

JUDGMENT OF THE COURT

15 January 1998 *

In Case C-44/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that court between

Mannesmann Anlagenbau Austria AG and Others

and

Strohal Rotationsdruck GesmbH

on the interpretation of Article 1(b) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and Article 7(1) of Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1993 L 193, p. 5),

* Language of the case: German.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, M. Wathelet and R. Schintgen (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn (Rapporteur), J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: P. Léger,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mannesmann Anlagenbau Austria AG and Others, by M. Winischhofer, of the Vienna Bar,
- Strohal Rotationsdruck GesmbH, by W. Wiedner, of the Vienna Bar,
- the Netherlands Government, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,
- the Austrian Government, by W. Okressek, Ministerialrat in the Bundeskanzleramt-Verfassungsdienst, acting as Agent,
- the Commission of the European Communities, by H. van Lier, Legal Adviser, and C. Schmidt, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mannesmann Anlagenbau Austria AG and Others, represented by M. Winischhofer; of Strohal Rotationsdruck GesmbH, represented by W. Wiedner; of the French Government, represented by P. Lalliot, Foreign Affairs Secretary in the Legal Directorate of the Ministry of Foreign Affairs, acting as Agent; of the Netherlands Government, represented by M. Fierstra, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; and of the Commission, represented by H. van Lier, at the hearing on 3 June 1997,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1997,

gives the following

Judgment

- 1 By order of 2 February 1996, received at the Court on 14 February 1996, the Bundesvergabeamt (Federal Procurement Office) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty seven questions on the interpretation of Article 1(b) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), and Article 7(1) of Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1993 L 193, p. 5).
- 2 Those questions were raised in proceedings brought before that court by Mannesmann Anlagenbau Austria AG and Others against Strohal Rotationsdruck GesmbH (hereinafter 'SRG') concerning the application of the Austrian public procurement legislation at the initiation of such a procurement procedure.

The relevant Community provisions

Directive 93/37

- 3 Article 1 of Directive 93/37, which consolidates Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as last amended by Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1), provides:

‘For the purpose of this Directive:

- (a) “public works contracts” are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;
- (b) “contracting authorities” shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

A “body governed by public law” means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

- having legal personality, and

- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I. ...’

Directive 89/665

- 4 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989

L 395, p. 33) required Member States to take 'the measures necessary to ensure that ... decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible ... on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law'. According to Article 5, those measures were to be adopted before 21 December 1991.

Regulation No 2052/88

5 Article 7(1) of Regulation (EEC) No 2052/88 as amended by Regulation (EEC) No 2081/93 reads as follows:

'Measures financed by the Structural Funds or receiving assistance from the EIB or from another existing financial instrument shall be in conformity with the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including those concerning the rules on competition, the award of public contracts and environmental protection and the application of the principle of equal opportunities for men and women.'

The Austrian legislation

6 Paragraph 1 of the Bundesgesetz über die Österreichische Staatsdruckerei (Staatsdruckereigesetz) of 1 July 1981 (Federal Law on the Austrian State Printing Office,

Bundesgesetzblatt für die Republik Österreich 340/1981; hereinafter the 'StDrG'), reads as follows:

'Economic entity "Österreichische Staatsdruckerei"

Paragraph 1.

(1) An independent economic entity is established with the name "Österreichische Staatsdruckerei" (hereinafter the "Staatsdruckerei"). It has its registered office in Vienna and has legal personality.

(2) The Staatsdruckerei is a trader for the purposes of the Commercial Code. It must be registered in Part A of the Commercial Register of the Vienna Commercial Court.

(3) The activities of the Staatsdruckerei are to be pursued in accordance with the rules governing trade.'

7 The tasks to be carried out by the Österreichische Staatsdruckerei (hereinafter the 'ÖS') are described in Paragraph 2 of the StDrG. According to Paragraph 2(1), those tasks consist, in particular, of the production for the federal administration of printed matter requiring secrecy or security measures, such as passports, driving licences, identity cards, the federal official journal, the federal reports of laws and decisions, forms and the *Wiener Zeitung*. Those activities are collectively referred to as 'public service obligations'.

