OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 6 September 2007 [1]

I — Introduction

1. To think of radio broadcasting as a medium for conveying information would be to reduce it to the feature which is most characteristic of it, while neglecting other features which have more significance in the light of the social and cultural importance which it has acquired in the course of its history. In western societies the association of communication media with current material well-being brings fresh meaning to the Roman maxim *panem et circenses*, which the Latin poet Juvenal [2] employed to mock the Roman people's acquiescent idleness and lack of interest in matters of politics. [3] Today, a translation of that aphorism could use comfort instead of bread, and television in place of the games of the Roman Circus.

2. No one now contests the immense power of images, which are capable of penetrating into the most remote corners of private life; consequently, in order to avoid the fulfilment of premonitions such as that of George Orwell in his novel *1984* [4] that audiovisual technology become a means of delivering propaganda, governments strive to forge safeguards to ensure a degree of objectivity and independence, at least in public broadcasting.

3. The three questions which the Oberlandesgericht (Higher Regional Court) of Düsseldorf (Germany) has referred to the Court of Justice are set in the context of the struggle to have a public broadcasting service

1 — Original language: Spanish.

2 — Decimus Junius Juvenal (probably born between 55 and 60 AD in Aquino and certainly deceased after 127 AD), author of the *Satires*, of whose life the only other biographical details are those found in occasional confidences in his own works. At the end of his life, he may have been exiled for a time because of his criticism of the authorities, perhaps because he alluded in one of his poems to Titus Elius Alcibiades, a steward of the emperor Hadrian. (Translator's note: reference to Spanish text not translated.)

3 — 'The same people, ... now that their votes are not for sale to anyone, have cast aside their worries. Those who previously had the power to make Emperors, generals, commanders of legions, the power to do anything, are now content to covet two things, bread and the Games. ...', *Satire X*, verses 74-81. (Translator's note: free translation.)

4 — It is a commonplace to consider that novel, written in 1948 after the trauma of the Second World War, not so much as a diatribe against totalitarianism, but as a warning of the subtlety with which such a regime can be established, through manipulation of the media of communication.

which is sufficient for and compatible with the requirements of a State governed by the rule of law, in particular that of neutrality and respect for the plurality of political options. In Germany, as is clear from the order of reference, that guarantee is sustained, to a great extent, by requiring public broadcasting institutions to collect and manage their own funds, which derive from the obligatory payment of a certain sum chargeable on the mere fact of possessing a radio or a television.

4. That system of funding, which is the consequence of an uncontested public service obligation, raises the question whether those broadcasting bodies should be regarded as 'contracting authorities' within the meaning of the Community directives on the subject of public procurement, or whether, on the other hand, they should not be so described, and should be exempt from the procedures for public tendering for contracts.

II — Legal framework

A — *Community legislation*

5. As a preliminary, the referring court has turned to both Article 1(9) of Directive 2004/18/EC,[5] as regards its scope ratione personae, and Article 16(b) as regards its scope ratione materiae. That directive consolidated the rules of public contract tendering at Community level. The court points out that since the prescribed period for adoption of that Directive into national law has expired without the relevant transposition, the case-law of the Bundesgerichtshof (German Supreme Court) leads it to interpret the national rules in the light of any recently adopted Community legislative instrument, though it may not govern the contracting procedure at issue.

6. Even if the reasoning of the Oberlandesgericht is accepted, it is appropriate to consider the wording of Article 1(a) and (b) of Directive 92/50/EC,[6] for two reasons: first, that Article is the basic provision by which the German legislature was guided in adapting its legal order to the Community legal order and, consequently, the national legislation refers to that Article; secondly, because the corresponding rules of the consolidated text of Directive 2004/18 are absolutely identical.

5 — Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

6 — 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).

7. In order to define its scope ratione personae, Article 1(b) of Directive 92/50, within Title I, on general provisions, considers contracting authorities as:

'...

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.'

A body governed by public law meaning any body:

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

— having legal personality and

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

8. Next, that provision specifies that 'the lists of bodies or of categories of such bodies governed by public law which fulfil (those) criteria are set out in Annex I to Directive 71/305/EEC [7] ... . Those lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 30b of that Directive; ...'.

