

OPINION OF ADVOCATE GENERAL
ALBER

delivered on 30 January 2001¹

I — Introduction

II — Legal framework

A — *Directive 92/50*

1. The two references for a preliminary ruling from the Tribunale amministrativo regionale per la Lombardia (Lombardy Regional Administrative Court) (Italy) concern — in connection with procurement procedures conducted by the Milanese fair company Ente Autonomo Fiera Internazionale di Milano (hereinafter the ‘Ente Fiera’²) — the question of the interpretation of the concept of a ‘body governed by public law’ within the meaning of the second subparagraph of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (hereinafter ‘Directive 92/50’).³ In particular, the parties disagree on the requirement of being established ‘... for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character’.

2. The relevant provisions of Article 1 of Directive 92/50 state:

‘For the purposes of this Directive:

...

(b) contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

1 — Original language: German.

2 — Hereinafter, the term ‘the’ Ente Fiera (il Ente Fiera) will be used, in accordance with the Italian. The term ‘Ente’ signifies in Italian law bodies that are designated in German by the concepts ‘Körperschaft’ (society) or ‘Anstalt des öffentlichen Rechts’ (institution of public law). An Ente is characterised by legal personality and financial autonomy. They may be regional or local authorities (enti locali), such as for example autonomous regions or districts, or commercial bodies, such as for example the former State electricity supplier E.N.E.L. (Ente Nazionale Energia Elettrica), in which the state has some kind of stake.

3 — OJ 1992 L 209, p. 1.

Body governed by public law means any body:

lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 30b of that Directive;

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

...’

— having legal personality and

B — *Italian implementing legislation*

3. Directive 92/50 was implemented in Italian law by Decree-Law No 157 of 17 March 1995 (hereinafter ‘Decree-Law No 157/95’).⁴ The concept of a ‘body governed by public law’ was adopted from Directive 92/50 in Article 2 of the Decree-Law.

— 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.

C — *Articles of association of the Ente Fiera*

4. The Ente Fiera was established in the early part of the 20th century in the form of a committee under private law. Its capital was for the most part provided by private businessmen. By Royal Decree No 919 of 1 July 1922 the Ente Fiera was transformed into a private-law legal person.

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

⁴ — *Gazzetta Ufficiale della Repubblica Italiana* (hereinafter ‘GURI’) No 104 of 6 May 1995.

5. The Ente Fiera is responsible for the organisation of the international fair in Milan. At the time of the reference for a preliminary ruling, the provisions of its articles of association relevant to these proceedings stated:

association, including financial operations, loans and the conclusion of commercial guarantees in respect of movable and immovable property in pursuance of its objects; furthermore, it may form companies or bodies whose objects are similar, related or linked to its own, or acquire stakes or shares in such companies or bodies.

'Article 1 — Object

...

1. The objects of the Ente Autonomo Fiera Internazionale di Milano (hereinafter "Ente") having its seat in Milan, Largo Domodossola Nr. 1, established by Royal Decree No 919 of 1 July 1922, declared Ente Fieristico Internazionale by Decree of the President of the Republic No 616 of 24 July 1977, are to carry on and facilitate any activity concerned with the organisation of fairs and conferences and any other initiative which, by fostering trade relations, promotes the presentation of the production of goods and services and if possible their sale. The Ente is a non-profit-making body and carries on activities in the public interest. Its operations are governed by the principles of the Civil Code.

Article 3 — Means of pursuing its objects

1. The Ente shall pursue the objects for which it was created using the proceeds arising from carrying on its activities, from administration (including special administration) and management of its assets and from contributions by legal or natural persons.

...'

2. Management of the Ente shall be based on the criteria of performance, efficiency and cost-effectiveness.

3. The Ente may effect any operations not prohibited to it by law or its articles of

Under Article 5 of the articles of association, the President of the Ente Fiera is appointed by order of the President of the Republic and the Vice-Presidents and Secretary-General by order of the Minister for Industry (Article 10 of the articles of association).

Under Article 6, more than half of the Consiglio Generale, which is responsible for making the Ente Fiera's fundamental decisions (see Article 7 of the articles of association), are representatives of the central State, of the region of Lombardy, of the province of Milan and of the city of Milan, the other members being representatives of industry and of the employees.

Under Article 15 of the articles of association, the Ente Fiera is subject to the control of the Minister for Industry.

Under Article 16(1), the Minister for Industry can transfer the management of the Ente Fiera to a commissioner if general administration is no longer effective or serious irregularities are discovered. Under Article 16(2) the Minister for Industry can liquidate the Ente Fiera either because its objects can no longer be achieved or on public interest grounds.

