

JUDGMENT OF THE COURT (Third Chamber)

19 June 2008^{*}

In Case C-454/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesvergabeamt (Austria), made by decision of 10 November 2006, received at the Court on 13 November 2006, in the proceedings

presstext Nachrichtenagentur GmbH

v

Republik Österreich (Bund),

APA-OTS Originaltext — Service GmbH,

APA Austria Presse Agentur registrierte Genossenschaft mitbeschränkter Haftung,

^{*} Language of the case: German.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Lõhmus, J.N. Cunha Rodrigues (Rapporteur), A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: J. Kokott,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 24 January 2008,

after considering the observations submitted on behalf of:

— presstext Nachrichtenagentur GmbH, by G. Estermann, Rechtsanwalt,

— the Republik Österreich (Bund), by A. Schittengruber and C. Mayr, acting as Agents,

— APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung, by J. Schramm, Rechtsanwalt,

— the Austrian Government, by M. Fruhmann and C. Mayr, acting as Agents,

- the French Government, by J.-C. Gracia, acting as Agent,

- the Lithuanian Government, by D. Kriauciūnas, acting as Agent,

- the Commission of the European Communities, by D. Kukovec and R. Sauer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 March 2008,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of 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) and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by ('Directive 89/665').

- 2 The reference was made in the context of proceedings between presstext Nachrichtenagentur GmbH ('PN'), on the one hand, and the Republik Österreich (Bund), APA-OTS Originaltext — Service GmbH ('APA-OTS') and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung ('APA'), on the other, concerning a contract for press agency services.

Legal framework

Community legislation

- 3 Article 3(1) of Directive 92/50 provides:

'1. In awarding public service contracts or in organising design contests, contracting authorities shall apply procedures adapted to the provisions of this Directive.'

- 4 Under Article 8 of that directive:

'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'.

5 Article 9 of that directive states:

‘Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.’

6 Article 10 of the same directive provides:

‘... Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.’

7 Article 11(3) of that directive provides:

‘Contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice in the following cases:

...

(e) for additional services not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the performance of the service described therein, on condition that the award is made to the service provider carrying out such service:

- when such additional services cannot be technically or economically separated from the main contract without great inconvenience to the contracting authorities,

or

- when such services, although separable from the performance of the original contract, are strictly necessary for its completion.

However, the aggregate estimated value of contracts awarded for additional services may not exceed 50% of the amount of the main contract;

- (f) for new services consisting in the repetition of similar services entrusted to the service provider to which the same contracting authorities awarded an earlier contract, provided that such services conform to a basic project for which a first contract was awarded according to the procedures referred to in paragraph 4. As soon as the first project is put up for tender, notice must be given that the negotiated procedure might be adopted and the total estimated cost of subsequent services shall be taken into consideration by the contracting authorities when they apply the provisions of Article 7. This procedure may be applied solely during the three years following the conclusion of the original contract.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 8 APA was established in Austria as a limited liability registered cooperative following the Second World War. Almost all of the Austrian daily newspapers as well as the Austrian radio and television broadcasting corporation, ORF, were members of the cooperative. Together with its subsidiaries, APA is the main operator on the news agencies market in Austria and traditionally provides the Republik Österreich (Bund) with various news agency services.
- 9 PN has been present on the Austrian news agency market since 1999 but has hitherto issued press releases for the Austrian federal authorities to a limited extent only. PN has fewer journalists working for it than APA and does not have available to it such large archives as APA.
- 10 In 1994, prior to its accession to the European Union, the Republik Österreich (Bund) concluded an agreement ('the basic agreement') with APA relating to the provision of certain services for remuneration. That agreement essentially allows the Austrian federal authorities to access and use current information (the so-called 'basic service'), to request historical information and previous press releases from an APA database, known as 'APADok', and to use the APA original text service, known as 'OTS', both for the information they provide and for the dissemination of their own press releases. The APADok database contains the data from the basic service since 1 January 1988 and the press releases handled by the OTS service since 1 January 1989.
- 11 The basic agreement was concluded for an indefinite period, subject to a clause by which the parties waived the right to terminate the agreement until 31 December 1999.