9. The same Article 1(a) lists the contracts which fall ratione materiae within the scope of the Directive, and expressly excludes:

'...

7 — Council Directive of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ 1971 L 206, p. 26).

(iv) contracts for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time;

...'

B — *National law*

1. Regulation of public procurement

10. The procedures for the award of contracts by German public administrative bodies are incorporated in the Law against anti-competitive practices (Gesetz gegen Wettbewerbsbeschränkungen; [8] the 'GWB'); Article 1(b) of the Directive, on contracting authorities, has its national counterpart in Paragraph 98(2) of the GWB:

'Paragraph 98 — Contracting authority

Contracting authorities within the meaning of this chapter are:

1. regional or local authorities and their funds;

2. other legal persons governed by public and private law, established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character if they are financed for the most part by the bodies in sections 1 or 3, whether individually or jointly by shareholding or other means, or if those bodies exercise any control over their management or have appointed more than half the members of one of its administrative or supervisory organs. The foregoing shall also apply when a body falling within section 1 is one which, individually or jointly with others, provides most of the financing or which appoints more than half of the members of the administrative or supervisory organs;

3. associations the members of which are included in subsections 1 and 2;

...'

8 — Since 1 January 1999 the Law in force is that of the Sixth Reform by Law 703-4/1 of 26 August 1998 (BGBl. I, p. 358).

2. The legislation on the fee for public broadcasting

11. According to the order for reference, the financing of the public broadcasting authorities is regulated in Germany by two State Treaties concluded between the Federal State and the Länder. The characteristics of the broadcasting fee are essentially described in the Staatsvertrag über die Regelung des Rundfunkgebührenwesens (State Treaty concerning broadcasting fees; the 'State Treaty') of 31 August 1981, amended in 1996.

12. Paragraph 2 provides:

'(1) The broadcasting fee shall consist of the basic fee and the television fee. Its amount shall be set by the Treaty on financing of broadcasting institutions.

...'

13. Paragraph 4 of the State Treaty provides:

'(1) The obligation to pay the broadcasting fee runs from the first day of the month in which possession is taken of a broadcasting receiver.

(2) ...'

14. In turn, Paragraph 7 of the State Treaty governs the distribution of the revenues obtained from the fee:

'(1) The income received from the basic fee shall be allocated to the broadcasting institution of the Land and, in the proportion determined in the State Treaty on financing of broadcasting institutions, to Deutschlandradio and to the Landesmedienanstalt (Communications media authority of the Land), in the territory of which a television and radio signal receiver is operational.

(2) The income received from the television fee shall be allocated to the broadcasting institution of the Land and to the extent provided in the Treaty on financing of broadcasting institutions, to the Landesme-

dienanstalt in the territory of which a television signal receiver is operational, and also to Zweites Deutsches Fernsehen (the second public television channel; "ZDF"). ...

...'

15. The referring court explains that a second Treaty, the Rundfunkfinanzierungsstaatsvertrag (State Treaty on financing of broadcasting institutions; the 'State Financing Treaty') of 26 November 1996, determines the actual level of the fees, setting their amounts with the consent of the Länder Parliaments.

16. The assessment and calculation of the budgets of the broadcasters is delegated, in accordance with Paragraphs 2 to 6 of the State Financing Treaty, to the Kommission zur Überprüfung und Ermittlung des Finanzbedarfs der Rundfunkanstalten (Commission for the study and assessment of the financial needs of broadcasting institutions; the 'KEF'), which is independent and which prepares, at least every two years, a report on which the decision as to fees adopted by Parliaments and Governments of the Länder is based (Paragraph 3(5), together with Paragraph 7(2), of the State Financing Treaty).

17. By means of a Regulation of 18 November 1993, on the procedure for the payment of fees of Westdeutscher Rundfunk Köln, adopted pursuant to Paragraph 4(7) of the State Treaty with the consent of the Land Government, the broadcasters of the respective Länder obtain the money constituted by the fees from the citizens through the intermediary Gebühreneinzugszentrale der öffentlich-rechtlichen Rundfunkanstalten in der Bundesrepublik Deutschland (the Fee Collection Agency of the public broadcasters of the German Federal Republic; the 'GEZ') by the exercise of sovereign powers.