III — Facts of the main proceedings

A — *Facts of Case C-223/99*

6. On 24 December 1997, Agorà srl (hereinafter 'Agorà') sent an application in

accordance with Article 25 of Italian Law No 241 of 7 August 1990⁵ to the Ente Fiera. In it, Agorà requested the Ente Fiera to send it the documents concerning the award of a contract for the hire of fixtures and fittings for reception areas and information points, which had been referred to in an award notification of 2 August 1997.

7. By decision of 5 January 1998, the Ente Fiera refused to send the documents concerned. By way of justification, it stated that it was not a legal person under public law and was therefore not bound by the transparency requirements of the rules on public service contracts.

8. On 23 January 1998, Agorà challenged that decision in the national court. In its decision of 3 March 1998, the latter upheld its claim and held that the Ente Fiera must send Agorà all documents relating to the award procedure.

9. The Ente Fiera appealed against this decision to the Consiglio di Stato (Council of State). In its decision of 8 July 1998, its Sixth Chamber found a flaw affecting the entire proceedings at first instance and

⁵ — Law on new rules applicable to administrative proceedings and the right of access to administrative documents, GURI No 192 of 18 August 1990.

accordingly remitted the case to the court referring the question.

10. By a document of 19 October 1998, Agorà applied anew for its claim to be upheld. It argued that a reference to the Court for a preliminary ruling was appropriate in respect of the disputed question on the applicability of the rules on public service contracts.

11. The national court is of the opinion that the obligation which Agorà claims binds the Ente Fiera to observe the transparency requirements under Italian Law No 241 follows from its status as a 'contracting authority'. In this connection it refers to the diverging interpretations of Article 2 of Decree-Law No 157/95 and Article 1(b) of Directive 92/50 by the Italian national courts. On the one hand, both the Consiglio di Stato in its judgment No 354 of 21 April 1995, and the referring court in its judgment No 1365 of 17 November 1995, held that the Ente Fiera meets the requirements for the definition of a 'body governed by public law' within the meaning of Directive 92/50. On the other hand, the Consiglio di Stato in its judgment No 1267 of 16 September 1998 reversed the case-law. According to that judgment, the Ente Fiera pursued objects having commercial character and consequently could not be regarded as a 'body governed by public law' within the meaning of Directive 92/50.

12. The Ente Fiera produced the latter decision of the Consiglio di Stato as appendix 3 to its memorandum of 5 November 1999. The Consiglio di Stato based its classification of the Ente Fiera on the fact that the indirect promotion of commerce, which followed from its activity as an organiser of fairs, was not sufficient for a finding of needs in the general interest 'not having an industrial or commercial' character. Though the activity of the Ente Fiera promotes the general interest, in the same way as, for example, banking facilities and telecommunications services are provided in the general interest, the organisation of fairs is an essentially commercial activity connected with the marketing and distribution of goods and services which complements manufacturing by business.⁶

13. Since then, the Corte suprema di cassazione (Supreme Court of Cassation) has confirmed the decision of the Consiglio di Stato in appeal proceedings. The Corte suprema di cassazione also takes the view that the Ente Fiera meets needs in the general interest of an industrial or commercial character. By organising fairs and exhibitions, it promotes the economic and business activities of the exhibitors. Over and above that, it competes with other fair organisers. The fact that the Ente is non-profit-making does not invalidate this classification. The Ente Fiera at least endeavours to cover its costs and any losses it may suffer from its receipts.⁷

⁶ — Decision of the Consiglio di Stato No 1267/98 of 16 September 1998, p. 11.

⁷ — Corte suprema di cassazione, Decision No 97 of 4 April 2000, published in extract in *Giurisprudenza italiana* 2000, p. 1496, 1500.

B — *Facts of Case C-260/99*

14. By an announcement published in the *Official Journal of the European Communities* of 29 July 1997, the Ente Fiera issued a restricted invitation to tender. It concerned the award of cleaning services in respect of its exhibition premises for the period 1 January to 31 December 1998 with the possibility of a two-year extension.

15. Excelsior s.n.c. (hereinafter ‘Excelsior’) participated in the procurement procedure for areas 2 to 5. At the end of the procedure, the third area was awarded to Consorzio Miles. The latter was in third place on the award list; the first two applicant firms were rejected by the Ente Fiera. Excelsior was in fifth place on the list.

16. Thereafter, the Ente Fiera cancelled the award of the contract to Miles owing to a serious breach. For the period 13 February to 30 June 1998, the contract was temporarily awarded to C.I.F.T.A.T., which in the earlier procedure had been placed seventh on the list. On 7 March 1998, a new invitation to tender in respect of the area in question was published in the *Official Journal of the European Communities* for the period 1 July to 31 December 1998, with the possibility of an extension for a further two years.