12 Article 2(c) of the basic agreement provided:

‘For online inquiries for APA information services as defined in Article 1, APA shall bill as licensing revenues for the use of the electronic data processing system, per minute (net) CPU, a price corresponding to the lowest graduated consumer price of the official tariff (currently ATS 67, HT per minute CPU) less 15%.’

13 The agreement also included provisions relating to the date of the first price increase, the maximum amount of each increase and indexation of prices on the basis of the consumer price index for 1986, the reference value being the index figure calculated for 1994. Article 5(3) of the agreement provided inter alia: ‘... it is expressly agreed that the values of the remuneration provided for in Article 2(a) and (b) shall be guaranteed to be constant. For the calculation of the indexation, the starting point shall be the 86 consumer price index (CPI 86) published by the Austrian Central Statistics Office (ÖSTAT) or the following index replacing it.’

14 In September 2000, APA established a wholly-owned subsidiary, APA-OTS, in the form of a limited liability company. The two companies are bound by a contract excluding profit and loss, which, according to APA and APA-OTS, provides for APA-OTS to be integrated financially, organisationally and economically within APA and for APA-OTS to conduct and manage its business on the basis of instructions from APA. APA-OTS is furthermore required to pass its annual profits to APA, whilst APA has to make good any annual losses incurred by APA-OTS.

15 In September 2000, APA transferred to APA-OTS the operation of its OTS service. This alteration was notified to the Republik Österreich (Bund) in October 2000. An authorised employee of APA gave an assurance to the Austrian authorities that, following that transfer, APA was jointly and severally liable with APA-OTS, and that there would be no change in the overall service performed. The Austrian authorities thereupon authorised the future provision of the OTS service by APA-OTS, and the remuneration for that service has since then been paid direct to APA-OTS.

- 16 Furthermore, the provisions of the basic agreement were amended by an initial supplemental agreement signed in 2001 and effective as from 1 January 2002. When the transition was made to the euro, that supplemental agreement adjusted the initial contract, as described in paragraphs 17 to 20 of this judgment.
- 17 First, the amount of the annual charge for the use of editorial articles and media archives, ATS 10 080 000, was replaced with EUR 800 000. Under the indexation clause, the price for 2002 should have been ATS 11 043 172 (converted to EUR 802 538.61 due to transition to the euro). The decision was made to use not that amount but the rounded-off figure of EUR 800 000, giving a reduction of 0.3%.
- 18 Secondly, the price fixed for online inquiries for APA information services, which had been ATS 67 per minute, was replaced with a price of EUR 4.87 per minute. Apart from the rounding-off effected at the time of transition to the euro, the basic amount of that price remained unchanged.
- 19 Thirdly, for the calculation of the indexation, the index calculated for 1994 on the basis of the consumer price index for 1986 was replaced, as reference point, by the index calculated for 2001 on the basis of the consumer price index for 1996. In that regard, the first supplemental agreement amended inter alia amended Article 5(3) of the basic agreement to read as follows:

‘It is expressly agreed that the values of the remuneration provided for in Article 2(a) and (b) shall be guaranteed to be constant. For the calculation of the indexation, the starting point shall be the 96 consumer price index (CPI 96) published by the Austrian Central Statistics Office (ÖSTAT) or the following index replacing it.’

20 Fourthly, by way of derogation from that indexation mechanism, some prices were fixed immediately for 2002 to 2004. The price of ATS 8.50 per line for inclusion of press releases in the OTS service was replaced by fixed prices of EUR 0.66 per line for 2002, EUR 0.67 for 2003 and EUR 0.68 for 2004. Had the indexation clause been applied, the price for 2002 should have been ATS 9.31 per line (rounded off to EUR 0.68 per line). The price was thus reduced by 2.94% for 2002 and 1.47% for 2003.

