

OPINION OF ADVOCATE GENERAL

STIX-HACKL

delivered on 12 April 2005¹

I — Introductory remarks

1. This reference for a preliminary ruling concerns the significance of primary law in the area of public procurement. The matter is concerned, in particular, with determining the obligations that are imposed on contracting authorities in pursuance of the fundamental freedoms. These proceedings thus also provide an opportunity to define further the case-law of the Court of Justice, in particular the *Telaustria* judgment.²

following legislation (hereinafter: ‘the directives’), which has since been superseded by new directives (the ‘legislative package’), must be mentioned:

- from among the ‘classic’ directives, Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts³ (hereinafter: ‘Services Directive’), and

II — Relevant legislation

A — Community law

2. In the context of secondary Community law applying to public procurement, the

- Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors⁴ (hereinafter: ‘Utilities Directive’).

¹ — Original language: German.

² — Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745.

³ — OJ 1992 L 209, p. 1, as amended.

⁴ — OJ 1993 L 199, p. 84, as amended.

B — *National law*

3. Article 22(3) of Law No 142 of 8 June 1990 on local self-government⁵ permitted municipalities and provinces to perform the local public functions for which they are responsible by one of the methods listed in (a) to (e) of that provision, namely:

- (a) by public management, where, owing to the small size or the special features of the relevant function, it is not expedient to set up an institution or an undertaking;
- (b) by concessions ('concessione') to third parties, where there are technical, economic or social expediency reasons;
- (c) by recourse to special undertakings, inter alia for the performance of a number of functions of economic and commercial interest;
- (d) by recourse to institutions, for the performance of social functions not having any commercial interest;
- (e) by recourse to companies limited by shares or to limited-liability companies with a predominantly public shareholding, which have been set up by or involve the participation of the establishment responsible for providing the public service concerned.

III — Facts, main proceedings and question referred for a preliminary ruling

4. The Consorzio Aziende Metano (hereinafter: 'Coname') had entered into a contract with the Municipality of Cingia de' Botti 'for the maintenance, supply and supervision of the methane gas network' for the period from 1 January 1999 to 31 December 2000.

5. By letter of 30 December 1999 the Municipality of Cingia de' Botti notified Coname that, by decision of 21 December 1999, the municipal council had approved the 'agreement with Padania Acque SpA for the management of the distribution and maintenance of the gas installation'. By that decision, approval was also granted for the draft contract between Padania Acque SpA (hereinafter: 'Padania') and the Municipality of Cingia de' Botti.

6. Padania, a predominantly state-owned undertaking, was created through the transfer of the former Consorzio per l'acqua

⁵ — GURI No 135, 12 June 1990. That law was recast in Article 113 of Legislative Decree No 267 of 18 August 2000. That provision was subsequently amended by Article 35(1) of Law No 448 of 28 December 2001 (Finance Law for 2002).

potabile (Consortium for drinking water) to the municipalities of the Province of Cremona. Almost all the municipalities of that province have a holding in Padania, including the Municipality of Cingia de' Botti, which holds 0.97% of the share capital, together with the Province of Cremona itself.

7. In view of its nature, that undertaking was entrusted directly with supplying the services in question pursuant to Article 22(3)(e) of Law No 142/1990.

8. Coname brought an action before the Tribunale Amministrativo Regionale per la Lombardia — Sezione staccata di Brescia (Lombardy Regional Administrative Court — Separate Chamber for Brescia) seeking, in particular, annulment of the municipality's decision. The national court referred the following question to the Court of Justice for a preliminary ruling:

Do Articles 43 [EC], 49 [EC] and 81 EC, in so far as they prohibit, respectively, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State and on freedom to provide services within the Community in respect of nationals of Member States, as well as commercial and corporate practices which are liable to prevent, restrict or distort competition within the European Union, preclude provision for the direct award, that is to say, without an invitation to tender, of the management of the public gas distribution service to a company in which a

municipality has a holding, whenever that holding is such as to preclude any direct control over the management itself, and must it therefore be declared that, as is the case in these proceedings where the holding amounts to 0.97%, the essential preconditions for 'in-house' management are not met?

IV — Admissibility

9. The reference for a preliminary ruling in this case raises various issues as regards admissibility.

A — Article 81 EC

10. There are doubts concerning the admissibility of the question referred as regards Article 81 EC.

11. As the Court has consistently held, the national court must state the precise reasons which caused it to question itself as to the interpretation of Community law and to consider it necessary to refer questions to the

Court for a preliminary ruling.⁶ The Court has accordingly held that it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions of which it requests an interpretation and of the link it establishes between those provisions and the national legislation applicable to the dispute.⁷

12. The Court has further held that it has no jurisdiction to rule on questions referred for a preliminary ruling where it is obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose.⁸

13. In the light of the abovementioned requirements established in the Court's case-law with regard to the admissibility of questions referred for a preliminary ruling, it should be noted that, apart from reproducing the wording of Article 81 EC, the observations on that Treaty provision in the order for reference merely point to the fact that free competition constitutes a general principle of Community law and that any infringement of that principle constitutes a wholly exceptional situation which is permitted only under specific conditions.

