JUDGMENT OF THE COURT (Second Chamber)

18 July 2007 *

In Case C-382/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 20 October 2005,

Commission of the European Communities, represented by A. Aresu and X. Lewis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent and G. Fiengo, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, P. Kūris, K. Schiemann (Rapporteur), L. Bay Larsen and C. Toader, Judges,

Advocate General: J. Mazák,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 8 March 2007,

having decided, after hearing the Advocate General, to proceed to judgment without an opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court of Justice to declare that, owing to the fact that the Presidenza del Consiglio dei Ministri — Dipartimento per la protezione civile — Ufficio del Commissario delegato per l'emergenza rifiuti e la tutela delle acque in Sicilia (Office of the Prime Minister, Civil Defence Department, Office of the Commissioner for Waste Emergencies and Water Protection in Sicily) (i) initiated the procedure for the conclusion of agreements concerning the use of that part of municipal waste produced in the municipalities of the Region of Sicily and remaining after the

collection of selected material and (ii) concluded those agreements, without following the procedures laid down by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1) ('Directive 92/50'), and, in particular, without publishing the appropriate contract notice in the *Official Journal of the European Communities*, the Italian Republic failed to fulfil its obligations under that directive, in particular under Articles 11, 15 and 17 thereof.

Legal context

Community legislation

2 Article 1(a) of Directive 92/50 states:

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

3 Article 8 of Directive 92/50 provides:

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

4 In Title V of Directive 92/50, Article 15(2) provides:

'Contracting authorities who wish to award a public service contract by open, restricted or, under the conditions laid down in Article 11, negotiated procedure, shall make known their intention by means of a notice.'

5 Under Article 17 of Directive 92/50:

'1. The notices shall be drawn up in accordance with the models set out in Annexes III and IV and shall specify the information requested in those models ...

4. The notices referred to in Article 15(2) and (3) shall be published in full in the *Official Journal of the European Communities* and in the TED data bank in their original language. A summary of the important elements of each notice shall be published in the official languages of the Communities, the text in the original language alone being authentic.

...'

6 Annex I A to Directive 92/50, entitled 'Services within the meaning of Article 8', includes inter alia Category No 16 'Sewage and refuse disposal services; sanitation and similar services' with the CPC reference number 94.

7 Annex III to Directive 92/50 contains inter alia models of 'prior information notices' and 'contract notices'.

National legislation

8 Article 4 of Order No 2983 of the Prime Minister of 31 May 1999 (GURI No 132 of 8 June 1999), as amended by Order No 3190 of 22 March 2002 ('Order No 2983/99'), provides:

'The Commissioner, the President of the Region of Sicily, after hearing the Ministry of the Environment and the Protection of Natural Resources, shall conclude agreements with a duration of up to 20 years concerning the use of that part of municipal waste produced in the municipalities in the Region of Sicily and remaining after the collection of selected material ... For that purpose, the Commissioner, the President of the Region of Sicily, shall designate the industrial operators on the basis of transparent public procedures, in derogation from the Community tendering procedures ...'

9 The words 'in derogation from the Community tendering procedures' which appeared in that provision were repealed by Order No 3334 of the Prime Minister of 23 January 2004 (GURI No 26 of 2 February 2004).

The facts of the case and the pre-litigation procedure

10 By Order No 670 of 5 August 2002, the President of the Region of Sicily, acting in his capacity as the Commissario delegato per l'emergenza rifiuti e la tutela delle acque in Sicilia (the Commissioner for Waste Emergencies and Water Protection in Sicily, 'the Commissioner') and pursuant to Article 4 of Order No 2983/99, approved a document entitled 'Public notice on the conclusion of agreements for the use of that part of municipal waste produced in the Region of Sicily and remaining after the collection of selected material' ('the notice at issue'). The notice at issue contains three annexes. Annex A lays down 'guidelines concerning the use of that part of municipal waste produced in municipalities in the Region of Sicily and remaining after the collection of selected material'. Annex B is entitled 'Financial plan summary' and Annex C comprises a model agreement for use with the appointed operators ('the model agreement').

