'independently of the rules of normal commercial management', [32] so long as the other requirements of the definition are also met.

45. In the light of what I have said, the problem of whether or not ARA is to be regarded as a body governed by public law now appears to have been settled. There is no doubt that the functions that body was estab-

30 — Case 118/85 *Commission* v *Italy* [1987] ECR 2599 and, more recently, Case C-343/95 *Diego Cali & Figli* v *SEPG* [1997] ECR I-1547.

31 — Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35).

32 — Judgment in Case 118/85 *Commission* v *Italy*, cited above.

lished to fulfil [33] and does fulfil institutionally, together with the manner in which it performs its tasks, are among those defined in the Directive as meeting 'needs in the general interest, not having an industrial or commercial character.'

46. It should also be pointed out, incidentally, that it is irrelevant for the purposes of the present case that, as the order for reference mentions in passing, ARA — directly or through a company entirely owned by it — not only performs the tasks entrusted to it by the municipalities but also provides similar services for third parties in return for appropriate remuneration. In my opinion, those activities, which, it appears, account for a small proportion of all the functions that body performs [34] and, from an economic point of view, have no appreciable effect on its financial structure, are not, however, such as to cause me to alter the conclusion I reached earlier. Moreover, the Court has already ruled on this point in its recent judgment in *Mannesmann*, [35] in which it recognised that the fact that a body performs other activities in addition to the main activity it was established to perform is not in itself such as to change the nature of the body in question for the purposes of applying the public contracts directives. From an economic and financial point of view, the existence of ARA effectively depends, as we have seen, on the contribution the municipalities make to its budget. This completely rules out the possibility that any other activity it performs might actually be run on specifically commercial lines: the municipalities' financial contribution radically alters the element that forms the basis of all commercial relationships, namely the endeavour to achieve the best and most effective ratio between costs and remuneration. The fact that in any event the body succeeds in balancing its books as a result of the assistance it receives from the municipalities, and that there is consequently no element of risk, means that its activities cannot be regarded as being competitive in any real sense.

The service provided by ARA meets a public need that has to be met, namely the collec-

33 — The expression 'established for the specific purpose of meeting needs etc...' in the definition given in the Directive must of course be interpreted in the light of changing circumstances. The aims originally set out in the body's instrument of incorporation must be compared with the present situation and the aims it is actually pursuing, as stated, for example, in the objects of the company in the case of bodies incorporated as companies.

34 — It appears from the documents before the Court that ARA's turnover for 1995 was NLG 39 392 000, comprising NLG 32 791 000 for the collection and disposal of household refuse and NLG 6 601 000 for the collection and disposal of industrial waste.

35 — Judgment in Case C-44/96 *Mannesmann Anlagenbau Austria and Others* v *Strohal Rotationsdruck*, cited above. In that judgment, the Court held that in any case the activity performed by the Austrian body in addition to its principal activity was covered by the public works directive. The Court came to that conclusion by distinguishing between institutional activities that are specifically intended to meet needs in the general interest, not having an industrial or commercial character, and activities that do not meet those criteria. However, the answer given by the Court, which I think was essentially correct in the conclusion it reached, needs some amplification. In fact, I must observe in this connection that, to my mind, it is impossible to distinguish between activities that do not have an industrial or commercial character and those that do, when the body in question is one of those classified as contracting authorities within the meaning of the public works or public services directive. The absence of risk that is characteristic of the way in which the body in question operates means that any activity it performs, even if it may in theory be a profit-making activity, is ultimately indistinguishable in financial terms from its institutional activity, which consequently absorbs other activities and radically alters their commercial or industrial character.

tion and treatment of refuse. That task is not performed for profit and is not part of a system in which the rules of the market apply. Both the conditions the Community legislature laid down in the first part of the definition of a body governed by public law are therefore fully satisfied: namely that it must be established for the specific purpose of meeting needs in the general interest and that those needs must not have a commercial or industrial character.

Conclusion

In the light of the foregoing considerations, I propose that the Court give the following answers to the questions referred to it by the Gerechtshof te Arnhem:

(1) The relationship between two municipalities and a body established by them, to which they have entrusted the refuse collection and treatment service within their areas and whose remuneration comes *inter alia* from the municipal budget, ensuring that in any event that body's activities remain financially balanced, does not constitute a service contract within the meaning of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts;

(2) An entity of the type described above is also a body governed by public law within the meaning of Directive 92/50/EEC.