17. By proceedings instituted on 10 and 11 April 1998, Excelsior challenged both

the temporary award of the cleaning services concerned to C.I.F.T.A.T. and the renewed invitation to tender in the *Official Journal* of 7 March 1998 in respect of the same services before the national court.

18. The Ente Fiera raised as a defence to the action that the courts of administrative jurisdiction had no jurisdiction to decide the questions in issue. It stated as its reason that it was not a ‘body governed by public law’ and therefore was not bound to observe Community or national rules on the award of public contracts.

19. The national court considers the question whether the Ente Fiera is to be deemed a ‘body governed by public law’ within the meaning of Article 1(b) of Directive 92/50 to be decisive in order to determine which court is competent.

IV — Questions referred and proceedings before the Court

20. These are the facts which led the national court to refer the following ques-

tion, which is the same in both main proceedings, to the Court:

‘May the definition of a body governed by public law contained in Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts be deemed applicable to the Ente Autonomo Fiera Internazionale di Milano?’

21. By order of the President of 14 September 1999, the two cases C-223/99 and C-260/99 were joined pursuant to Article 43 of the Rules of Procedure of the Court of Justice both for the purposes of the written and oral procedure and for the purposes of judgment.

V — Arguments of the parties

22. The plaintiff in the main proceedings in Case C-223/99, Agorà, submits that the Ente Fiera meets ‘needs in the general interest’. This follows both from its articles of association, and from the national legislation, which regulate its tasks and activities. Organising fairs is of general interest and is of use to a group of persons so large that it may be equated to the entirety of the population.

23. Furthermore, the Ente Fiera was also established ‘for the specific purpose’ of meeting needs in the general interest. For this it is enough that the Ente Fiera pursue these interests as an institution. The fact that it was originally established as a committee under private law is irrelevant.

24. Agorà also argues that the Ente Fiera meets needs in the general interest ‘not having an industrial or commercial character’. The ‘industrial or commercial’ nature of an activity is to be understood as a synonym for a purely private activity on the part of the body concerned. For this it is in turn decisive that it be subject to an obligation to maximise profits.

25. However, under Article 1 of its articles of association, the Ente Fiera’s activities are not directed to making profits. Therefore, its decisions cannot be said with certainty to be made solely by reference to economic criteria.

26. Moreover, the State’s right of supervision over the Ente Fiera’s activities prevent it from operating according to purely economic considerations on the market. The State’s control of the organisation of fairs in general means that fair companies

are moreover generally liable to be preferred in relation to competitors.

27. Agorà submits that the fact that the Ente Fiera is bound by the provisions of the Civil Code in no way precludes its classification as a ‘body governed by public law’.

28. Finally, Agorà submits that the Ente Fiera always observed the Community rules on the award of public contracts until the reversal in the case-law of the Consiglio di Stato in 1998.

29. The plaintiff in the main proceedings in case C-260/99, Excelsior, takes the view that the concept of a ‘body governed by public law’ must be defined in a manner consistent with the purpose underlying the European public procurement rules. These are intended to prevent the relevant Member State from favouring national companies over companies from other Member States. In order not to undermine that purpose, the concept of a ‘contracting authority’, which determines the scope of application of the relevant provisions, is not defined restrictively; instead, the flexible notion of a ‘body governed by public law’ was introduced.

30. Excelsior argues that it is the ‘needs in the general interest’ which must not be

industrial or commercial, not the body itself. The requirement is, first of all, fulfilled where bodies meet needs in the general interest not related to end-consumers’ demand for goods and services. It is likewise fulfilled where bodies meet needs in the general interest that are not specifically for individual benefit and so admit of no discrimination on the basis of price. The Ente Fiera meets needs not having an industrial or commercial character, because it does not provide direct services to individual consumers, but promotes and coordinates the economic activities of third parties. Furthermore, it is not the purpose of the Ente Fiera’s activities to make a profit.

31. The Ente Fiera first of all disputes the admissibility of the request for a preliminary ruling in Case C-223/99. The main dispute concerns the applicability of the Italian transparency rules only, not that of the Community rules on public procurement. Whether or not the Ente Fiera is classified as a ‘body governed by public law’ for the purposes of Directive 92/50 is therefore immaterial to the question in issue in the main proceedings relating to the right of access to public documents.