11 On 7 August 2002, a notice concerning the abovementioned agreements, based on the model notice entitled 'prior information notice' in Annex III to Directive 92/50, was sent to the Publications Office. Publication in the *Official Journal of the European Communities* (OJ 2002 S 158, electronic version) subsequently occurred on 16 August 2002.

12 The notice at issue itself was published in the *Gazzetta ufficiale della Regione Siciliana* (Official Journal of the Region of Sicily) on 9 August 2002.

13 The Commission, having received a complaint regarding that procedure, sent a letter to the Italian authorities on 15 November 2002 requesting information, to which those authorities replied by letter on 2 May 2003.

14 On 17 June 2003, four agreements, which were based in essence on the model agreement, were concluded between the Commissioner and Tifeo Energia Ambiente Soc. coop. arl, Palermo Energia Ambiente Soc. coop. arl, Sicil Power SpA and Platani Energia Ambiente Soc. coop. arl respectively ('the agreements at issue').

15 On 17 October 2003, the Commission, in accordance with Article 226 EC, sent a formal notice to the Italian Republic alleging that it had infringed Directive 92/50, in particular Articles 11, 15 and 17 thereof. On 9 July 2004, dissatisfied with the reply of 1 April 2004 which it received to that formal notice, the Commission sent a reasoned opinion to the Italian Republic calling on it to bring an end to the alleged failure to fulfil obligations within a two-month time-limit.

16 In their reply of 24 September 2004 to that reasoned opinion, the Italian authorities denied the infringement.

17 Not satisfied with this reply, the Commission decided to bring the present action.

The action

Arguments of the parties

18 The Commission maintains that the agreements at issue are public service contracts within the meaning of Article 1 of Directive 92/50 but they were not concluded in compliance with the publicity requirements of that directive. It claims, in particular,

that instead of using the contract notice form required by Annex III to that directive for the award of public contracts, the notice published in the *Official Journal of the European Communities* was based on the 'prior information' form, which appears in the same annex. Non-national service providers were moreover discriminated against when compared to national operators who had the benefit of a detailed contract notice published in the Gazetta ufficiale della Regione Siciliana.

19 According to the Commission, the agreements at issue cannot be classified, as the Italian Republic maintains, as service concessions falling outside the scope of Directive 92/50. The operators' remuneration does not lie in their right to exploit for payment their own service by receiving revenue from users, whilst assuming all the risks linked to that exploitation.

20 First, in the present case, the operator's remuneration consists in a royalty directly paid to it by the Commissioner the amount of which is fixed by the agreements at issue in euros per tonne of waste transferred to the operator by the municipalities. The income which the operator is able to derive additionally from the sale of electrical energy produced during the thermal treatment of waste does not constitute a part of its remuneration.

21 Secondly, the operator does not assume the risk connected with the exploitation, in particular since the agreements at issue guarantee it the transfer of a minimum annual quantity of waste whilst providing for the annual adjustment of the amount of the royalty in order to take account of trends in the costs for which it is responsible. Moreover, those agreements provide for an adjustment of the royalty if the annual quantity of waste actually transferred falls below 95% or exceeds 115% of the guaranteed minimum quantity, in order to ensure the economic and financial equilibrium of the operator.

22 The Italian Government maintains, on the contrary, that the agreements at issue constitute, as is clear particularly from the national case-law, service concessions which are outside the scope of Directive 92/50.

23 First, such contracts are intended to delegate authority for the performance of a service of general interest, the continuity of which the operator is obliged to ensure.

24 Secondly, the services at issue are provided directly to users, namely the body of residents of the municipalities producing the waste, who, having to pay a charge to the municipalities covering both the removal and processing of the waste, ultimately bear the cost of the royalty paid to the operator and thus remunerate it for the services it provides. The Commissioner plays only the role of intermediary in that respect.