III — The facts of the main proceedings and the questions referred for a preliminary ruling

18. The parties which brought an appeal before the Oberlandesgericht of Düsseldorf are the broadcasters of the Länder (the regional broadcasters), the members of the Arbeitsgemeinschaft der Rundfunkanstalten Deutschlands (the association of German regional public broadcasters; the 'ARD') and the public television organisation ZDF, created by State Treaty of 6 June 1969, and also Deutschlandradio (together: 'the broadcasters').

19. In 2002 those institutions established the GEZ as an administrative body governed by public law, responsible for collecting and settling the fees in respect of each of the broadcasters of the Länder. Since it lacks legal personality, the GEZ acts in the name

of and on behalf of the respective broadcasting institutions.

20. In August 2005, following market research, the GEZ sent a written invitation to 11 businesses to submit binding tenders for the provision of cleaning services in its buildings, and also in the canteen of Westdeutscher Rundfunk (one of the broadcasters included in the ARD) in Cologne, for the period between 1 March 2006 and 31 December 2008, providing for tacit extension from year to year. The value of the contract was estimated at more than EUR 400 000. No Community procedure for the awarding of public contracts compatible with the national provisions and the relevant Directive took place.

21. The company Gesellschaft für Gebäudereinigung und Wartung mbH ('GEWA'), the respondent before the Oberlandesgericht of Düsseldorf, and the intervener, Mr Warnecke, responded to the GEZ's invitation to tender with separate offers. The former's offer had the lowest price. By a decision of 9 November 2005, the GEZ's board of directors decided to enter into negotiations with four of the tenderers, including GEWA and the intervener. The decision was also made that the economic feasibility of the each of the offers would be analysed, using the Kepner-Tregoe method, which allocates specific values in an assessment featuring technical, commercial and risk criteria. In terms of that assessment GEWA's offer was ranked in third place, and the offer of the intervener came first.

22. The GEZ informed GEWA by telephone that it had not been awarded the contract. In a written complaint of 14 November 2001, GEWA accused the GEZ, as the contracting authority, of failure to comply with the rules relating to public contracts, since it had not invited tenders at Community level for the cleaning contract. The GEZ rejected the complaint.

23. GEWA then brought an action, before the Vergabekammer (the court which has jurisdiction over the awarding of public contracts) of the Bezirksregierung (District administration) of Cologne, against the GEZ. GEWA's claim was that the GEZ be ordered to award the cleaning contracts by means of the formal procedure of Part 4 of the GWB or, as an alternative, that there be a new evaluation, subject to the Vergabekammer's ruling on the law.

24. The Court held that the GEZ, as a broadcaster, was a contracting authority within the meaning of Paragraph 98(2) of the GWB, given that such organisations were

financed predominantly by means of fees paid by citizens and given that the basic provision of radio and television services, which was patently a public service, was a need in the general interest, not having an industrial or commercial character.

25. The Court held, in addition, that Article 1(a)(iv) of Directive 92/50 excluded only contracts for the acquisition, development, production or co-production of programmes by broadcasters and contracts for broadcasting time, manifestly different in nature from the service at issue in the main proceedings.

26. By a decision of 13 February 2006, the Vergabekammer upheld GEWA's action and ordered the GEZ and the broadcasters, if they intended to maintain their invitation to tender, to respect the rules relating to awarding of public contracts and the principles of equal treatment and transparency, and accordingly to make a public invitation to tender at the European level.

27. The regional broadcasters appealed against that decision before the administrative courts and sought its annulment on the ground that the applicant's claim against the GEZ was inadmissible and, in any event, unfounded. In their opinion, since they are public broadcasters, they cannot be regarded as contracting authorities within the meaning of Paragraph 98(2) of the GWB, since the burden of financing public broadcasting is met principally out of the fees paid by the customers.

28. They add that the State control required by Paragraph 98(2) of the GWB is lacking, because the State carries out only limited and secondary legal review. Further, the members of the broadcasters' boards of directors represent various social groups. The lack of any majority in their governing bodies eliminates the possibility of any State influence on the awarding of a public contract.