32. As regards the answer to the question referred, the Ente Fiera advances the view

that only one of the requirements for a 'body governed by public law' is indisputably fulfilled, namely the possession of 'legal personality'. On the other hand, it argues that it is not subject to State control. The State's very restricted rights of supervision over the Ente Fiera under national law correspond to those that also exist in respect of foundations and other, exclusively private, economic activities. The State merely has a residual general right of supervision and coordination in respect of the organisation of fairs. Beyond that, the organisation of fairs is entrusted to various bodies under public and private law without State collaboration. Moreover, the Ente Fiera is not subjected to any state audit of its accounts, nor does the State have any financial stake in it.

indicator that we are not dealing with a 'need in the general interest, not having an industrial or commercial character'. Given the competition, if the Ente Fiera did not operate on the basis of economic criteria, its business results would of necessity be negative. But the Ente Fiera's balance sheets show positive financial results.

35. The 'Commission interpretative communication concerning the application of the Single Market rules to the sector of fairs and exhibitions'⁸ (hereinafter the 'Interpretative Communication') too confirms that the organisation of fairs is an economic activity.

33. The Ente Fiera carries out activities of an exclusively economic nature. This appears from the fact that it does not operate for free but against payment on the part of the companies that wish to avail themselves of its services. The fact that the activity is not directed at making profits merely means that any surplus is not divided between the shareholders but is reinvested in the Ente Fiera. In this way it is able to finance its activities itself in a cost-effective way. The fact that the Ente Fiera meets needs in the general interest is therefore immaterial because those needs are in any event industrial or commercial in nature.

36. Finally, the Ente Fiera also points out that no inference as to the general applicability of the Community rules on the award of public contracts may be drawn from the fact that it has voluntarily observed those rules.

34. Moreover, the Ente Fiera operates in competition with an ever increasing number of other participants in the market. According to the case-law, this is a further

37. The Commission in its observations expresses doubts as to whether the Ente Fiera does in fact meet needs in the general interest. Its specific object is to promote the interests of a defined group of persons,

8 — OJ 1998 C 143, p. 2.

namely economic operators. The interests of this admittedly large, but none the less restricted, category can hardly be equated with the general interest.

38. The Commission is of the opinion that, according to its objects, the Ente Fiera pursues purely commercial interests. It follows from Article 1 of its articles of association that the interests that the Ente Fiera is specifically supposed to pursue are inextricably bound up with the presentation and possible sale of the goods or services offered by the economic operators at the fair. The view that the promotion and stimulation of particular economic and production sectors as well as the activity of other economic operators only represents an industrial or commercial interest if it leads to direct satisfaction of individual consumers' demand for goods and services is far too narrow and does not reflect the Directive.

39. Furthermore, the Ente Fiera was also established for the specific purpose of satisfying the industrial and commercial interests described above. It was founded in the early 20th century to meet traditional and spontaneous interests of economic operators.

40. The distinguishing features of the Ente Fiera's activities and the way in which it functions also lead the Commission to the

conclusion that its activities are industrial or commercial in nature. It is true that the Ente Fiera is not profit-orientated, but this only means that profits are not distributed but retained by it. Furthermore, the Ente Fiera is managed according to the criteria of performance, efficiency and cost-effectiveness and it finances itself from the proceeds of exercising its activities. Therefore, the Ente Fiera does make profits and reinvests them so as to remain self-financing.

41. Apart from that, the Ente Fiera is in competition with other private organisers and bodies in the organisation and management of fairs, so in this respect, too, it enjoys no privileges. According to the case-law, this is an indicator of needs having an industrial or commercial character. The presence of competition is in itself admittedly not enough to exclude the possibility that the relevant body is guided by something other than economic considerations. However, according to Article 1 of its articles of association, the Ente Fiera is required to pursue its activities in a manner ensuring high performance, efficiency and cost-effectiveness. It follows from this, combined with the fact that there is competition on the relevant market, that we are here dealing with industrial and commercial needs.

42. The Commission also refers to its Interpretative Communication already cited. It confirms that the Ente Fiera carries out a remunerative activity in a context characterised by competition.

VI — Opinion

A — Admissibility of the reference for a preliminary ruling in Case C-223/99

43. No concerns were raised as to the admissibility of the reference for a preliminary ruling in Case C-260/99. However, the Ente Fiera claims that the reference in Case C-223/99 is inadmissible, because the question referred concerns the interpretation not of Community law but of Italian law.

44. As explained under ‘Applicable Provisions’, the Community definition of a ‘body governed by public law’ was adopted by Italian law when Directive 92/50 was implemented.⁹ According to the information from the national court, the interpretation of that definition is of decisive significance as regards the application of the rules on administrative transparency, Law No 241 of 7 August 1990. So, the question referred concerns the interpretation of the notion of a ‘body governed by public law’ within the meaning of Directive 92/50. It follows that the question relates to the interpretation of secondary Community law and therefore a subject admissible under Article 234 EC.