25 Thirdly, the requirement to produce energy when processing the waste and, accordingly, the sale of that energy certainly fall within the object and purpose of the agreements at issue. It is, moreover, classically the case that the remuneration of a concession derives not only from the price paid by the user but also from other activities connected with the service provided.

26 Fourthly, having regard to the financial significance of the operator's investment, which is in the region of a billion euros, and to the length of the agreements at issue, namely 20 years, the profits to be made by the operator are uncertain, particularly as a part of them is derived from the sale of energy produced.

27 Fifthly, responsibility for the organisation and management of services thus delegated is exclusively the operator's, the authorities limiting themselves to a simple monitoring role.

28 In the case of service concessions, the necessary transparency may be ensured by all appropriate means, including, as in the present case, publication of a notice in the national daily specialist press.

Findings of the Court

29 It is clear from settled case-law that service concessions are excluded from the scope of Directive 92/50 (see, inter alia, Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 9, and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 42).

30 The Italian Government having, on various occasions, stressed that it is clear from national case-law that agreements such as the agreements at issue must be classified as service concessions, it must be noted as a preliminary point that the definition of a public service contract is a matter of Community law, with the result that the classification of the agreements at issue under Italian law is irrelevant for the purpose of determining whether they fall within the scope of Directive 92/50 (see, to that effect, Case C-264/03 *Commission* v *France* [2005] ECR I-8831, paragraph 36, and Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 40).

31 The question whether the agreements at issue should or should not be classed as service concessions must therefore be considered exclusively in the light of Community law.

32 In that respect, it is necessary, first, to point out that the agreements at issue provide for the payment by the Commissioner to the operator of a royalty the amount of which is fixed in euros per tonne of waste transferred by the municipalities concerned to that operator.

33 As the Court has previously held, it follows from the definition in Article 1(a) of Directive 92/50 that a public service contract within the meaning of that directive involves consideration which is paid directly by the contracting authority to the service provider (*Parking Brixen*, paragraph 39). Accordingly, a royalty of the type for which the agreements at issue provide is capable of characterising a contract as one for pecuniary interest within the meaning of Article 1(a), and accordingly as a public contract (see, as to the payment of a fixed sum per dustbin or container by a town to an enterprise with exclusive responsibility for the collection and treatment of waste, Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705, paragraphs 8 and 32).

34 Secondly, it is clear from the case-law of the Court of Justice that a service concession exists where the agreed method of remuneration consists in the right of the service provider to exploit for payment his own service and means that he assumes the risk connected with operating the services in question (see Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 58; the order in Case C-358/00 *Buchhändler-Vereinigung* [2002] ECR I-4685, paragraphs 27 and 28; and *Parking Brixen*, paragraph 40).

35 It must be stated that the method of remuneration for which the agreements at issue provide does not consist in the right to exploit for payment the services in question, nor does it involve the assumption by the operator of the risk connected with operating them.

36 Not only is the operator essentially remunerated by the Commissioner by means of a fixed royalty per tonne of waste transferred to it, as pointed out at paragraph 32 of the present judgment, but it is not in dispute that, under the agreements at issue, the Commissioner undertakes, first, that all the municipalities concerned will transfer all of the remaining part of their waste to the operator and, secondly, that a minimum annual quantity of waste will be transferred to it. The agreements at issue provide, moreover, for the adjustment of the amount of the royalty if the annual quantity of waste actually transferred falls below 95% or exceeds 115% of the guaranteed

minimum quantity, in order to ensure the economic and financial equilibrium of the operator. They also provide for the annual adjustment of the royalty in the light of trends in the costs of staff, raw materials and maintenance work, and of an economic index. The agreements provide moreover for a renegotiation of the royalty if, owing to a change to the legislative framework, the operator is faced with investment above a certain level in order to comply with the new legislation.

37 Having regard to the foregoing, the agreements at issue must be considered to be public service contracts subject to Directive 92/50 and not service concessions outside the scope of that directive.