29. GEWA, on the other hand, defends the decision of the Vergabekammer.

30. Since it considers that the outcome of the proceedings depends on the interpretation of Article 1 of Directive 2004/18, the Vergabesenat of the Oberlandesgericht (the Chamber of the Higher Regional Court of Düsseldorf which has jurisdiction over awarding of public contracts) has decided to stay proceedings and to refer the following

questions to the Court of Justice of the European Communities pursuant to the first paragraph of Article 234 EC:

'(1) Where it appears in the first alternative of the third indent of the second subparagraph of Article 1(b) of Directive 92/50, is the term "financed ... by the State" to be interpreted as including indirect financing of certain bodies through the payment of fees by persons who possess broadcasting receivers, taking into account the overriding obligation imposed on the State by constitutional law to ensure the independent financing and the existence of those bodies?

(2) If the first question is answered in the affirmative, is the first alternative of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 to be interpreted as requiring that "financing by the State" must involve a direct public influence on the awarding of contracts by the body financed by the State?

(3) If the second question is answered in the negative, is the first alternative of the third indent of the second subparagraph of Article 1(b) of Directive 92/50, in the light of Article 1(a)(iv), to be interpreted to mean that the only services excluded from its scope of application are those services specified in the latter provision, and that included within its scope are other services which are ancillary or secondary but which are not specifically related to programming (by *argumentum a contrario*)?'

IV — The procedure before the Court of Justice

31. The reference for a preliminary ruling was lodged at the Registry of the Court of Justice on 7 August 2006.

32. Written observations have been submitted by GEWA, the broadcasters, the German, Polish and Austrian Governments, the European Free Trade Association ('EFTA') Surveillance Authority and the European Commission.

33. At the hearing on 14 June 2007 oral argument was presented by the legal representatives of the broadcasters and of GEWA,

and also by agents of the German Government, of the EFTA Surveillance Authority and of the European Commission.

V — Analysis of the questions referred for a preliminary ruling

A — *Defining the issues*

34. Although the referring court has submitted three questions, it appears appropriate to take the first two together, [9] since they both refer to the scope of ratione personae and to the first alternative of the third indent of the second subparagraph of Article 1(b) of Directive 92/50. [10]

35. The German broadcasters consider that they are not financed from public funds and claim that an analogy can be drawn between the legislation on the public procurement at issue in these proceedings and Articles 87 EC and 88 EC, on State aid, which require funding 'through State resources'.

36. However, and on this an observation of the Commission is very apt, I do not consider that the distinct character of the two sets of provisions and the objectives pursued by them permit such an audacious comparison, since, while on the matter of subsidies the EC Treaty aims to avoid any unjustified distortion of competition in a specific market caused by the use of public money, on the matter of public tendering for contracts what is at issue is the inclusion of an authority within the concept of 'contracting authority' for the purpose of determining whether that body must comply with the public tendering procedures.

37. It may therefore be remarked that those two spheres of law are not based on similar reasoning, and accordingly their comparison by analogy is inappropriate.

38. Lastly, although the third question has no relevance to the classification of the German broadcasters as contracting authorities, as they themselves say in their written observations, its analysis is to some extent useful if the answer to the first question is in the affirmative and the answer to the second question in the negative, since, in requesting interpretation of Article 1(a)(iv) of Directive 92/50, the Oberlandesgericht seeks to discover the scope of ratione materiae, which is logical, although it appears obvious.

9 — This is the approach of the Austrian Government and also of the Polish Government, although the latter deals with them separately.

10 — In points 5 and 6 of this Opinion this option is explained.

B — *The first and second questions referred for a preliminary ruling*

39. The dispute relates to the German system of providing financial resources to broadcasting institutions. It is accordingly necessary to examine the essential characteristics of the system, to clarify whether the revenues of those bodies are 'State funded' for the purposes of Directive 92/50 and the case-law of the Court of Justice.

1. An obligation to pay governed by rules of public law

40. The broadcasters maintain that payment of the fee is left entirely to the free will of the consumer, who can avoid payment by doing without a receiver. The German Government expands on this idea, its opinion being that there exists an obligation which directly links the consumer and the broadcasters, and which does not affect the State budgets, since the GEZ collects the fee, and the money ingathered does not enter into the Treasury funds. Both therefore reject, in this case, funding 'by the State'.