⁹ — See also the Corte suprema di cassazione in its judgment of 4 April 2000 (*Giurisprudenza italiana* 2000, p. 1496, 1498, paragraph 2.1.1).

45. The extent to which the question referred for a preliminary ruling is necessary for the decision in the main litigation is in principle a matter to be determined by the national court alone and is not examined by this Court.¹⁰ There is a possible exception to this principle where there is manifestly no connection between the question referred and the main proceedings or where the question is general or hypothetical in nature.¹¹ However, the question referred in Case C-223/99 cannot be said to be inadmissible on those grounds. The national court stated in the order for reference that the question whether the Ente Fiera is bound by the Italian transparency rules at issue in the main proceedings depends on its possible classification as a ‘body governed by public law’ within the meaning of Article 1(b) of Directive 92/50.¹² The reference for a preliminary ruling in Case C-223/99 is therefore admissible.

B — Interpretation of Article 1 of Directive 92/50

46. In order for the Ente Fiera to be regarded as a contracting authority, the following three conditions must, according to Article 1(b) of Directive 92/50, be satisfied. The Ente Fiera must have legal personality, be subject to State control

¹⁰ — Judgments in Case 5/77 *Denkavit* [1977] ECR 1555, paragraphs 17 to 19, and in Case 244/80 *Foglia* [1981] ECR 3045, paragraph 15.

¹¹ — Judgments in Case 244/80 *Foglia*, cited in footnote 10, paragraph 18 and in Case C-83/91 *Mellicke* [1992] ECR I-4871, paragraphs 22 to 26.

¹² — See page 3 of the order for reference.

and have been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character. According to the case-law, these conditions are cumulative.¹³

1. Legal personality of the Ente Fiera

47. The Ente Fiera was transformed by Royal Decree of 1 July 1922 from an initiative ('iniziativa') into a legal person ('ente morale'). It has legal personality by virtue of the rules in the third sentence of Article 1(1), Article 1(3), and Article 3 of its articles of association in conjunction with the Royal Decree. The condition in the second indent of Article 1(b) of Directive 92/50 is thereby fulfilled.

2. Influence of the State and of other regional or local authorities on the Ente Fiera

48. More than half of the Ente Fiera's administrative board are representatives of the ministries of the central State and of the regional and district administration (Article 6 of the articles of association), and the President is appointed by the President of the Republic (Article 5(1) of the articles of association). The Minister for Industry appoints the Vice-Presidents (Article 5(3)

of the articles of association). The management of the Ente Fiera is therefore designated by the State and other regional or local authorities. Moreover, the Ente Fiera is, pursuant to Article 15 of its articles of association, subject to the control of the Minister for Industry and, under Article 16, can even be liquidated by him or her. To this extent its management too is subject to State supervision. In the light of the decision in *Commemara Machine Turf* in particular, according to which even the possibility of indirect control by the State is sufficient,¹⁴ there can be no doubt about this. The powers of central government in respect of the Ente Fiera were admittedly transferred by Decree of the Council of Ministers of 7 July 1999¹⁵ to the government of the region of Lombardy. But the latter is also a regional authority, and the management organs of the Ente Fiera are thus still appointed by regional or local authorities and its activity controlled by them within the meaning of the third indent of Article 1(b) of Directive 92/50.

3. Establishment for the specific purpose of meeting needs of general interest, not having an industrial or commercial character

49. As the national court has observed, it follows from the foregoing that, as to the

13 — Judgment in Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraph 29.

14 — Judgment in Case C-306/97 *Commemara Machine Turf* [1998] ECR I-8761, paragraph 34.

15 — GURI No 176 of 29 July 1999, p. 44.

extent to which the Ente Fiera is a 'body governed by public law' within the meaning of Article 1 of Directive 92/50, it is only necessary to examine whether it is a body established for the specific purpose of meetings needs in the general interest, not having an industrial or commercial character (first indent of Article 1(b) of Directive 92/50).

(a) Establishment for the specific purpose of meeting needs in the general interest

50. The first issue is whether the Ente Fiera was established for the specific purpose of meeting 'needs in the general interest' within the meaning of Article 1(b) of Directive 92/50.

51. According to Article 1 of the articles of association, the objects of the Ente Fiera '... are to carry on and facilitate any activity concerned with the organisation of fairs and conferences and any other initiative which, by fostering trade relations, promotes the presentation of the production of goods and services and if possible their sale'. It follows that the Ente Fiera was founded for the purpose of organising fairs and conferences. What is in question is whether this is a need in the general interest.