21 A second supplemental agreement, signed in October 2005 and effective as from 1 January 2006, introduced two further amendments to the basic agreement. By that second supplemental agreement, the basic agreement was amended as described in paragraphs 22 and 23 of this judgment.

22 First, the waiver of the right to terminate the agreement, agreed in the basic agreement until 31 December 1999, was agreed once again until December 2008.

23 Secondly, the reduction given on the price for online inquiries for APA information services, fixed at 15% in the basic agreement, was increased to 25%. In that regard, the second supplemental agreement amended Article 2(c) of the basic agreement as follows:

‘The following provisions of the [basic agreement as amended by the first supplemental agreement] shall be amended as follows as from 1 January 2006:

1. Article 2(c): the percentage of 15% shall be replaced by 25%.

...’

24 In 2004, PN offered its news agency services to the Republik Österreich (Bund), but that offer did not lead to the signing of an agreement.

25 By actions brought on 4 and 19 July 2006, PN sought, by way of principal head of claim, a declaration from the Bundesvergabeamt (Federal Procurement Office) that the severing of the basic agreement, following the restructuring of APA in 2000, and the supplemental agreements signed in 2001 and 2005, which it referred to as 'de facto awards', were unlawful and, in the alternative, that the choice of the various award procedures in question was unlawful.

26 In regard to the time-limits for bringing an action, the Bundesvergabeamt points out that, whilst the transactions complained of date back to 2000, 2001 and 2005, the legal remedy available under domestic law in respect of unlawful awards of contracts, namely an application for a declaration having the effect of dissolving the agreement, was created only subsequently, that is to say with effect from 1 February 2006. The period provided for this legal remedy is six months from the date of the unlawful award. The Bundesvergabeamt deems it appropriate to apply Paragraph 1496 of the Austrian General Civil Code (Allgemeines Bürgerliches Gesetzbuch — ABGB), under which limitation periods do not run if the requisite legal remedy is not available, provided that such application is compatible with Community law.

27 In those circumstances, the Bundesvergabeamt decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are the terms "awarding" in Article 3(1) of Directive 92/50... and "awarded" in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which a contracting authority intends to obtain services in the future from a service provider established as a limited liability company where those services were previously supplied by a different service provider who is the sole shareholder in the future service provider and has control of the future service provider? In such a case is it legally relevant that the contracting authority has no guarantee that throughout the entire period of the original contract the shares in the future service provider will not be disposed of in whole or in part

to third parties and moreover has no guarantee that the membership of the original service provider, which is in the form of a co-operative society, will remain unchanged throughout the entire contract period?

- (2) Are the terms “awarding” in Article 3(1) of Directive 92/50... and “awarded” in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which, during the period of validity of a contract concluded for an indefinite period with certain service providers for the joint provision of services, a contracting authority agrees with those service providers amendments to the charges for specified services under the contract and reformulates an index-linking clause, where these amendments result in different charges and are made upon the changeover to the euro?

- (3) Are the terms “awarding” in Article 3(1) of Directive 92/50... and “awarded” in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which, during the period of validity of a contract concluded for an indefinite period with certain service providers for the joint provision of services, a contracting authority agrees with those service providers to amend the contract, first, renewing for a period of three years a waiver of the right to terminate the contract by notice, the waiver no longer being in force at the time of the amendment, and second, also laying down a higher rebate than before for certain volume-related charges within a specified area of supply?