8 Those activities, for which, according to Paragraph 2(3), the ÖS has sole responsibility, are, by virtue of Paragraph 13(1) of the StDrG, monitored by a State control service. Pursuant to Paragraph 12 of that Law, the prices for those orders are fixed — in accordance with commercial principles and taking into account, in particular, the need to keep capacity available — at the request of the Director-General of the ÖS, by the economic council, which, according to Paragraph 8(2), is composed of 12 members, eight of whom are appointed by the Federal Chancellery or various ministries and four by the works council. In accordance with Paragraph 5(2) of the StDrG, the Director-General of the ÖS is appointed by the economic council.

9 Furthermore, pursuant to Paragraph 15(6) of the StDrG, the ÖS is subject to scrutiny by the Court of Auditors.

10 According to Paragraph 2(2) of the StDrG, the ÖS may pursue other activities, such as the production of other printed matter and the publication and distribution of books, newspapers, etc. Finally, according to Paragraph 3 of that Law, the ÖS may acquire holdings in undertakings.

The dispute in the main proceedings

11 In February 1995, the ÖS took over Strohal Gesellschaft mbH, whose activities consisted of rotary 'heatset' printing. On 11 October 1995, Strohal set up SRG, in which it holds 99.9% of the share capital, with the object of producing printed matter using the abovementioned process in printing works in Müllendorf.

- 12 In order to reduce the waiting period prior to those printing works becoming operational, while SRG was still in the process of being set up, the ÖS initiated a tendering procedure for a project relating to the technical installations on 18 October 1995. To that end, it incorporated into each of the works contracts a clause reserving the right to assign all its rights and obligations under those contracts to a third party of its choice at any time. Following a conciliation procedure before the Bundesvergabekontrollkommission (Federal Procurement Review Commission) which resulted in an amicable settlement, that call for tenders was withdrawn. After initiating a new tendering procedure, the ÖS informed tenderers that the firm responsible for the call for tenders and awarding contracts was SRG.
- 13 A conciliation procedure was subsequently initiated at the request of the Verband der Industriellen Gebäudetechnikunternehmen Österreichs (Association of Industrial Construction Undertakings in Austria) in order to determine whether or not the tendering procedure should be conducted in accordance with the national legislation on public works contracts. In contrast to that association, SRG and the ÖS challenged the applicability of that legislation and claimed that, since there was no contracting authority, there was no public works contract in the present case.
- 14 The Bundesvergabekontrollkommission decided in their favour and held that the question did not fall within its jurisdiction. It did not, however, exclude the possibility of the need to comply with Directive 89/665 if the entity awarding the contract was in receipt of Community funds, in accordance with Article 7(1) of Regulation No 2081/93.
- 15 Since no amicable settlement was reached, Mannesmann Anlagebau and Others initiated a review procedure before the Bundesvergabeamt.

16 The Bundesvergabeamt was uncertain of the interpretation to be given to the Community law and referred the following questions for a preliminary ruling:

'1. Can a provision of a national law, such as Paragraph 3 of the Staatsdruckerigesetz in the present case, which confers special and exclusive rights on an undertaking, establish that undertaking as meeting needs in the general interest not having an industrial or commercial character within the meaning of Article 1(b) of Directive 93/37/EEC and make such an undertaking as a whole fall within the scope of that directive, even if those activities form only part of the undertaking's activity and the undertaking in addition participates in the market as a commercial undertaking?

2. In the event that such an undertaking falls within the scope of Directive 93/37/EEC only with respect to the special and exclusive rights conferred on it, is such an undertaking obliged to take organisational measures to prevent financial means obtained from earnings from those special and exclusive rights being switched to other sectors of activity?

3. If a contracting authority starts a project and that project is therefore to be classified as a public works contract within the meaning of Directive 93/37/EEC, may the intervention of a third party who *prima facie* does not fall within the personal scope of the directive have the effect of altering the classification of a project as a public works contract, or should such a proceeding be regarded as an evasion of the personal scope of the directive and incompatible with the aim and purpose of the directive?