52. The first point supporting the argument that we are dealing with needs in the general interest is the wording of the

second sentence of Article 1(1) of the Ente Fiera's articles of association which provides that it is not its purpose to make profits and that its activities are pursued in the public interest.

53. The parties to the main proceedings do not dispute that the organisation of fairs and exhibitions is in the general interest. The Consiglio di Stato and the Corte suprema di cassazione, in their more recent case-law cited above, also conclude that the Ente Fiera meets needs in the general interest. Only the Commission disputes that this condition is satisfied. It bases that view on the limited category of persons whose interests the activity of the Ente Fiera serves.

54. The Court does not appear in its case-law on public procurement hitherto to have considered the extent to which the organisation of fairs is an activity in the general interest. The following duties have so far been recognised as being in the general interest: the issue of official documents such as passports, driving licences and identity cards,¹⁶ the collection and treatment of household refuse,¹⁷ the maintenance of national woods and of a forestry industry¹⁸ and the running of a university.¹⁹ In addition, Advocate General

16 — Judgment in Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraph 24.

17 — Judgment in Case C-360/96 (cited in footnote 13), paragraph 52.

18 — Judgments in Case C-353/96 *Commission v Ireland* [1998] ECR I-8565, paragraph 37 and in Case C-306/97 (cited in footnote 14), paragraph 32.

19 — Judgment in Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 19.

Fennelly has classified the operation of public telecommunications networks and the provision of public communications services as being in the general interest²⁰ and Advocate General Mischo has assumed that ‘Offices publics d’aménagement et de construction’ and a ‘Société anonyme d’habitations à loyer modéré’ likewise operate in the general interest.²¹

public benefits from university research and its contribution to the level of knowledge in general, so also do fairs, by bringing together manufacturers and retailers, serve the interests of consumers who may, for example, obtain goods from individual retailers via wholesalers and retailers who have acquired information at the fair. As the Commission has stated in its Interpretative Communication on the sector of fairs, fairs and exhibitions represent ‘a sales promotion instrument’, which serves the ‘growing need for communication and information’ in the economy and helps ‘optimise consumer choice’.²² The fact that the class of participants is restricted therefore does not undermine the view that fairs are organised in the general interest.

55. The examples cited in fact relate to situations where the general public in principle has access. However, there are certain services, such as for example attendance at university, that can only be taken up by certain persons, namely those who satisfy the conditions for admission. Similarly, flats in the social housing sector are only allocated to those in need. If one compares these activities to the organisation of fairs, it can be seen that fairs, too, are sometimes only open to a certain category of the public, as, for example, in the case of trade fairs. But anyone who satisfies the conditions laid down by the organiser — so, say, anyone who operates in the sector of the economy to which the fair relates — can exhibit. Contrary to the view of the Commission, it does not appear to be justified to deduce from the fact that direct users of fairs are a limited group that the organisation of fairs does not serve the general interest. Thus, just as the general

56. We may therefore assume by way of an initial conclusion that the Ente Fiera meets needs in the general interest.

(b) Type of needs met

57. Lastly, in order for the Ente Fiera to be classified as a body governed by public law, the needs met by it must ‘not [have] an industrial or commercial character’. The real dispute between the parties in the main proceedings revolves around the interpretation and application of this criterion. The plaintiffs think that the Ente Fiera does not

20 — Opinion in Case C-324/98 *Telaustria* [2000] ECR I-10745, I-10747, point 15.

21 — Opinion in Case C-237/99 *Commission v France* [2001] ECR I-939, I-941, points 5 and 6 *passim*.

22 — See paragraph 3 of the introduction, OJ 1998 C 143, p. 2.

carry on an industrial or commercial activity, whereas the Ente Fiera itself and the Commission are of the view that organising fairs is a purely industrial or commercial activity. The latter view is shared by the Consiglio di Stato and the Corte suprema di cassazione.

commercial' needs in the general interest may be distinguished from those that are 'not ... industrial or commercial', and whether the need met by the Ente Fiera for fairs to be organised is 'industrial or commercial' or not.

58. So far as can be seen, the only case in which the Court has made any finding on the criterion of needs 'not having an industrial or commercial character' to date is *BFI Holding*. It stated that 'it is clear from the second subparagraph of Article 1(b) of Directive 92/50, in its different language versions, that the absence of an industrial or commercial character is a criterion intended to clarify the meaning of the term "needs in the general interest" as used in that provision'.²³ As justification it relied primarily on the practical effectiveness of the provision. For '[i]f the Community legislature had considered that all needs in the general interest were not of an industrial or commercial character it would not have said so because, in that context, the second component of the definition would serve no purpose'.²⁴

59. One must therefore agree with the Commission that characterising needs 'not having an industrial or commercial character' entails defining the concept of needs in the general interest more narrowly. However, it is not clear how 'industrial or

60. Agorà infers that the Ente Fiera's activity is 'not... industrial or commercial' in character, principally from the second sentence of Article 1(1) of the articles of association, which state that the Ente Fiera is non-profit-making ('L'Ente non ha fini di lucro...'). This argument must be accepted at least to the extent that an industrial or commercial activity in principle aims to produce a commercial profit.