38 In addition, none of the arguments put forward by the Italian Government for the purpose of contesting that classification prevails.

39 Concerning, first, the fact that the operators are in a position, over and above the receipt of the agreed royalty, to benefit from the financial returns connected with the sale of electricity produced during the processing of waste, it is necessary to point out that Article 1(a) of Directive 92/50, which defines what is a public contract, refers to 'contracts for pecuniary interest' and that the pecuniary interest in a contract refers to the consideration paid to the contractor on account of the provision of services designated by the contracting authority (see, to that effect, *Auroux and Others*, paragraph 45).

40 In the present case, it is evident that the consideration received by the operator in return for the provision of services designated by the Commissioner, namely the processing of transferred waste with energy recovery, consists essentially in the payment of the amount of the royalty by the Commissioner.

41 Even assuming that the income from the sale of electricity could also be regarded as consideration for the services designated by the Commissioner — owing, in particular, to the fact that in the agreements at issue the Commissioner undertakes to facilitate its sale to third parties — the mere fact that the operator would accordingly be able, over and above the remuneration received by way of consideration from the Commissioner, to obtain income incidentally from third parties in consideration for its provision of services is insufficient to prevent the agreements at issue from being classified as public contracts (see, by analogy, *Auroux and Others*, paragraph 45).

42 Furthermore, the length of the agreements at issue and the significant initial investment which the operator must make in performing them are not conclusive either for the purpose of classifying those agreements, as such characteristics may be present both in public contracts and in service concessions.

43 The same is also true of the fact that the treatment of waste comes within the general interest. In that respect, it should moreover be pointed out that, as is clear from Annex I A to Directive 92/50, '[s]ervices within the meaning of Article 8', to which the directive is capable of applying, include the category of '[s]ewage and refuse disposal services; sanitation and similar services', which the Court has previously held to cover inter alia services for the collection and treatment of waste (see, to that effect, *Commission* v *Austria*, paragraph 32).

44 Nor, finally, is it conclusive, for the purpose of classifying an agreement as a public contract or a service concession, that the services offered by the operator require, where appropriate, a large degree of independence of performance on his part.

45 Since the agreements at issue constitute public service contracts within the meaning of Article 1(a) of Directive 92/50, they could only be concluded in accordance with the provisions of the directive, in particular Articles 11, 15 and 17 thereof. Under those provisions, the contracting authority concerned was inter alia obliged to publish a contract notice which conformed to the model laid down in Annex III to the directive, which it did not do.

46 It follows that the Commission's action must be upheld and that it is necessary to hold that, owing to the fact that the Presidenza del Consiglio dei Ministri — Dipartimento per la protezione civile — Ufficio del Commissario delegato per l'emergenza rifiuti e la tutela delle acque in Sicilia (i) initiated the procedure for the conclusion of agreements concerning the use of that part of municipal waste produced in the municipalities of the Region of Sicily and remaining after the collection of selected material and (ii) concluded those agreements, without following the procedures laid down by Council Directive 92/50 and, in particular, without publishing the appropriate contract notice in the *Official Journal of the European Communities*, the Italian Republic failed to fulfil its obligations under that directive, in particular under Articles 11, 15 and 17 thereof.

Costs

47 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs and the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, owing to the fact that the Presidenza del Consiglio dei Ministri — Dipartimento per la protezione civile — Ufficio del Commissario delegato per l'emergenza rifiuti e la tutela delle acque in Sicilia (i) initiated the procedure for the conclusion of agreements concerning the use of that part of municipal waste produced in the municipalities of the Region of Sicily and remaining after the collection of selected material and (ii) concluded those agreements, without following the procedures laid down by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001, and, in particular, without publishing the appropriate contract notice in the *Official Journal of the European Communities*, the Italian Republic failed to fulfil its obligations under that directive, in particular under Articles 11, 15 and 17 thereof;**

2. **Orders the Italian Republic to pay the costs.**

[Signatures]