- (4) If the answer to any of the first three questions is that there is an award: is Article 11(3)(b) of Directive 92/50..., or are any other provisions of Community law, such as, in particular, the principle of transparency, to be interpreted as permitting a contracting authority to obtain services by awarding a single contract in a negotiated procedure without prior publication of a contract notice, where parts of the services are covered by exclusive rights as referred to in Article 11(3)(b) of Directive 92/50/EEC? Or do the principle of transparency or any other provisions of Community law require in the case of an award of mostly non-priority services that a contract notice is none the less published prior to the contract award, to enable undertakings in the sectors concerned to assess

whether services are in fact being awarded that are subject to an exclusive right? Or do the provisions of Community law relating to the award of public contracts require that in such a case services can only be awarded in separate tender procedures, according to whether they are or are not subject to exclusive rights, in order to allow at least competitive tendering as to part?

- (5) If the answer to the fourth question is to the effect that a contracting authority may award services which are not subject to exclusive rights in a single procurement procedure together with services which are subject to an exclusive right: can an undertaking which does not have any right to deal with data that is subject to an exclusive right possessed by an undertaking which has a dominant position in the market establish that in that respect it has the capacity, for the purposes of procurement law, to provide a comprehensive service to a contracting authority, by relying on Article 82 EC and an obligation derived from that provision on the market-dominant undertaking which has the power of disposal over the data and is established in a Member State to provide the data on reasonable conditions?
- (6) If the answer to the first, second and third questions is to the effect that the partial contract transfer in 2000 and/or one or both of the contract amendments referred to constituted new awards; and furthermore should the fourth question be answered to the effect that either when awarding a contract for services not subject to exclusive rights by means of a separate award procedure, or when awarding a combined contract (in the present case for press releases, the basic service and rights to use APADok), a contracting authority should have first published a contract notice to ensure that the intended contract award was transparent and capable of being reviewed:

Is "harmed" in Article 1(3) of Directive 89/665... and in Article 2(1)(c) of that directive to be interpreted as meaning that an undertaking in a case such as the present one is harmed, within the meaning of those provisions of Directive 89/665..., simply where he has been deprived of the opportunity to participate in a procurement procedure because the contracting authority did not, prior to making the award, publish a contract notice, on the basis of which the undertaking could have tendered for the contract to be awarded, could have submitted an offer or could have had the claim that exclusive rights were involved reviewed by the competent procurement review body?

- (7) Are the Community law principle of equivalence and the Community law requirement for effective legal protection, or the principle of effectiveness, to be interpreted, having regard to any other relevant provisions of Community law, as conferring an individual and unconditional right on an undertaking against a Member State such that it has at least six months from the time when it could have known that a contract award infringed procurement law to bring legal proceedings before the competent national authority to seek damages following the contract award on account of an infringement of Community procurement law, while it must be allowed additional time for periods when it could not make such a claim owing to the absence of a statutory basis in national law, in circumstances where under national law claims for damages based on infringements of national law are normally subject to a limitation period of three years from the date of knowledge of the wrongdoer and of the damage and, in the absence of legal protection in a particular area of law, the limitation period does not (continue to) run?’

The questions referred for a preliminary ruling

²⁸ The Court notes as a preliminary point that, even though the agreement at issue in the main proceedings was concluded prior to the Republic of Austria’s accession to the European Union, the relevant Community rules apply to such an agreement as from the date of that State’s accession (see, to that effect, Case C-76/97 *Tögel* [1998] ECR I-5357, paragraph 14).

²⁹ By its first three questions, the Bundesvergabeamt asks, essentially, in which circumstances amendments to an existing agreement between a contracting authority and a service provider may be regarded as constituting a new award of a public services contract within the meaning of Directive 92/50.

30 Directive 92/50 does not provide a specific answer to those questions, but it does contain a number of pertinent indications which should be placed in the overall framework of Community rules governing public procurement.

31 It is clear from the case-law that the principal objective of the Community rules in the field of public procurement is to ensure the free movement of services and the opening-up to undistorted competition in all the Member States (see Case 26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 44). That two-fold objective is expressly set out in the second, sixth and twentieth recitals in the preamble to Directive 92/50.