6 — Orders of 12 March 2004 in Case C-54/03 *Austroplant-Arzneimittel* [2004] not published in the ECR, paragraph 11, Case C-101/96 *Italia Testa* [1996] ECR I-3081, paragraph 6, Joined Cases C-128/97 and C-137/97 *Testa and Modesti* [1998] ECR I-2181, paragraph 15, and Case C-9/98 *Agostini* [1998] ECR I-4261, paragraph 6.

7 — Orders in Case C-54/03 (cited in footnote 6), paragraph 11, Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023, paragraph 9, and Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraph 16.

8 — Order in Case C-54/03 (cited in footnote 6), paragraph 12, and judgments in Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39, and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19.

14. On that basis, the order for reference fails, however, to meet the requirements of the case-law cited above as regards the reasons underlying the request for the interpretation of a provision of Community law.

15. According to consistent case-law, moreover, questions referred for a preliminary ruling are admissible only if the order for reference contains sufficient information on the facts of the case in the main proceedings.⁹

16. It is essential in that regard to impose particularly stringent criteria in the context of competition law, which includes Article 81 EC on the prohibition of cartels.¹⁰

17. As far as Article 81 EC is concerned, the order for reference also fails to meet the requirements as regards the facts. Thus, the order for reference does not contain, in particular, information on the undertakings concerned or on the practices which, in the view of the referring court, fall within the scope of Article 81 EC.

9 — Judgment in Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6, and orders in Case C-157/92 *Banchero* [1993] ECR I-1085, paragraph 4, Joined Cases C-128/97 and C-137/97 (cited in footnote 6), at paragraph 5, Case C-9/98 (cited in footnote 6), paragraph 4, and Case C-54/03 (cited in footnote 6), paragraph 10.

10 — Judgment in Case C-176/96 *Lehtonen and Castors* [2000] ECR I-2681, paragraph 22, and orders in Case C-157/92 (cited in footnote 9), paragraph 5, Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraph 19, and Joined Cases C-438/03, C-439/03, C-509/03 and C-2/04 *Cannito and Others* [2004] ECR I-1605, paragraph 6.

18. As regards Article 81 EC, the order for reference therefore fails to meet the criteria governing the admissibility of the question referred for a preliminary ruling.

B — *The fundamental freedoms*

19. The question referred raises problems as to admissibility also in relation to the fundamental freedoms cited (Articles 43 EC and 49 EC).

20. The Court had declared a reference for a preliminary ruling from the same Member State, which likewise concerned public procurement, to be inadmissible because, in that case, the undertaking which challenged the legality of the choice made by a municipality had its seat in Italy and did not operate on the Italian market in reliance on freedom of establishment or freedom to provide services. The Court of Justice concluded that the situation did not therefore have any connecting link with one of the situations envisaged by Community law in the area of the free movement of persons and services. If, however, there is a situation in which all the facts are confined to within a single Member State and which does not therefore have any connecting link with one of the situations envisaged by Community law in the area of the freedom of movement for

persons and freedom to provide services, the fundamental freedoms do not apply. The Court of Justice came to that conclusion in the *RISAN* case.¹¹

21. However, the Court has also held references for a preliminary ruling to be admissible and has responded to them with indications as to the interpretation and application of primary law, even though the matters at issue likewise concerned purely internal situations.¹² In the context of public procurement, reference in this regard must be made to the *Telaustria* case,¹³ in the main proceedings in which the parties came from the same Member State. The *Buchhändler-Vereinigung* case,¹⁴ in which the principles developed in *Telaustria* were applied, must also be cited. Likewise in *Buchhändler-Vereinigung*, all parties to the proceedings were from the same Member State. The same is true of the *ARGE* case, in which the Court of Justice none the less answered a question on the interpretation of a fundamental freedom.¹⁵

22. It must therefore be determined why the Court none the less still ruled on the substance of those three references for a

11 — Case C-108/98 *RISAN*. [1999] ECR I-5219, paragraph 21 et seq.

12 — See also Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 24 et seq., which did not, however, concern procurement law.

13 — Case C-324/98 (cited in footnote 2).

14 — Order in Case C-358/00 *Buchhändler-Vereinigung* [2002] ECR I-4685.

15 — Case C-94/99 *ARGE Gewässerschutz* [2000] ECR I-11037, in particular as regards the third question referred.

preliminary ruling concerning public procurement, even though the facts of those cases were similar to those in *RISAN*. One possible reason could be that, in the cases of *Telaustria* and *Buchhändler-Vereinigung*, the questions themselves specifically addressed the interpretation of directives. In contrast, the question referred in the present proceedings is focused specifically on primary law, in particular on two fundamental freedoms.