4. If a contracting authority establishes undertakings for carrying on commercial activities and holds majority holdings in them which enable it to exercise economic control over those undertakings, does the classification as a contracting authority then also apply to those associated undertakings?

5. If a contracting authority transfers funds which it has earned from special and exclusive rights conferred on it to purely commercial undertakings in which it owns a majority holding, does that have the effect that, regardless of the legal position of the associated undertaking, that undertaking as a whole must let itself be treated and behave as a contracting authority within the meaning of Directive 93/37/EEC?

6. If a contracting authority which both meets needs in the general interest not having an industrial or commercial character and also carries on commercial activities establishes operating installations which are capable of serving both purposes, is the award of the contract for constructing such operating installations to be classified as a public works contract within the meaning of Directive 93/37/EEC, or does Community law contain criteria according to which such an operating installation can be classified either as serving public needs or as serving commercial activities, and if so, which criteria?

7. Does Article 7(1) of Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments make the recipients of the Community subsidies subject to the review procedures within the meaning of Directive 89/665/EEC, even if they themselves are not contracting authorities within the meaning of Article 1 of Directive 93/37/EEC?

The first and sixth questions

- 17 By its first and sixth questions the national court is, essentially, asking whether an entity such as the ÖS should be regarded as a body governed by public law within

the meaning of the second subparagraph of Article 1(b) of Directive 93/37 and, thus, as a contracting authority within the meaning of the first subparagraph of that provision. If so, the national court further asks whether all works contracts, of whatever nature, entered into by that entity, constitute public works contracts within the meaning of Article 1(a) of that directive.

- 18 According to the applicants in the main proceedings, the Commission and the French Government, Article 1(a) of Directive 93/37 applies to all works contracts entered into by a body such as the ÖS, which pursues both activities intended to meet needs in the general interest not having an industrial or commercial character and activities of a commercial nature.
- 19 SRG and the Austrian and Netherlands Governments, on the other hand, consider that a body such as the ÖS does not satisfy the criteria set out in the second subparagraph of Article 1(b) of Directive 93/37 and should not therefore be regarded as a body governed by public law within the meaning of that provision.
- 20 Under the second subparagraph of Article 1(b) of Directive 93/37, a body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law.
- 21 It is clear from that provision that the three conditions set out therein are cumulative.

- 22 As regards the first condition, it should be noted, first, that the ÖS was established in order to produce, on an exclusive basis, official administrative documents, some of which require secrecy or security measures, such as passports, driving licences and identity cards, whilst others are intended for the dissemination of legislative, regulatory and administrative documents of the State.
- 23 Furthermore, the prices for the printed matter which the ÖS is required to produce are fixed by a body consisting mainly of members appointed by the Federal Chancellery or various ministries and a State control service is responsible for monitoring the printed matter which is subject to security measures.
- 24 According to the legislation applicable to it, therefore, that entity was established for the purpose of meeting needs in the general interest, not having an industrial or commercial character. The documents which the ÖS must produce are closely linked to public order and the institutional operation of the State and require guaranteed supply and production conditions which ensure that standards of confidentiality and security are observed.
- 25 Furthermore, it is apparent from Paragraphs 1(1) and 2(1) of the StDrG that the ÖS was established for the specific purpose of meeting those needs in the general interest. In that respect, it is immaterial that such an entity is free to carry out other activities in addition to that task, such as the production of other printed matter and the publication and distribution of books. The fact, raised by the Austrian Government in its written observations, that meeting needs in the general interest constitutes only a relatively small proportion of the activities actually pursued by the ÖS is also irrelevant, provided that it continues to attend to the needs which it is specifically required to meet.
- 26 The condition, laid down in the first indent of the second subparagraph of Article 1(b) of the directive, that the body must have been established for the 'specific' purpose of meeting needs in the general interest, not having an industrial

or commercial character, does not mean that it should be entrusted only with meeting such needs.