41. However, the alternatives of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 are conceived as a supposition dependent on funding the greater part of which is public. If that premiss is admitted, dependency can be inferred, and it is then unnecessary to require other conditions for application such as, for example, that the financing should cause direct State influence on the awarding of public contracts. The context for assessment of that condition is the second alternative, that referring to control, since the degree of control can be measured. [11]

42. Further, that reflection finds support in the distinction applied in *University of Cambridge* between sums which are disbursed in exchange for a consideration and those which are not, [12] since the intention was to provide guidance to the court which made a reference in that case so that it might determine whether that premiss for the suppositions, namely financing provided for the most part by the State, was satisfied.

43. It follows from the above two points that the second question as it has been presented by the Oberlandesgericht is inappropriate and that it is advantageous to deal with it and the first question together.

11 — Case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraph 48 et seq.

12 — Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraphs 22 to 25.

44. Returning to the substance of the matter, it is common ground in these proceedings that the fee was established by means of agreements governed by public law ('Staatsverträge'), the State Treaty and the State Financing Treaty. [13]

45. It is equally common ground that a 'Staatsverträge' is a measure governed by the public law of the German legal system. [14]

46. Consequently, the legal relationship which connects the possessor of a radio or television to the broadcasters is governed by public law, taking the form almost of a tax, since the obligation to pay is engendered by the mere possession of a radio or television receiver, a genuine 'taxable act', characteristic in the charging of any tax, where the television viewer is the inactive subject. It little matters, beyond that, what name the obligation to pay bears under national law. [15]

47. Thus, since both the operation and existence of the broadcasters are bound up with measures of the legislature, the highest form of State control, the reference, in the provision under examination, to financing for the most part by the State as the first alternative is not merely fortuitous but the logical consequence of the fact that economic subordination represents *par excellence* that 'close dependency of a body on the State' to which the Court of Justice has referred. [16] Pertinent here is the celebrated phrase of the German jurist von Kirchmann, pointing out that law is not a science, since it requires no more than 'three words of correction by the legislature' for 'entire libraries to become waste paper', [17] which highlights moreover the strength of the legislative power.

48. In light of the foregoing, the resources of the broadcasters collected by the GEZ can be categorised as public; additionally, there are those who assign to that collection agency the status of a State institution, notwithstanding its lack of legal personality, adducing its capacity to charge the fee and to collect it by distraint proceedings, [18] powers characteristic of the exercise of functions

13 — Point 11 et seq. of this Opinion.

14 — On the legal principles of that State, Maurer, H., *Allgemeines Verwaltungsrecht*, 12th ed. revised and enlarged, Ed. C.H. Beck, Munich, 1999, p. 352 et seq.

15 — While the German Government states that the word 'Gebühr' (tax or levy) is not suitable to describe the obligation to pay, some academic writing ascribes it to tax law as 'Abgabe' (duty or burden); Boesen, A., *Vergaberecht: Kommentar zum 4. Teil des GWB*, published by Bundesanzeiger, 1st ed., Cologne, 2000, p. 151, No 73.

16 — *University of Cambridge*, paragraph 20, and *Commission* v *France*, paragraph 44.

17 — Von Kirchmann, J.-H., *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*, Berlin, Springer, 1848.

18 — Frenz, W., 'Öffentlich-rechtliche Rundfunkanstalten als Beihilfeempfänger und öffentlich Auftraggeber', in *WRP — Wettbewerb in Recht und Praxis*, 3/2007, p. 269.

linked to national sovereignty, which accentuate its public character.

49. However, that character, although it is significant evidence of economic support by the State, is not reliable proof of it, as the broadcasters point out, and it is accordingly appropriate to examine other special features of the German system of subsidy to State broadcasting.

2. Indirect financing

50. The broadcasters and the German Government are at one in the view that Directive 92/50 refers only to payments which are borne *directly* by the State budget [19] and not to indirect transfers of financial resources from any public institution or another contracting authority. They assert further that in the present case the amount paid by the fee circulates solely between the consumer and the broadcasters, and that there is no intervention by the State, which is not a party to that flow of money.