23. Consequently it could be inferred that the admissibility of a question referred for a preliminary ruling depends on its specific focus, that is to say whether it concerns primary or secondary law.¹⁶

24. There are two reasons to suggest, in these proceedings also, that the question referred with regard to the relevant fundamental freedoms is admissible, the first of which deals with procedure and the second with substance.

25. As far as procedure is concerned, it should be borne in mind that in preliminary ruling proceedings the Court of Justice is concerned with providing the referring court with an answer that will be of use to it. In some cases, that even means the Court having to reword the questions referred. In these proceedings, however, the question

cannot be reworded because it focuses expressly on the interpretation of primary law, not on that of the directives, as the national court confirmed in its written answer to a question to that effect raised by the Court.

26. The question whether the main proceedings involve a concession or a contract for the purposes of Community law can ultimately be left unanswered. After all, as far as the Court is concerned, questions referred for a preliminary ruling need only give it cause to consider 'other factors in making an interpretation which *may* assist the determination of the main proceedings.'¹⁷ Whether or not they are *actually* applied to the specific facts of the case in the main proceedings should not therefore be relevant.

27. As regards substance, it is essential to caution against dogmatising the approach adopted in the *RISAN* case. In the specific context of procurement law, which is aimed at opening up national markets, whether or not all the parties in a given award procedure and/or in the subsequent national review procedure come from the same Member State as the contracting authority must not be the decisive factor.¹⁸ That approach could even be construed as an indication that the requisite announcement of the award proce-

16 — See, by contrast, Case C-448/98 *Guimont* [2000] ECR I-10663. In that case the question referred specifically addressed the interpretation of primary law.

17 — Case C-324/98 (cited in footnote 2), paragraph 59; emphasis added.

18 — See also, for example, the circumstances at issue in Case C-94/99 (cited in footnote 15).

dure had not in fact taken place and, therefore, that no foreign undertaking could participate in it. That is the case not only for the procurement directives but also for the fundamental freedoms concerned. Thus, protection must be afforded not only to the undertakings actually participating in an award procedure but also to potential tenderers. Therefore, undertakings from other Member States need only be potentially concerned for there to be a cross-border situation and, thus, for a criterion for the application of the fundamental freedoms to be met.

28. In so far as they concern the fundamental freedoms in Articles 43 EC and 49 EC, those reasons support the admissibility of the question referred.

V — Substance

29. The question referred for a preliminary ruling, in so far as it is admissible, essentially concerns the scope of Articles 43 EC and 49 EC, and more specifically the requirements or prohibitions under those provisions in respect of award procedures.

30. It thus relates to an essential part of the principles which the Court has described as 'fundamental rules of the Treaty, in general,

and the principle of non-discrimination on the ground of nationality, in particular.'¹⁹

A — Preliminary observations on the legislation applicable

31. Even though the question referred for a preliminary ruling refers expressly to the interpretation of specific provisions of primary law, that in itself still does not mean that those provisions are in fact applicable.

32. Rather, their applicability depends on whether the actual award process at issue in the main proceedings meets the relevant requirements for the application of those provisions of primary law.

33. In that regard it is irrelevant that the national court has described the award as a 'concessione' because that description could be a specific reference to national law, where that term is familiar. Nevertheless, the national term does not necessarily have to be coterminous with the Community law term. However, even if the national court has

¹⁹ — Case C-324/98 (cited in footnote 2), paragraph 60; confirmed, in different terms, in the order in Case C-59/00 *Vestergaard* [2001] ECR I-9505, paragraph 20

in mind the Community concept of concession, that still does not mean that classification of the award as such is actually accurate in the main proceedings.

34. Moreover, even if the requirements essential for the application of secondary law are met, further clarification is necessary to determine the directive under which the facts of this case fall. It should be noted in this regard that the Court is not familiar with all the relevant details of the facts of this case.

35. Since municipalities, as local authorities, are contracting authorities within the meaning of the classic directives on public procurement and the Utilities Directive alike, the purpose of the award should therefore be established. After all, that purpose determines which of the directives applies.²⁰

36. Even if it is established that the Utilities Directive — a special directive in relation to the other directives — does not apply, it would still be unclear under which of the classic procurement directives the award falls. The decisive factor in that regard is the object of the award, whether, for instance, it concerns the supply of products, such as the supply of energy, or the provision

of services, such as maintenance. If the award is for a mixed contract, that is to say, if it covers both products and services, the directive applicable is determined, in accordance with Article 2 of the Services Directive, by a comparison of the values of each of the component parts of the contract.