- 27 As regards the second condition laid down in the second subparagraph of Article 1(b) of Directive 93/37, it should be noted that, according to the national Law, the ÖS has legal personality.
- 28 As regards the third condition, it should be noted that the Director-General of the ÖS is appointed by a body consisting mainly of members appointed by the Federal Chancellery or various ministries. Furthermore, it is subject to scrutiny by the Court of Auditors and a State control service is responsible for monitoring the printed matter which is subject to security measures. Finally, according to the statements made at the hearing by SRG, the majority of the shares in the ÖS are still held by the Austrian State.
- 29 It follows that an entity such as the ÖS must be classified as a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 93/37 and must thus be regarded as a contracting authority within the meaning of the first subparagraph of that provision.
- 30 The Austrian and Netherlands Governments object that it is not possible to disregard the fact that the overall activity of an entity such as the ÖS is dominated by those activities pursued in order to meet needs having an industrial or commercial character.
- 31 In that respect, it should be recalled that, as stated at paragraph 26 above, the wording of the second subparagraph of Article 1(b) of Directive 93/37 does not exclude the possibility that a contracting authority may pursue other activities in addition to its specific task of meeting needs in the general interest, not having an industrial or commercial character.

32 As regards such activities, it should be noted first that Article 1(a) of the directive makes no distinction between public works contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest and those which are unrelated to that task.

33 The fact that no such distinction is made is explained by the aim of Directive 93/37 to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities.

34 Finally, to interpret the first indent of the second subparagraph of Article 1(b) of Directive 93/37 in such a way that its application would vary according to the relative proportion of its activities pursued for the purpose of meeting needs not having an industrial or commercial character would be contrary to the principle of legal certainty which requires a Community rule to be clear and its application foreseeable by all those concerned.

35 The answer to the first and sixth questions referred by the national court should therefore be that an entity such as the ÖS must be regarded as a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 93/37, and thus as a contracting authority within the meaning of the first subparagraph of that provision, so that works contracts, of whatever nature, entered into by that entity are to be considered to be public works contracts within the meaning of Article 1(a) of that directive.

The second question

- 36 In view of the answer given to the first and sixth questions, there is no need to answer the second question.

The fourth and fifth questions

- 37 By its fourth and fifth questions, the national court is essentially asking whether an undertaking which carries on commercial activities and in which a contracting authority has a majority shareholding must itself be considered to be a contracting authority within the meaning of Article 1(b) of Directive 93/37, if that undertaking was established by the contracting authority in order to carry on commercial activities or if the contracting authority transfers to it funds derived from activities it pursues in order to meet needs in the general interest, not having an industrial or commercial character.
- 38 As pointed out at paragraph 21 above, it is clear from the wording of the second subparagraph of Article 1(b) of Directive 93/37 that the three conditions set out therein are cumulative.
- 39 It is therefore not sufficient that an undertaking was established by a contracting authority or that its activities are financed by funds derived from activities pursued by a contracting authority in order for it to be regarded as a contracting authority itself. It must also satisfy the condition set out in the first indent of Article 1(b) of

Directive 93/37, that it must be a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.

40 If that condition is not satisfied, an undertaking such as the one referred to by the national court cannot be considered to be a contracting authority within the meaning of Article 1(b) of the directive.

41 The answer to the fourth and fifth questions referred by the national court must therefore be that an undertaking which carries on commercial activities and in which a contracting authority has a majority shareholding is not to be regarded as a body governed by public law within the meaning of Article 1(b) of Directive 93/37, and thus as a contracting authority within the meaning of that provision, on the sole ground that that undertaking was established by the contracting authority or that the contracting authority transfers to it funds derived from activities pursued in order to meet needs in the general interest, not having an industrial or commercial character.