32 In order to pursue that two-fold objective, Community law applies inter alia the principle of non-discrimination on grounds of nationality, the principle of equal treatment of tenderers and the obligation of transparency resulting therefrom (see, to that effect, Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31; Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 and 61; and Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I-3801, paragraphs 108 and 109).

33 Directive 92/50 implements those principles and that obligation of transparency in respect of contracts coming within its ambit and concerning, either solely or for the most part, services listed in Annex I A thereto, by requiring inter alia certain award procedures. For contracts coming within its ambit and concerning, either solely or for the most part, services listed in Annex I B thereto, the directive does not impose the same rules for the award procedures, but that category of public contracts nevertheless remains subject to the fundamental rules of Community law and the obligation of transparency resulting therefrom (see, to that effect, Case C-507/03 *Commission v Ireland* [2007] ECR I-9777, paragraphs 26, 30 and 31).

34 In order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the

contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, to that effect, Case C-337/98 *Commission v France* [2000] ECR I-8377, paragraphs 44 and 46).

35 An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.

36 Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. This latter interpretation is confirmed in Article 11(3)(e) and (f) of Directive 92/50, which imposes, in respect of contracts concerning, either solely or for the most part, services listed in Annex I A thereto, restrictions on the extent to which contracting authorities may use the negotiated procedure for awarding services in addition to those covered by an initial contract.

37 An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.

38 It is in the light of the foregoing considerations that the questions referred to the Court are to be answered.

The first question

39 By its first question, the Bundesvergabebamt is referring to the transfer to APA-OTS in 2000 of the OTS services hitherto provided by APA. It asks, essentially, whether a change in the contractual partner, in circumstances such as those at issue in the main proceedings, is a new award of contract within the meaning of Articles 3(1), 8 and 9 of Directive 92/50.

40 As a rule, the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract in question, unless that substitution was provided for in the terms of the initial contract, such as, by way of example, provision for sub-contracting.

41 According to the order for reference, APA-OTS is established as a limited liability company and therefore has separate legal personality from APA, the initial contractor.

42 It is also common ground that, since the OTS services were transferred from APA to APA-OTS in 2000, the contracting authority makes payment for those services directly to APA-OTS, and no longer to APA.

43 However, some of the specific characteristics of the transfer of the activity in question permit the conclusion that such amendments, made in a situation such as that at issue in the main proceedings, do not constitute a change to an essential term of the contract.

44 According to the information in the case-file, APA-OTS is a wholly-owned subsidiary of APA, APA has the power to instruct APA-OTS in the conduct and management of its business and the two companies are bound by a contract under which profit and loss are transferred to and assumed by APA. The case-file also shows that a person authorised to represent APA assured the contracting authority that, following the transfer of the OTS services, APA was jointly and severally liable with APA-OTS and that there would be no change in the overall performance experienced.

45 Such an arrangement is, in essence, an internal reorganisation of the contractual partner, which does not modify in any fundamental manner the terms of the initial contract.

46 In that context, the Bundesvergabebamt asks whether legal consequences follow from the fact that the contracting authority does not have an assurance that the shares in APA-OTS will not be transferred to third parties at any time during the currency of the contract.

47 If the shares in APA-OTS were transferred to a third party during the currency of the contract at issue in the main proceedings, this would no longer be an internal reorganisation of the initial contractual partner, but an actual change of contractual partner, which would, as a rule, be an amendment to an essential term of the contract. Such an occurrence would be liable to constitute a new award of contract within the meaning of Directive 92/50.

48 Similar reasoning would apply if the transfer of shares in the subsidiary to a third party was already provided for at the time of transfer of the activities to the subsidiary (see, to that effect, Case C-29/04, *Commission v Austria* [2005] ECR I-9705, paragraphs 38 to 42).

49 Until such a development occurs, however, the analysis in paragraph 45 of this judgment remains valid, namely that the situation envisaged is an internal reorganisation of the contractual partner. This conclusion is not affected by the fact that there is no

guarantee that the shares in the subsidiary will not be transferred to a third party at any time during the currency of the contract.