37. Although it cannot be inferred from the documents before the Court whether the main action is concerned with a mixed contract of that kind, that does not appear to be inconceivable in the light of the practice pursued in the Member State concerned, as is indeed shown by preliminary ruling proceedings in which the Court has already delivered its ruling.²¹

38. As already shown in *RISAN*, the Court is unable to verify the accuracy of the referring court's analysis that the award of a public service contract is not at issue in the main proceedings.²²

39. However, even if a given contract in principle meets all the requirements essential for the application of one of the directives, the actual award process could still be excluded from the scope of the directive in question. Thus, in this case, besides one of the exceptions expressly provided for in the

20 — See, to that effect, Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609, and Case C-126/03 *Commission v Germany* [2004] ECR I-11195.

21 — Order of 14 November 2002 in Case C-310/01 *Comune di Udine*, not published in the ECR.

22 — Case C-108/98 (cited in footnote 11), at paragraph 20.

directives, such as in Article 13 of the Utilities Directive, one of the unwritten exceptions established by the Court could also apply, such as the exception established in *Teckal*²³ and interpreted in the *Stadt Halle* judgment²⁴ in respect of 'quasi-in-house' contracts. If that were the case, primary law would again apply.

contracting authorities that derive from the fundamental freedoms enshrined in Articles 43 EC and 49 EC, relate to the central issue of whether the fundamental freedoms not only impose prohibitions in the form of restrictions on the actions of Member States but also lay down positive obligations and, if so, of what those obligations are.

40. That would also be a reason for the national court to confine the question referred to the interpretation of primary law.

41. After all, if none of the directives is actually applicable, the fundamental freedoms, which impose on the Member States inter alia obligations of equality of treatment and transparency in relation to operators from other Member States, could be material to a decision in the case at issue.

43. Some of the prohibitions deriving from the fundamental freedoms can easily be defined as restrictions; those prohibitions, moreover, have been the subject of countless proceedings before the Court. In the context of public procurement, reference might be had — simply by way of example — to the prohibition deriving from the free movement of goods, under which 'a contracting authority [is precluded] from including in the contract documents for that contract a clause requiring the use in carrying out the contract of a product of a specified make, without adding the words "or equivalent".'²⁵

B — *Fundamental freedoms and positive obligations*

42. These proceedings, which are concerned with establishing the obligations for the

44. However, the circumstances of that case and their treatment by the Court show very clearly that a prohibition against refraining from carrying out a measure, namely against refraining from adding particular words, can also be construed as an obligation to carry out a measure, that is to say to add particular words.

23 — Case C-107/98 *Teckal* [1999] ECR I-8121.

24 — Case C-26/03 *Stadt Halle* [2005] ECR I-1.

25 — Order in Case C-59/00 (cited in footnote 19), paragraph 24.

45. Applying that reasoning to the circumstances of the main action forming the basis of these preliminary ruling proceedings, those circumstances can thus be construed from at least two angles. First, it could be examined whether the fundamental freedoms — understood as meaning restrictions — impose a prohibition on contracts awarded directly or by private agreement. Secondly, it could be examined whether some degree of advertising or a particular form of publication is required under the fundamental freedoms. Whether or not a positive obligation is considered to exist therefore depends on whether the reasoning is based on omissions or on measures actively carried out.

46. However, for the purposes of answering the question referred for a preliminary ruling, it proves absolutely vital, for a further reason, to address the issue of positive obligations in the circumstances of this case.

47. Indeed, the circumstances at issue can also be considered from the perspective of 'defensive rights'. The practices of the contracting authority or entity awarding the concession may also be regarded as an encroachment on a right of a third party, and more specifically as an encroachment on the right of undertakings to participate in an award procedure or to submit a tender. Member States, including the contracting authorities or entities awarding concessions, must ensure observance of that right conferred by Community law.

48. For the sake of completeness it should be observed finally that the circumstances of

this case could be assessed on the basis of whether they give rise to an obligation of protection or of guarantee on the part of the local authority concerned. In any event, it is not in dispute that a Member State, of which the municipality concerned in these proceedings is also considered a part, is required to safeguard the fundamental freedoms, in this case, those enjoyed by the undertakings, that is to say, by the potential tenderers.

49. The Court's case-law on mutual recognition is an essential starting point with a view to determining whether the fundamental freedoms contain any *positive obligations* and, if so, what their content is.

50. The Member States' obligation to set up and apply a particular procedure can, in fact, be inferred from that case-law. The obligation actively to carry out measures is addressed to the legislature, the administrative authorities and the judiciary alike. The requirements deriving from the fundamental freedoms relate in particular to the content of the procedure, for example, the requirement to carry out a specific examination procedure. From a procedural perspective, such examination is defined even further in that its objective and method — proceeding by way of a comparison of certain documents — are specified. In addition, the decisions must be reasoned and capable of

being subject to review in judicial proceedings.²⁶

51. Those requirements can also be transposed to public procurement law, an area concerned — likewise in this case — with the observance of certain procedural principles. It can therefore be concluded from the existing case-law on mutual recognition that the fundamental freedoms certainly do impose specific procedural *obligations* on the Member States.