The third question

42 By its third question, the national court is seeking to ascertain whether a project which must be classified as a public works contract within the meaning of Article 1(a) of Directive 93/37 continues to be subject to the provisions of that directive when, before completion of the work, the contracting authority transfers its rights and obligations in the context of a call for tenders to an undertaking which is not itself a contracting authority within the meaning of Article 1(b) of that directive.

43 In that respect, it is clear from Article 1(a) of Directive 93/37 that a contract which satisfies the conditions set out in that provision cannot cease to be a public works contract when the rights and obligations of the contracting authority are transferred to an undertaking which is not a contracting authority. The aim of Directive 93/37, which lies in the effective realisation of freedom of establishment and freedom to provide services in the field of public works contracts, would be undermined if the application of the rules in the directive could be excluded on the sole ground that the rights and obligations of a contracting authority in the context of a call for tenders are transferred to an undertaking which does not satisfy the conditions set out in Article 1(b) of Directive 93/37.

44 The contrary would be true only if it were to be established that, from the outset, the whole of the project at issue fell within the objects of the undertaking concerned and the works contracts relating to that project were entered into by the contracting authority on behalf of that undertaking.

45 It is for the national court to ascertain whether that is the case here.

46 The answer to the third question referred by the national court must therefore be that a public works contract is not subject to the provisions of Directive 93/37 when it relates to a project which, from the outset, falls entirely within the objects of an undertaking which is not a contracting authority and when the works contracts relating to that project were entered into by a contracting authority on behalf of that undertaking.

The seventh question

- 47 By its seventh question, the national court is essentially seeking to ascertain whether Article 7(1) of Regulation No 2052/88 as amended by Regulation No 2081/93 is to be interpreted as meaning that Community funding of a works project is conditional upon the recipients complying with the review procedures laid down by Directive 89/665, even if they themselves are not contracting authorities within the meaning of Article 1(b) of Directive 93/37.
- 48 As the Advocate General noted at point 105 of his Opinion, it is clear from the wording of Article 7(1) of Regulation No 2052/88 that the requirement that the measures referred to must be in conformity with Community law presupposes that those measures fall within the scope of the relevant Community legislation.
- 49 The answer to the seventh question referred by the national court must therefore be that Article 7(1) of Regulation No 2052/88 as amended by Regulation No 2081/93 is to be interpreted as meaning that Community funding of a works project is not conditional upon the recipients complying with the review procedures within the meaning of Directive 89/665, if they are not themselves contracting authorities within the meaning of Article 1(b) of Directive 93/37.

Costs

- 50 The costs incurred by the Austrian, French and Netherlands Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesvergabeamt by order of 2 February 1996, hereby rules:

- 1. An entity such as the Österreichische Staatsdruckerei must be regarded as a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, and thus as a contracting authority within the meaning of the first subparagraph of that provision so that works contracts, of whatever nature, entered into by that entity are to be considered to be public works contracts within the meaning of Article 1(a) of that directive.**
- 2. An undertaking which carries on commercial activities and in which a contracting authority has a majority shareholding is not to be regarded as a body governed by public law within the meaning of Article 1(b) of Directive 93/37, and thus as a contracting authority within the meaning of that provision, on the sole ground that that undertaking was established by the contracting authority or that the contracting authority transferred to it funds which it has earned from activities pursued in order to meet needs in the general interest, not having an industrial or commercial character.**
- 3. A public works contract is not subject to the provisions of Directive 93/37 when it relates to a project which, from the outset, falls entirely within the objects of an undertaking which is not a contracting authority and when**

the works contracts relating to that project were entered into by a contracting authority on behalf of that undertaking.

4. Article 7(1) of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993, is to be interpreted as meaning that Community funding of a works project is not conditional upon the recipients complying with the review procedures within the meaning of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts if they are not themselves contracting authorities within the meaning of Article 1(b) of Directive 93/37.

Rodríguez Iglesias	Gulmann	Wathelet	Schintgen	
Mancini	Moitinho de Almeida	Kapteyn	Murray	
Edward	Puissochet	Hirsch	Jann	Sevón

Delivered in open court in Luxembourg on 15 January 1998.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President