50 The Bundesvergabebamt also asks what legal consequences arise from the lack of guarantee, for the contracting authority, that there will be no changes in the composition of the shareholders in the service provider at any time during the currency of the contract.

51 Public contracts are regularly awarded to legal persons. If a legal person is established as a public company listed on a stock exchange, it follows from its very nature that the composition of its shareholders is liable to change at any time. As a rule, such a situation does not affect the validity of the award of a public contract to such a company. The situation may be otherwise in exceptional cases, such as when there are practices intended to circumvent Community rules governing public contracts.

52 Similar considerations apply in the case of public contracts awarded to legal persons established not as publicly-listed companies but as limited liability registered cooperatives, as in the main proceedings. Any changes to the composition of the shareholders in such a cooperative will not, as a rule, result in a material contractual amendment.

53 Accordingly, the conclusion in paragraph 45 of this judgment is not affected by those considerations either.

54 It follows that the answer to the first question must be that the terms 'awarding' and 'awarded', used in Articles 3(1), 8 and 9 of Directive 92/50, must be interpreted as not covering a situation, such as that in the main proceedings, where services supplied to the contracting authority by the initial service provider are transferred to another

service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions, provided that the initial service provider continues to assume responsibility for compliance with the contractual obligations.

The second question

55 By its second question, the Bundesvergabebamt refers to the amendments made to the basic agreement by the first supplemental agreement, signed in 2001 and effective as from 1 January 2002. It asks, essentially, whether certain price amendments constitute a new award of a contract for the purposes of Directive 92/50.

56 This question concerns, first, the conversion of prices to euros without changing their intrinsic amount, secondly, the conversion of prices to euros entailing a reduction in their intrinsic amount and, thirdly, the reformulation of a price indexation clause.

57 The answer must be that, where, following the changeover to the euro, an existing contract is changed in the sense that the prices initially expressed in national currency are converted into euros, it is not a material contractual amendment but only an adjustment of the contract to accommodate changed external circumstances, provided that the amounts in euros are rounded off in accordance with the provisions in force, including those of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1).

- 58 Where the rounding off of the prices converted into euros exceeds the amount authorised by the relevant provisions, that is an amendment to the intrinsic amount of the prices provided for in the initial contract. The question then arises as to whether such a change in prices constitutes a new award of a contract.
- 59 It is evident that the price is an important condition of a public contract (see, to that effect, *Commission v CAS Succhi di Frutta*, paragraph 117).
- 60 Amending such a condition during the period of validity of the contract, in the absence of express authority to do so under the terms of the initial contract, might well infringe the principles of transparency and equal treatment as between tenderers (see, to that effect, *Commission v CAS Succhi di Frutta*, paragraph 121).
- 61 Nevertheless, the conversion of contract prices into euros during the course of the contract may be accompanied by an adjustment of their intrinsic amount without giving rise to a new award of a contract, provided the adjustment is minimal and objectively justified; this is so where it tends to facilitate the performance of the contract, for example, by simplifying billing procedures.
- 62 In the situation at issue in the main proceedings, the annual fee for the use of editorial articles and media archives was reduced by a mere 0.3% in order to give a round figure to facilitate calculations. Moreover, the per-line prices for inclusion of press releases in the OTS service were reduced by 2.94% and 1.47% for 2002 and 2003 respectively, so that they would be expressed in round figures, also liable to facilitate calculations. Not only did those price adjustments relate to a small amount, but they also operated to the detriment rather than to the advantage of the contractor, who consented to a reduction in the prices which would have resulted from the conversion and indexation rules normally applicable.

63 In such circumstances, it can be found that an adjustment to the prices of a public contract during its currency does not constitute an amendment to the essential conditions of that contract such as to constitute a new award of a contract within the meaning of Directive 92/50.