61. The inference of this provision is supported by Article 16 of the Ente Fiera's articles of association. Article 16(1) provides that the Minister for Industry can transfer the management of the Ente Fiera to a commissioner if general administration is no longer effective or serious irregularities are found. Further, under Article 16(2), the Minister for Industry can even liquidate the Ente Fiera, either because its objects are no longer achievable or on public interest grounds. The possibility of liquidation on public interest grounds is, however, difficult to reconcile with the view that the Ente Fiera meets industrial or commercial needs. Where an undertaking

23 — Judgment in the case of *BFI Holding* (cited in footnote 13), paragraph 32.

24 — Judgment in the case of *BFI Holding* (cited in footnote 13), paragraph 35.

meets needs having an industrial or commercial character, it may be liquidated either on grounds of insolvency or because the owner no longer has any interest in its continued existence. The first eventuality is dictated by economic considerations alone and the second reflects the private owner's right of disposal. Article 16(2) of the articles of association could therefore be an indication that the Ente primarily fulfils needs in the general interest 'not having an industrial or commercial' character.

'events with a commercial purpose'.²⁶ However, it must be emphasised that the fact that the exhibitors at a fair pursue activities having an industrial or commercial character does not necessarily mean that organising the fair itself is industrial or commercial in character. The organiser of a fair may well be pursuing non-commercial objects, such as a local policy to develop an area as a location for fairs or the promotion of sales of regional and local products, by creating a convenient opportunity to present them.

62. However, the Commission and the Ente Fiera, arguing that the needs met by the Ente Fiera are industrial or commercial in character, point first of all to the Commission's Interpretative Communication on the sector of fairs, which makes clear that the organisation of fairs is an industrial or commercial activity. The Consiglio di Stato argues, along the same lines, that the organisation of fairs is connected with the advertising and marketing of goods and services and therefore complements business manufacturing.²⁵ The Corte suprema di cassazione views the organisation of fairs as supporting exhibitors' economic and business activities and, on this basis, classifies the organisation of fairs as an 'industrial or commercial' activity.

64. The Commission's Interpretative Communication describes the activity of fairs in general and states that they are a 'concrete expression of the market concept'.²⁷ Fairs are further described as a sales promotion instrument supplementary to advertising in that they bring together supply and demand in an environment favourable to operators. They offer participants an opportunity to find out more about the market, identify new trends, assess the competition and make new contacts.²⁸ But nowhere is the organisation of fairs as such categorically stated to constitute an 'industrial or commercial' activity. On the contrary, the communication expressly excepts measures of a purely private nature adopted by

63. In the Commission's Interpretative Communication, fairs are described as

²⁵ — See p. 11 of the decision of the Consiglio di Stato, Sixth Chamber, No 1267/98 of 17 September 1998.

²⁶ — Paragraph I(1).

²⁷ — Introduction, second paragraph.

²⁸ — Introduction, third paragraph.

economic operators or groups of them involved in the fair sector.²⁹ Therefore, it is doubtful whether and to what extent this communication is applicable to commercially organised fairs at all. It seems to be all the more doubtful as the communication is only intended to contribute to the compatibility of national measures governing the organising of fairs with the principles of Community law, in particular the freedom of establishment and the free movement of services and goods.³⁰ If the communication expressly excludes measures of a purely private nature from its scope of application, this is rather an indication that there undoubtedly are fairs that are organised for reasons that are not purely industrial or commercial. Accordingly, no inference may be drawn from the communication to establish whether the Ente Fiera's activities are industrial or commercial in character.

65. The Consiglio di Stato further cites in support of its view that the Ente Fiera is not classifiable as a public body the fact that the Ente Fiera's objects are laid down by a founding document under private law and that its capital finance came from the investors on the committee.³¹ However, this argument is not persuasive either. It cannot be inferred from the fact that the Ente Fiera is founded on a private-law founding document that the needs it meets are industrial or commercial. According to the case-law, 'with a view to giving full effect to the principle of freedom of movement, the term "contracting authority" must be interpreted in functional terms ...

In view of that need, no distinction should be drawn by reference to the legal form of the provisions setting up the entity and specifying the needs which it is to meet'.³² The private-law act establishing the Ente Fiera does not therefore constitute grounds for assuming the existence of needs having an industrial or commercial character.