52. A further source of rights under primary law — in addition to the fundamental freedoms — from which procedural requirements can be inferred is Article 10 EC. The first paragraph of that provision contains a clear obligation to take action which is addressed to the Member States ('Member States shall take all appropriate measures ...'). That general and entirely fundamental provision at the very least gives rise to the obligation to organise procedures, thus including tendering procedures, in such a way that the Member States meet their substantive obligations under Community law.

53. To the extent to which certain obligations are derived from Community law, and thus from the fundamental freedoms in this

case, the Member States, including the municipalities, also have to take relevant measures with regard to contracts or concessions, for instance comply with certain time-limits or proceed with specific publications.

54. Also connected with and developed from Article 10 EC are the Community law principles of equivalence and effectiveness, which impose certain limits as regards the procedural law of the Member States, including the law governing procurement procedure. The rules in question do not simply concern legal protection but actually relate to the phase upstream, that is to say when tendering procedures are carried out. Admittedly, in that respect each case 'must be analysed by reference to the role of [the] provision [concerned] in the procedure, its progress and its special features'.²⁷

55. Those requirements of primary law, which supplement the Member States' obligations deriving from the fundamental freedoms, acquire great significance specifically beyond the scope of the procurement directives.

56. It remains, finally, to mention the general principles of law, from which it is possible likewise to infer rules for national

26 — Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraph 16 et seq.

27 — Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 66, and Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 56.

procedural law and which may likewise play a part in the award procedure. That is true in particular of the general principle of equality (principle of equal treatment), which goes beyond the principle of non-discrimination on grounds of nationality.

application of the fundamental freedoms. Included in that regard, in addition to the grounds expressly laid down in the Treaty, such as public security or public health,²⁸ are the general interests as defined in the *Cassis de Dijon* case-law.

C — Obligations arising from the fundamental freedoms in the area of public procurement

1. Restricted scope of the fundamental freedoms

57. Even if it is accepted that the fundamental freedoms apply as a rule to contracting authorities and entities awarding concessions, that still certainly does not mean that every award procedure is, on that ground, subject to the fundamental freedoms.

58. Thus it is not inconceivable for a contracting authority or entity awarding a concession to cite, as is their right, one of the numerous grounds which justify the non-

59. In one of its communications²⁹ the Commission also acknowledged that the grounds of justification can in general be applied as regards the award of concessions. Of course, the criteria essential for allowing the justification — the details of which I will not go into here — such as the proportionality of a national measure, must also be met in the context of procurement.

60. In addition to such justification relating to the fundamental freedoms, the derogations expressly provided for in the Treaty also come into play. Those derogations can in themselves apply to the award of concessions, as a result of which the awarding entity is not bound by the requirements of the fundamental freedoms.

61. Of relevance here, in particular, are the provisions concerning various aspects of internal or external security, reference to which was in fact made at the hearing.

28 — As regards freedom of establishment and the freedom to provide services, the provisions concerned are Articles 45 EC and 55 EC.

29 — Commission interpretative communication on concessions under Community law (OJ 2000 C 121, p. 2, point 3.1).

Article 296(1)(b) EC accordingly permits the Member States to take certain measures considered necessary for the protection of the essential interests of their security. In the area of public procurement, that involves the procurement of specific supplies intended for defence purposes. Although that sector is not exactly suitable for concessions, their inclusion still would not be ruled out on the basis of Community law.

62. Article 297 EC, for its part, permits Member States to take certain measures in specific crisis situations. That provision is likewise applicable in principle to procurement.

63. As is apparent in particular from Article 298 EC, the Member States' powers in applying the two Treaty provisions cited above are not by any means unlimited and are in particular subject to scrutiny by the Commission and the Court of Justice.

64. It remains, finally, to refer to a further provision of primary law which, although not tailored specifically to the fundamental freedoms, can still function as a derogation from them. Article 86(2) EC provides that the 'rules contained in this Treaty,' thus including the fundamental freedoms, apply 'in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them [the undertakings]'. The provision lays down the

further condition that the development of trade must not be affected beyond the degree specified. However, the sole addressees of that provision — in contrast with Article 10 EC, which applies to the Member States — are undertakings, and specifically only those which are entrusted with the operation of particular services or are revenue-producing monopolies. It therefore applies only to those entities awarding concessions which can be designated as undertakings of that kind.

65. As regards these preliminary ruling proceedings, it should therefore be examined whether the entity awarding the concession falls within one of the categories of undertaking covered by that derogation and whether the manner in which the award was made was necessary to enable it to perform its task of general interest in economically acceptable conditions.³⁰ Indeed, even the Member State concerned may rely on Article 86 EC to justify the grant of rights to an undertaking.³¹

66. To conclude, it is essential to mention the case-law in *Teckal*³² and *Stadt Halle*³³ cited in the course of these proceedings, and the derogation laid down in Article 13 of the Utilities Directive applying to particular contracts awarded to affiliated undertakings.