64 With respect to the reformulation of the indexation clause, the Court notes that Article 5(3) of the basic agreement provided inter alia that '[f]or the calculation of the indexation, the starting point [was to] be the 86 consumer price index (CPI 86) published by the Austrian Central Statistics Office (ÖSTAT) or the following index replacing it.'

65 It follows that the basic agreement had provided for the price index to which it referred to be replaced by a subsequent index.

66 The first supplemental agreement replaced the price index referred to in the basic agreement, namely the 1986 consumer price index (VPI 86) published by ÖSTAT, by a more recent index, namely the 1996 consumer price index (VPI 96), also published by ÖSTAT.

67 As stated in paragraph 19 of this judgment, that supplemental agreement used as a reference point the index calculated for 2001, the year in which it was concluded, instead of the one for 1994, the year in which the basic agreement was concluded. That updating of the reference point is consistent with the updating of the price index.

68 It follows that the first supplemental agreement merely applied the stipulations of the basic agreement as regards keeping the indexation clause up to date.

69 In such circumstances, the Court considers that the reference to a new price index does not constitute an amendment to the essential conditions of the initial agreement such as to constitute a new award of a contract within the meaning of Directive 92/50.

70 It follows that the answer to the second question must be that the terms 'awarding' and 'awarded', used in Articles 3(1) and 8 and 9 of Directive 92/50, must be interpreted as not covering an adjustment of the initial agreement to accommodate changed external circumstances, such as the conversion to euros of prices initially expressed in national currency, the minimal reduction in the prices in order to round them off, and the reference to a new price index where provision was made in the initial agreement to replace the price index fixed previously.

The third question

71 By its third question, the Bundesvergabeamt refers to the amendments made to the basic agreement by the second supplemental agreement, signed in October 2005 and effective as from 1 January 2006.

72 The Bundesvergabeamt asks, essentially, whether a new award of a contract results, first, from a renewal of the waiver of the right to terminate the contract by notice and, secondly, from an increase in the rebates granted on the prices of certain services covered by the contract.

73 First of all, as regards the conclusion of a new waiver of the right to terminate the contract during the period of validity of a contract concluded for an indefinite period,

the Court observes that the practice of concluding a public services contract for an indefinite period is in itself at odds with the scheme and purpose of the Community rules governing public contracts. Such a practice might, over time, impede competition between potential service providers and hinder the application of the provisions of Community directives governing advertising of procedures for the award of public contracts.

74 Nevertheless, Community law, as it currently stands, does not prohibit the conclusion of public service contracts for an indefinite period.

75 Likewise, a clause by which the parties undertake not to terminate for a given period a contract concluded for an indefinite period is not automatically considered to be unlawful under Community law governing public procurement.

76 As is apparent from paragraph 34 of this judgment, in determining whether the conclusion of such a clause constitutes a new award of contract, the relevant criterion is whether that clause must be regarded as being a material amendment to the initial contract (see, to that effect, *Commission v France*, paragraphs 44 and 46).

77 The clause at issue in the main proceedings formally sets out the waiver of any right to terminate the contract during the period from 2005 to 2008.

78 The Court notes, however, that, following the expiry on 31 December 1999 of the waiver of the right to terminate contained in the basic agreement, the contract at issue in the main proceedings could have been terminated at any time, subject to notice being given. It remained in effect, however, for the period from 2000 to 2005 inclusive, since neither the contracting authority nor the service provider exercised their right to terminate the contract.

79 There is nothing in the case-file to indicate that, during the period from 2005 to 2008 covered by the waiver of the right to terminate the contract, the contracting authority would have actually considered terminating the contract during its currency and put it out to tender again if that clause had not been present. Even if it had intended to do so, the time period envisaged by the waiver, namely three years, was not such that it would have been prevented from doing so for an excessive period in relation to the time necessary to organise such a procedure. In those circumstances, it has not been demonstrated that such a waiver of the right to terminate the contract, provided that it is not systematically re-inserted in the contract, entails a risk of distorting competition, to the detriment of potential new tenderers. Consequently, it cannot be held to be a material amendment to the initial agreement.