51. I strongly disagree with such an interpretation.

52. First, the German Government puts emphasis on a simplistic definition of financing as involving 'delivery', which would comprise only Bank transfers, cheques, bank giros or the physical conveyance of bags of money in an armoured vehicle from the Treasury to the offices of the body in receipt of the subsidy.

53. Leaving aside the fact that there is no substantial difference between the situation in which the State ingathers the fee in order to pass it on to the funded institutions and the situation in which the State assigns the power of collection to them, [20] it must not be forgotten that the State itself establishes the structure for the levying of the fee, since it determines the obligation to pay and fixes the amount to be paid by means of an

19 — Dreher, M., 'Öffentlich-rechtliche Anstalten und Körperschaften im Kartellvergaberecht', *NZBau — Neue Zeitschrift für Baurecht und Vergabe*, 6/2005, p. 302.

20 — Opitz, M., 'Vergaberechtliche Staatsgebundenheit des öffentlichen Rundfunks?', *NVwZ — Neue Zeitschrift für Verwaltungsrecht*, No 9/2003, p. 1090.

independent commission, the KEF, subject to ratification and possible amendment by the Länder, who have the last word. [21]

54. Secondly, the first alternative of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 is not restricted to methods of direct financing, since the only qualification of the verb 'finance' is to be found in the phrase 'for the most part' ('überwiegend', in German; 'majoritairement' in French; 'mayoritariamente' in Spanish), and there is no reference to the form, direct or indirect, of implementing the financial contribution to the supported institutions.

55. In conclusion, some support can be inferred from the case-law for the possibility that a State may provide economic support indirectly, since the Court of Justice, in the matter of the second alternative of the third indent of the provision, has recognised indirect control by the State, [22] and that could also be extended to the first alternative, particularly when the three options are equivalent, [23] as the German Government has correctly stated.

21 — Frenz, W., op. cit., p. 272. The broadcasters, in their observations, mention an action on grounds of infringement of the Constitution which is pending before the Bundesverfassungsgericht (German Constitutional Court) directed against the decrease introduced by the Länder on the proposed increase of the rate of the fee.

22 — Case C-306/97 *Connemara Machine Turf* [1998] ECR I-8761, paragraph 34.

23 — *Commission* v *France*, cited above, paragraph 49.

3. Financing without consideration

56. In *University of Cambridge*, referred to above, the Court defined public financing, and introduced a fundamental distinction, namely, whether the institution in receipt of the aid was under an obligation to provide specific consideration, since the criterion for the definition of public financing would be met only if such consideration was lacking. [24]

57. Against that background, and in support of their argument that the consumers pay the broadcasters directly, the broadcasters and the German Government contend that in exchange for that income the customer obtains as 'specific consideration' the right to receive the images and transmissions broadcast by German public television and radio; they rely on that argument in order to deny that the financing at issue is of a public nature. [25]

24 — Paragraph 21 of the judgment.

25 — Hailbronner, K., 'Öffentliches Auftragswesen', in Grabitz, E./Hilf, M., *Das Recht der Europäischen Union*, Ed. C.H. Beck, Munich, 2006, B 4, p. 22, No 121.

58. To rebut that contention, it would be sufficient to make the point that, having regard to their legislative origin, the resources generated by the television fee are not private. The broadcasters and the German Government may respond that, if statutory regulation of the sums paid by the consumer were to determine whether the funds collected were public, the fees of architects, lawyers and doctors would be considered as indirect public expenditure within the meaning of the Directives on public tendering. But, applying their logic, if the assessment of the condition [the first alternative] of public financing were to be concerned only with the private origin of the money, neither the office of trademarks and patents, nor the land ownership records and registers, to mention only some of the institutions where the person affected pays directly for the service which is provided to him by the public authority, nor in brief any tax, would warrant classification as public funds for the purposes of Directive 92/50.

59. Even if one were to maintain that the public funds also were handed over in exchange for the programming broadcast on the State radio and television channels, the argument would have no more weight. The (public) funds paid to the broadcasters neither create nor enhance any dependency similar to that found in normal commercial relationships, since they represent a constitutive measure [26] which permits those institutions to operate, but the State does not expect or receive value in return in the form of specific consideration.