30 — Case C-475/99 *Ambulanz Glockner* [2001] ECR I-8089, paragraph 57, and Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 16.

31 — Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, paragraph 32.

32 — Case C-107/98 (cited in footnote 23)

33 — Case C-26.03 (cited in footnote 24).

67. The above case-law and provision allow, subject to very specific conditions, the non-application of the classic directives on public procurement or the Utilities Directive. Awards which come under one of those derogations are not therefore subject to the procurement rules under secondary law. However, primary law, including the fundamental freedoms at issue in these proceedings, then automatically applies.

68. However, neither the case-law cited nor the express provisions of the Utilities Directive result in the non-application of primary law. In fact, neither primary law nor case-law provide a basis for such a broad derogation from Community law. If, therefore, primary law applies to the award at issue in the main proceedings, the issue as to the significance of the case-law cited or of the provisions of the Utilities Directive is no longer relevant because that involves derogations from the application of secondary law.

2. Grading within primary law or a uniform set of rules on procurement?

69. Even if it is established that primary law, such as the fundamental freedoms, is applicable to a specific award, a further step is

necessary in order to determine the specific obligations falling to the contracting authority or entity awarding the concession. It is therefore a matter of establishing the procurement rules which may be derived from the fundamental freedoms.

70. It is first of all uncertain in this regard whether the fundamental freedoms establish any set of rules at all, let alone a uniform set of rules, in other words whether the same rules apply to all awards they envisage. That may well be the case at a very generalised level. Accordingly, the contracting authorities and entities awarding concessions, regarded as part of the Member States, are required for instance to observe the principle of non-discrimination and to comply with certain restrictions on freedom of establishment and the freedom to provide services.

71. The very fact that rules even approximately as specific as those defined in the directives cannot be inferred from the fundamental freedoms militates against the argument that the same procedural rules, such as those concerning the method of publication and its content, are to apply to all awards.

72. In the interest of legal clarity and legal certainty, it would be advantageous to the contracting authorities, entities awarding concessions and undertakings as potential tenderers if there was a set of rules on procurement under primary law or indeed a few such sets of rules: then, it would be possible, for example, to avoid the problems

that occasionally arise in practice as a result of the fact that, in the course of a procedure for the award of a concession, it is not until the negotiation stage that the award in question becomes a public contract.³⁴

derogations established in the case-law in *Teckal* and *Stadt Halle* and under Article 13 of the Utilities Directive so that awards which they envisage are subject to a less stringent set of rules. However, the fact that there are absolutely no uniform rules on procurement under primary law from which a derogation could be made precludes application *mutatis mutandis* of the above derogations as a classification criterion.

73. On the other hand, it is favourable for the parties to enjoy a margin of discretion in award procedures. The directives themselves thus provide for a number of options. The same must also be true *a fortiori* within the scope of primary law.

76. It would therefore be appropriate to have recourse to criteria established by the directives themselves for the purpose of defining categories of awards.

74. The problem now lies in determining categories of awards to which a particular set of rules applies in each case. However, criteria for distinguishing between different groups (categories) of awards cannot be deduced either from the wording of the Treaty or from the case-law on the fundamental freedoms, in particular the case-law relating to public procurement. The principle of proportionality itself suggests, however, that grading is necessary.

77. The estimated value of the contract awarded is an essential criterion in that regard.³⁵ A further element for consideration is the subject-matter of the contract, that is to say whether it is for services, supplies or construction works. A distinction could be made between services, again as the directives do between excluded, non-priority and priority services, on the basis of their more detailed subject-matter. Furthermore, assessment should be based on the degree of complexity of the contract in question, that is to say, whether it involves relatively standardised products or complex infrastructure-related projects the technical, legal or financial conditions governing which cannot by any means be specified at the start of the award procedure.

75. Admittedly, it would be conceivable to have recourse, also in this context, to the

34 — Green paper on public-private partnerships and Community law on public contracts and concessions, COM (2004) 327 final, paragraph 34 et seq.

35 — The Community legislature considered in that regard that procedures laid down in the directives are not appropriate in the case of contracts of small value (order in Case C-59/00 (cited in footnote 19), paragraph 19).

78. The categorisation in the directives is based on the idea, applicable to procurement generally, that some awards are of greater relevance to the internal market than others, that is to say they are of interest to a wider group of economic operators — to be more precise, also to undertakings from other Member States. This could be a matter relevant particularly to application of the fundamental freedoms, given that they require a cross-border element.