80 It follows that, in circumstances such as those at issue in the main proceedings, the presence of a waiver of the right to terminate the contract for a period of three years during the period of validity of a services contract concluded for an indefinite period does not constitute a new award of a contract within the meaning of Directive 92/50.

81 Secondly, regarding the higher rebate provided for in the second supplemental agreement, the Court observes that the basic agreement provided, in respect of the services in question, for 'a price corresponding to the lowest graduated consumer price of the official tariff ... less 15%'.

82 According to the information provided to the Court, that reference is to the degressive tariff applied by APA, in application of which the prices of the services in question are reduced when the use of those services by APA's contractual partner increases.

83 According to the same information, the increase in the rate of the rebates from 15% to 25%, provided for by the second supplemental agreement, is tantamount to applying a lower price. Even though the formal presentation may be different, the reduction of a price and the increase of a rebate have a comparable economic effect.

84 In those circumstances, the increase of the rebate may be interpreted as coming within the ambit of the clauses laid down in the basic agreement.

85 Moreover, an increase in the rebate, which has the effect of reducing the remuneration received by the contractor as compared to what was initially provided for, does not shift the economic balance of the contract in favour of the contractor.

86 Additionally, the mere fact that the contracting authority obtains a greater rebate on part of the services covered by the contract is not liable to entail a distortion of competition to the detriment of potential tenderers.

87 It follows from the foregoing that, in a situation such as that at issue in the main proceedings, the fact of laying down, in a supplemental agreement, rebates greater than those initially provided for on certain volume-related prices within a specific area of supply, is not to be regarded as being a material contractual amendment and therefore is not a new award of a contract within the meaning of Directive 92/50.

88 Consequently, the answer to the third question must be that the terms ‘awarding’ and ‘awarded’, used Articles 3(1), 8 and 9 of Directive 92/50, must be interpreted as not covering a situation such as that at issue in the main proceedings, where a contracting authority, through the use of a supplemental agreement, agrees with the contractor, during the period of validity of a contract concluded with it for an indefinite period, to renew for a period of three years a waiver of the right to terminate the contract by notice, the waiver no longer being in force at the time of the amendment, and agrees with it to lay down higher rebates than those initially provided for in respect of certain volume-related prices within a specified area of supply.

89 In the light of the answers given to the first, second and third questions, it is not necessary to answer the fourth, fifth, sixth and seventh questions.

Costs

90 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

- 1. The terms ‘awarding’ and ‘awarded’, used in Articles 3(1), 8 and 9 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as not covering a situation, such as that in the main proceedings, where services supplied to the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions, provided that the initial service provider continues to assume responsibility for compliance with the contractual obligations.**
- 2. The terms ‘awarding’ and ‘awarded’, used in Articles 3(1) and 8 and 9 of Directive 92/50, must be interpreted as not covering an adjustment of the initial agreement to accommodate changed external circumstances, such as the conversion to euros of prices initially expressed in national currency, the minimal reduction in the prices in order to round them off, and the reference to a new price index where provision was made in the initial agreement to replace the price index fixed previously.**

3. **The terms ‘awarding’ and ‘awarded’, used Articles 3(1), 8 and 9 of Directive 92/50, must be interpreted as not covering a situation such as that at issue in the main proceedings, where a contracting authority, through the use of a supplemental agreement, agrees with the contractor, during the period of validity of a contract concluded with it for an indefinite period, to renew for a period of three years a waiver of the right to terminate the contract by notice, the waiver no longer being in force at the time of the amendment, and agrees with it to lay down higher rebates than those initially provided for in respect of certain volume-related prices within a specified area of supply.**

[Signatures]