60. In summary, I reject not only the theory that payment of the fee is an obligation borne by the customer in exchange for access to public programming, but also the idea that the State receives back consideration for its economic support in the form of the public broadcasting service.

4. An activity free from competition

61. Although it is irrelevant to define what is meant by 'body governed by public law ... established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character', [27] the Austrian Government and the EFTA Surveillance Authority are correct to incorporate an examination of the competi-

26 — According to *University of Cambridge*, above cited, paragraph 25.

27 — Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraphs 48 to 50.

tive position of the broadcasters in the context of that question referred for a preliminary ruling.

62. Taking account of the system for collection of the broadcasting fee, established by a specific piece of legislation with the rights and powers of public law referred to above (collection of monies and possible compulsory enforcement), it cannot validly be sustained that the generation of financial resources designed to satisfy a need of general interest for public programming, which the broadcasters indisputably provide, is independent of market conditions. The monies which the broadcasters receive from the fee do not come from their running a business in rivalry with their competitors, but are paid by the community, [28] and they are not concerned by the use actually made by the consumers of the audiovisual programmes offered to them.

63. That form of sheltered activity in the market frees the broadcasters of any uncertainty as to their income, since they have the State's guarantee, manifested in the budgets drawn up by the KEF. Accordingly, even if the argument that the origin of the funds is private were accepted, the confident assurance which the broadcasters can have in the arrival of their pecuniary resources does not differ from that which they may have when capital is placed directly at their disposal by the State.

64. In response to my question at the hearing whether that guarantee of funding of the broadcasters which the German Government is constitutionally obliged to provide extends to debts contracted by them, [29] the German Government categorically rejected such a possibility. However, as the Commission pointed out, that question never arises, since the KEF regularly checks the broadcasters' pecuniary needs, and comfortably meets them; indeed, the broadcasters are freed from resorting to private credit in the critical situation of insolvency, which reinforces the public character of the subsidy.

5. Other matters for consideration

65. From all of the foregoing it can be concluded that the economic resources

28 — Seidel, I., 'Öffentliches Auftragswesen', in Dauses, M., *Handbuch des EU-Wirtschaftsrechts*, Editorial C.H. Beck, Munich, 2006, p. 27, No 82; Boesen, A., op. cit., p. 152.

29 — Until now, the requirement for a public mechanism for the offsetting of debts had been referred to solely in the context of analysis of the first indent of the second subparagraph of Article 1(b) of the Community directives on public contracts, on the condition of the general interest; Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605, paragraph 40.

which support the work of the broadcasters are public. None the less, some further reflections may be added.

66. Thus, first, it is established case-law that the autonomous concept of Community law of 'contracting authority' must be given an interpretation which is both functional [30] and broad, [31] taking account of the fact that the aim is to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by contracting authorities, and the possibility that bodies financed or controlled by the State may be guided by considerations other than economic ones. [32]

67. In that context, in response to a question I put to them at the hearing, the broadcasters stated that none of the 11 businesses contacted by the GEZ to submit binding tenders was based in another Member State. That fact alone reveals that the fears of the Community legislature were not unfounded.

68. Secondly, the broadcasters, relying in part on German academic writing, [33] stress the constitutional imperative of impartiality which protects them from any intervention by the public authorities in their management.

69. The excellence of Article 5(1) of the German Constitution, which has succeeded in creating a public broadcasting service of quality, needs no comment, but there is no incompatibility between that imperative and the broadcasters' obligation at issue to respect and comply with the procedures for public tendering laid down by the Community directives.

70. Within the observations submitted on this reference for a preliminary ruling, no argument has been adduced to demonstrate that making the broadcasters subject to the procedures of the Directives might endanger their neutrality. Moreover, the freedom of

30 — Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraph 62; Case C-353/96 *Commission* v *Ireland* [1998] ECR I-8565, paragraph 36; Case C-470/99 *Universale-Bau* [2002] ECR I-11617, paragraph 53; Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 41; and Case C-283/00 *Commission* v *Spain* [2003] ECR I-11697, paragraph 73.