79. Furthermore, for the purpose of distinguishing between the various categories, that is to say, attributing a particular award to a particular category and, therefore, also to a particular set of rules, specific circumstances, such as the existence of exclusive rights or urgency, could be taken into account, just as they are in the directives. Some awards which fall within the scope of the fundamental freedoms could in that way be exempted in full from the obligation to publish a contract notice.

80. However, in the extreme, a system applying to all awards — and consisting of a number of categories, for each of which there is a specific set of rules — would ultimately give rise to a complex set of procurement rules under primary law modelled on the rules laid down in the directives, or, more specifically, to a number of sets of rules. However, the transparency mentioned in these preliminary ruling proceedings constitutes just one regulatory area among many.

81. Lastly, reference must be made to the principle of effectiveness which is also applicable to award procedures. Under that principle, the procedure actually adopted, viewed as a whole, its progress and its special features must be taken into consideration.³⁶

3. Rules applicable under primary law

82. To begin with, it can be established that the rules on procurement that apply within the scope of the directives cannot in any event apply under primary law. Two reasons above all militate against such wholesale transposition.

83. First, the rules laid down solely in respect of the awards envisaged by the directives would in that case effectively apply, without any recourse to the legislative procedure provided for in primary law, even beyond the scope of those directives. In that way, the Community legislative procedure would be circumvented. Secondly, those directives, which lay down rules exclusively for specific awards, would be circumvented.

³⁶ — Case C-276/01 (cited in footnote 27), paragraph 66, and — specifically with regard to procurement law — Case C-327/00 (cited in footnote 27), paragraph 56.

84. However, it should be borne in mind, first of all, that the rules deriving from the fundamental freedoms apply, in principle, to all aspects of awards, that is to say, on the one hand, to their substance, which includes the description of the object of the service to be provided (for instance, by means of technical specifications or duration of a concession) as well as criteria for qualitative selection (qualifications primarily) and for the award of the contract, in which respect the principle of mutual recognition in particular must be observed. On the other hand, those rules also apply to the procedural aspect, thus to the procedure in the strict sense, which includes the choice of type of procedure — which also covers the publication of a contract notice — and the time-limits involved (for example, for receipt of the request to participate or of the tender).

That also means that the requirements stipulated at the outset of the award procedure must be met and must be applied in the same manner to all candidates.

87. Since, however, these proceedings for a preliminary ruling are concerned exclusively with the issue of the transparency requirement, the following observations will be confined to that consideration.

(a) Transparency

85. In addition to the obligation of transparency at issue in these proceedings, the associated obligation of equality of treatment,³⁷ the principle of competition and the principle of proportionality can also be cited as rules that would also be applicable within the scope of primary law.

88. First it should be made clear that transparency, for the purposes of the directives, covers more than simply the matters connected with advertising particular award procedures. Such advertising comprises *inter alia* the various types of notice, whether in the form of an invitation to participate in an award procedure or a call for tenders, that is to say, an invitation to submit tenders.

86. It can be inferred from the obligation of equality of treatment, for example, that concessionaires must be selected objectively.

89. The directives, moreover, acknowledge other obligations to publish, such as the obligation to announce the award that has been made. Furthermore, the directives impose obligations to compile internal

³⁷ — Case C-275/98 *Univiron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31, and Case C-324/98 (cited in footnote 2), paragraph 61.

records, for instance, in the form of written reports or by keeping particular documentation.³⁸ Those obligations could also be transposed to primary law.

the directives, transparency is designed — also within the scope of primary law — to guarantee undistorted competition and contribute to the opening up of national markets.

90. In fact, the principle of transparency is, moreover, a guiding principle for the award procedure as a whole. It also comprises, for example, the demonstrability of decisions taken by contracting authorities and, generally, an objective approach during an award procedure.

93. The ‘degree of advertising’ necessary for an award relates primarily to the question whether there has to be any publication at all. Thus, cases in which a contract may be awarded by private agreement, that is to say by way of an award made without prior publication of a contract notice, cannot be ruled out. After all, whatever the directives allow must be permissible a fortiori under primary law. To avoid any blurring of the distinction between directives and primary law, it would be excessive to permit award procedures to go ahead without the publication of a contract notice only if the conditions specified in the directives are met, that is to say on the grounds exhaustively listed therein. It would also be excessive to make the validity of such procedures dependent on the requirement that all potential tenderers should be contacted. If the contracting authority or entity awarding a concession nevertheless proceeded to do that, the transparency requirement would in any case be met.⁴⁰

91. In these proceedings the Court is requested to define further its case-law on the obligation to publish. In *Telaustria* it held, as a matter of principle, that the contracting authority must ensure, ‘for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.’³⁹

94. Of course, contracting authorities or entities awarding concessions must, conversely, be prevented from abusing the discretion conferred on them. It could

92. In order to determine the ‘degree of advertising’ required, recourse must in the first instance be had to the objective of the transparency requirement of which an interpretation is sought. Indeed, as in the case of

38 — See, to that effect, Article 12 of the Services Directive and Article 41 of the Utilities Directive.