66. According to the Commission and the Ente Fiera, the non-profit-making rule referred to above merely means that profits are not paid out to the shareholders but are to be reinvested. Furthermore it must be observed in this connection that, under Article 1(2) of the articles of association, the Ente Fiera is managed according to the criteria of 'performance, efficiency and cost-effectiveness' and, under Article 3(1) of the articles of association, the Ente Fiera is to 'pursue the objects for which it was created using the proceeds arising from carrying on its activities'.

67. Finally, the fact that the profits that the Ente Fiera indisputably makes are not distributed but are reinvested in the company and that the Ente Fiera must, under Article 3 of its articles of association, finance its activities from its own income point to the existence of an industrial or commercial activity. The articles of association do not contain any provision whereby any losses incurred may be offset by the public authorities. The Ente Fiera

29 — Introduction, fifth paragraph.

30 — Introduction, fourth paragraph, and under II.

31 — See p. 10 of the decision of the Consiglio di Stato (6th Chamber) of 16 September 1998, submitted as appendix three to the memorandum of the Ente Fiera.

32 — Judgment in the case of *BFI Holding* (cited in footnote 13), paragraph 62. See also the judgments in Case C-353/96 (cited in footnote 18), paragraph 36 and in the case of *Comemara Machine Turf* (cited in footnote 14), paragraph 31.

thus bears the economic and financial consequences of its activities itself. But the fact that the articles of association do not provide for the possibility of losses being financed out of the public purse, suggests that it is an industrial or commercial activity that is being carried on. One of the characteristics of an industrial or commercial activity is that the undertaking bears the economic risk of its own transactions.

68. To this circumstance must be added the fact that the Ente Fiera stands in competition with other organisers of fairs, as the Commission and the Ente Fiera submit. The decision of the Corte suprema di cassazione also contains the same argument.

69. In this respect it must be found that, according to the case-law of the Court, the existence of competition in the area of the activity in question is an indicator of an industrial or commercial activity. This circumstance admittedly does not of itself preclude a finding of an activity 'not ... having an industrial or commercial character'.³³ But, together with the fact that the Ente Fiera alone bears the financial risk of its operations, it supports the view that the activity of the Ente Fiera should be regarded as industrial or commercial. The pressure of competition makes it improbable that the Ente Fiera would be guided in its decisions by non-economic considerations.

33 — Judgment in the case of *BFI Holding* (cited in footnote 13), paragraph 43.

70. Nor does it seem necessary from the spirit and purpose of Directive 92/50 to include the Ente Fiera in the category of 'bodies governed by public law' bound by the public procurement rules 'to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities'.³⁴ The concept of a 'body governed by public law' is to be understood in a functional way if this goal is to be effectively realised.³⁵ Accordingly, in assessing whether a particular body satisfies the conditions of the second subparagraph of Article 1(b) of Directive 92/50 it must always be asked whether, in the contracts awarded by it, there is actually a risk of discrimination between tenderers on grounds of nationality.

71. On the basis of the financing rules in the articles of association, the Ente Fiera may in principle only be guided by economic considerations. This financial risk typically exists in the case of entrepreneurial activities. In the case of undertakings that meet community needs 'not having an industrial or commercial character', there are always possibilities for the public purse, to ensure that such needs are met, to make up any losses that may be suffered so that it does not become impossible for the allocated tasks 'not having industrial or commercial character' to be performed.

34 — Judgments in the case of *BFI Holding* (cited in footnote 13), paragraph 42 and in the case of *University of Cambridge* (cited in footnote 19), paragraph 17.

35 — This interpretation has already been given by the Court in its seminal judgment in Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 11.

72. Despite its non-profit-making status and the close state connection, the fact that the economic and financial risk is borne by Ente Fiera alone ensures that there is no danger of any inclination to favour national service providers in awarding contracts.

73. In conclusion, therefore, it must be found that, according to its articles of association, the Ente Fiera was established for the specific purpose of meeting needs in the general interest having an industrial or commercial character. It follows that the requirements for the definition of a 'body governed by public law' within the meaning of the second subparagraph of Article 1(b) of Directive 92/50 are not fulfilled in the case of a body such as the Ente Fiera.

VII — Conclusion

74. On the basis of the foregoing considerations I propose that the question referred should be answered as follows:

The definition of a body governed by public law in Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 does not include bodies which, like the Ente Fiera, meet needs in the general interest, are non-profit-making, and are closely connected with public regional or local authorities, but which finance themselves exclusively from their assets and their own income, and bear the economic and financial risk of their activity themselves without there being any possibility of any losses being offset from the public purse.