31 — Wollenschläger, F., 'Der Begriff des "öffentlichen Auftraggebers" im Lichte der neuesten Rechtsprechung des Europäischen Gerichtshofes', *EWS (Europäisches Wirtschafts- und Steuerecht)*, nº 8/2005, p. 345.

32 — *University of Cambridge*, paragraph 17; *Universale-Bau*, paragraph 52; and *Adolf Truley*, paragraph 42, all cited above.

33 — Dreher, M., op. cit., p. 303; Hailbronner, K., op. cit., p. 22, No 123.

the press enjoyed by broadcasting and its impartiality have never been criteria by which to judge whether bodies governed by public law are contracting authorities. [34]

71. Lastly, it is common ground that the broadcasters receive the vastly predominant part of their financing from the fee as opposed to other sources of income, in particular advertising, which leads to the conclusion that, taking due notice of the explanations offered, the manner in which the broadcasters meet their costs satisfies the requirement, that they should be financed for the most part by the State, of the first alternative of the third indent of the second subparagraph of Article 1(b) of Directive 92/50.

6. Response to the first and second questions referred for a preliminary ruling

72. In the light of the foregoing reflections, I invite the Court of Justice to answer the first and second questions of the Oberlandesgericht Düsseldorf as follows: the indirect financing of bodies through the payment of fees by the possessors of radio or television receivers constitutes funding within the meaning of the provision at issue, analysis of which excludes the addition of other criteria, such as, for example, direct State influence on the awarding of public contracts by the body which the State is financing.

C — The third question referred for a preliminary ruling

73. By this question the referring court seeks to know whether Article 1(a)(iv) of Directive 92/50 includes within its scope services which are ancillary and secondary, and are not specifically related to programming.

74. I have already referred to the usefulness of answering this, if the broadcasters are to be categorised as a 'contracting authority'. In requesting an interpretation of that provision, the Oberlandesgericht seeks to clarify its scope ratione materiae in order to decide whether services for cleaning the premises of such authorities are excluded.

34 — Seidel, I., op cit., p. 27, No 82.

75. The wording of the provision is so clear that it is sufficient to turn to the adage *in claris non fit interpretatio*. The provision exempts from the requirement of compliance with public tendering procedures contracts closely bound up with the content of radio and television programmes (acquisition, development, production, co-production and those related to obtaining broadcasting time).

76. Since the above is an exception to the general rule, a strict interpretation is required, to the effect that any other activity ancillary to those expressly listed must be carried out within a contract governed by law, after a public invitation of tenders.

77. That conclusion appears to be supported by the history of the Community legislation, as emerges from comparison of the respective recitals of the grounds of Directives 92/50 and 2004/18. Thus, the 25th recital in the preamble to Directive 2004/18 has added detail to the succinct 11th recital in the preamble to Directive 92/50, including 'other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme'. On the other hand, it does not extend to 'supply of technical equipment necessary' to the production of those programmes.

78. Consequently, if specialised technical support cannot find refuge in the exception, nor can cleaning services for the broadcasters' buildings.

79. In brief, both grammatical and textual analysis militate in favour of using the *argumentum a contrario* when dealing with the scope ratione materiae of Directive 92/50 in relation to the contracts concluded with the German broadcasters.

80. I will allow myself a final comment, since it is within that provision that the constitutional guarantee of the impartiality of the German broadcasters is found to be respected, rather than in the way in which they are financed;[35] accordingly the Community legislature has provided for the programming exception in order to take account of social and cultural considerations, as is stated in the said 25th recital in the preamble to Directive 2004/18.

35 — Also Boesen, A., op. cit., p. 152, No 75.

VI — Conclusion

81. In accordance with the foregoing, I propose that the Court of Justice answer the questions referred for a preliminary ruling by the Oberlandesgericht of Düsseldorf in the following terms:

(1) On a proper construction of the first alternative of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, the requirement of 'financing by the State' extends to indirect financing of certain organisations through the payment of fees by those persons who possess broadcasting receivers, and it may not be made subject to other conditions, such as, for example, that the State have a direct influence on the awarding of public contracts by the organisation which it finances.

(2) Article 1(a)(iv) of Directive 92/50 excludes from its scope of application only those services which it specifies, and includes all others which are ancillary and secondary, which are not specific to programming.