39 — Case C-324/98 (cited in footnote 2), paragraph 62; emphasis added.

40 — Advocate General Fennelly acknowledges this at point 43 of his Opinion, with regard to the main proceedings in the *Telaustria* case, where the tenderers are not all or nearly all undertakings established in the same State as the contracting entity.

therefore be assumed that primary law imposes a principle of mandatory publication, which comprises various options for applying derogations. The contracting authority or entity awarding the concession would, accordingly, have to state the reasons, in the specific case, for its derogation from the publication rule.

95. However, even if the principle of mandatory publication is accepted, a number of issues are still unresolved.

96. For example, there is still the issue of the means of publication. This, on the one hand, involves geographical coverage, that is to say whether publication takes place at local, regional, national or European level. On the other hand, it relates to the actual publishing medium. Thus, in addition to the traditional print media such as official journals, the daily press or publications from the relevant economic sector, electronic forums such as the internet are also envisaged. In some circumstances recourse may even be had to the antiquated method of posting appropriate notices.⁴¹

97. However, the method of publication is just one aspect. In addition, it is important for the contracting authority or entity awarding the concession to know what restrictions are imposed on it by the fundamental freedoms as regards the minimum

content of the notice. Generally, the rule of thumb here is that it is essential to give as much information as the undertakings need to enable them to decide whether to participate in the award procedure or to submit a tender. However, it is by no means possible to deduce from the fundamental freedoms sufficient details, applying to all circumstances, which can then be used in their entirety to produce model contract notices, as provided for in the directives. The general rule, which applies also to the minimum content of a contract notice, is, therefore, that the fundamental freedoms do not in all circumstances require the entity concerned to provide the information which is mandatory in the model contract notices under secondary law.

98. However, both the method of publication and the content of the notice published are dependent on the abovementioned criteria for distinguishing — within primary law — between categories of awards and for the resulting grading.

99. In view of the fact that the documents in the case, in particular the order for reference, do not provide the information necessary to make it possible to determine the degree of advertising appropriate to the main proceedings, and in view of the principle that it is not for the Court of Justice, in the preliminary ruling procedure under Article 234 EC, to apply provisions of Community law to specific circumstances, it will fall to the

⁴¹ — In its communication (cited in footnote 29), the Commission considers this to be a valid publishing medium.

national court to rule on the question whether the obligation of transparency was complied with in the case in the main proceedings.⁴²

100. To that end the national court must, in the manner of a market analysis, identify the economic operators to whom the proposed contract is of interest, bearing in mind the potential competition, the value and object of the contract in that respect playing a decisive role.

(b) The derogation for some 'quasi-in-house' contracts

101. As already stated, neither the derogation under secondary law in the case-law in *Teckal* and *Stadt Halle* nor the derogation under Article 13 of the Utilities Directive can result in the non-application of primary law, and hence of the fundamental freedoms relevant in this case.

102. If the award at issue in the main proceedings is in fact to be regarded as a services concession and therefore does not fall within the scope of the directives, the question whether the directives do not apply to the award in question because of another factor, for example because of the derogation established by the case-law or laid down by the Utilities Directive, is redundant. In that case, primary law indeed applies for a different reason.

103. Moreover, in the context of a reference for a preliminary ruling under Article 234 EC, it does not fall to the Court of Justice to apply the Community provisions to the specific facts of the case. The Court has emphasised that point on a number of occasions, specifically in cases involving public procurement.⁴³ Accordingly, it instead falls to the national court to examine whether the criteria developed by the Court of Justice or the requirements laid down in the Utilities Directive are met in the main action. However, it would first be necessary to establish whether any of the directives is actually applicable.

104. If the matter concerns a services concession and, consequently, the directives are not applicable, the application of the two derogations for 'quasi-in-house' operations will in any event not be an issue.

43 — To that effect, simply see the judgments in Cases C-324/98 (cited in footnote 2), paragraph 63, C-18/01 *Korhonen and Others* [2003] ECR I-5321, and C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, and the order in Case C-310/01 (cited in footnote 20).

42 — For an analysis to that effect, see Case C-324/98 (cited in footnote 3), paragraph 63.

VI — Conclusion

105. In the light of the foregoing considerations, I propose that the Court should answer the question referred for a preliminary ruling as follows:

Articles 43 EC and 49 EC are to be interpreted as establishing in principle an obligation of transparency. However, Articles 43 EC and 49 EC do not in all circumstances preclude the direct award of contracts, that is to say, contracts awarded without publication of a contract notice or a call for competition. In assessing whether a direct award is permissible in an award procedure such as the one at issue in the main proceedings, the national court must, in the manner of a market analysis, identify the economic operators to whom the proposed contract is of interest, bearing in mind the potential competition, the value and object of the contract playing a decisive role in that respect.