

JUDGMENT OF THE COURT (Fifth Chamber)

3 October 2000 *

In Case C-380/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), for a preliminary ruling in the proceedings pending before that court between

The Queen

and

H.M. Treasury,

ex parte: University of Cambridge,

on the interpretation of Article 1 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), Article 1 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and Article 1 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54),

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, P.J.G. Kapteyn (Rapporteur), A. La Pergola, P. Jann and H. Ragnemalm, Judges,

Advocate General: S. Alber,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- the University of Cambridge, by D. Vaughan QC, A. Robertson, Barrister, and G. Godar, Solicitor,
- the United Kingdom Government, by M. Ewing, of the Treasury Solicitor's Department, acting as Agent, and K. Parker QC,
- the Netherlands Government, by M.A. Fierstra, Head of the European Law Department at the Ministry of Foreign Affairs, acting as Agent,
- the Austrian Government, by W. Okresek, Departmental Head at the Chancellor's Office, acting as Agent,
- the Commission of the European Communities, by R. Wainwright, Principal Legal Adviser, and M. Shotter, a national civil servant on secondment to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the University of Cambridge, represented by D. Vaughan and A. Robertson, the United Kingdom Government, represented by G. Amodeo, of the Treasury Solicitor's Department, acting as Agent, and R. Williams, Barrister, the French Government, represented by G. Taillandier, *rédacteur* in the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agent, the Austrian Government, represented by M. Winkler, of the Chancellor's Office, acting as Agent, and the Commission, represented by R. Wainwright and M. Shotter, at the hearing on 9 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2000,

gives the following

Judgment

1 By order of 21 July 1998, which was received at the Court on 26 October 1998, the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) four questions concerning the interpretation of Article 1 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), Article 1 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and Article 1 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

2 The questions arose in proceedings brought by the University of Cambridge ('the University') in the High Court following the decision of H.M. Treasury ('the

Treasury') to retain universities of the United Kingdom of Great Britain and Northern Ireland in the list of bodies governed by public law notified to the Commission and reproduced in Annex I to Directive 93/37, while amending the text of that annex.

Community legislation

- 3 Article 1 of Directive 93/37 provides:

‘For the purpose of this directive:

...

- (b) “contracting authorities” shall be the State, regional or local authorities, bodies governed by public law, [or] associations formed by one or several of such authorities or bodies governed by public law;

A “body governed by public law” means any body:

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

— 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;

The lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35. To this end, Member States shall periodically notify the Commission of any changes of their lists of bodies and categories of bodies;

...'

⁴ Article 1(b) of Directive 92/50 and Article 1(b) of Directive 93/36 were drafted in terms essentially identical to Article 1(b) of Directive 93/37.

- 5 As far as the United Kingdom is concerned, the list of bodies and categories of bodies governed by public law in Annex I to Directive 93/37 includes ‘universities and polytechnics, maintained schools and colleges’.

National legislation

- 6 Directives 92/50, 93/36 and 93/37 were transposed into United Kingdom law by the following measures:

— Public Services Contracts Regulations 1993 (S.I. 1993/3228)

— Public Supply Contracts Regulations 1995 (S.I. 1995/201)

— Public Supply Contracts Regulations 1991 (S.I. 1991/2680).

- 7 Those regulations do not reproduce Annex I to Directive 93/37. However, each of them contains a definition of the bodies governed by public law based on the definition provided by Community law.

The main proceedings and the questions referred

- 8 In 1995 and 1996 the Committee of Vice-Chancellors and Principals of the Universities communicated to the Treasury its view that Directives 92/50, 93/36 and 93/37 did not apply universally to universities, so that the reference to ‘universities’ in Annex I to Directive 93/37, to which the third indent of Article 1(b) of those directives refers, should be deleted.

- 9 On 17 January 1997 the Treasury suggested to the Commission that the reference to ‘Universities and polytechnics, maintained schools and colleges’ be replaced by the words ‘Maintained schools. Universities and colleges financed for the most part by other contracting authorities’, thereby restricting the circumstances in which the abovementioned directives were applicable in the case of universities and taking into account the most recent developments, the Further and Higher Education Act of 1992 having rendered obsolete, in this context, the title of ‘polytechnics’.

- 10 That proposal has not yet been adopted by the Commission under the procedure provided for in Article 35 of Directive 93/37.

- 11 The amendment to Annex I of Directive 93/37 proposed by the Treasury did not satisfy the University, which brought an application for judicial review (dated 7 November 1996) in the High Court contesting the position adopted by the Treasury.

- 12 On 21 March 1997 the matter came before the Queen’s Bench Division of the High Court, which gave the University leave to seek judicial review on the ground that there was a substantive issue concerning the interpretation of Directives

92/50, 93/36 and 93/37, and more specifically the exact interpretation of the expression ‘financed, for the most part’ by one or more contracting authorities.

- 13 By order of 21 July 1998, the High Court of Justice of England and Wales, Queen’s Bench Division (Divisional Court), stayed proceedings pending a preliminary ruling on the following questions:

‘1. Where Article 1 of Council Directive 92/50/EEC, Council Directive 93/37/EEC and Council Directive 93/36/EEC (“the directives”) refers to any body “financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law” what monies are to be included in the expression “financed ... by [one or more contracting authorities]”? In particular, in relation to payments to an entity such as the University of Cambridge, does the expression include:-

(a) awards or grants paid by one or more contracting authorities for the support of research work;

(b) consideration paid by one or more contracting authorities for the supply of services comprising research work;

(c) consideration paid by one or more contracting authorities for the supply of other services, such as consultancy or the organisation of conferences;

- (d) student grants paid by local education authorities to universities in respect of tuition for named students?
2. What percentage or other meaning is to be given to the expression “for the most part” in Article 1 of the directives?
 3. If the expression “for the most part” is defined in terms of a percentage figure, is the calculation limited to considering sources of finance for academic and related purposes or should it include finance obtained in relation to commercial activities as well?
 4. Over what period should any calculation be made for determining whether a university is a “contracting authority” in respect of any particular procurement, and how are foreseeable or future changes to be taken into account?’

First question

- ¹⁴ As appears from the order for reference, universities in the United Kingdom are financed from various sources and those funds are provided for a variety of purposes and on various grounds. Some funds go to universities on the basis of periodical assessments of the quality of the research they do and/or depending on the number of students they receive; other funds come from awards, grants or the supply of food and accommodation; still others represent payment for services commissioned by charities, government departments, industry or commerce.

- 15 It is therefore necessary to determine the real nature of each of the forms of financing referred to in the first question in order to determine their significance for the University and hence the influence they have on whether that body is to be regarded as a ‘contracting authority’.
- 16 It should be borne in mind at the outset that, as far as the purpose of Directives 92/50, 93/36 and 93/37 is concerned, the Court has held that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, to that effect, Case C-360/96 *Gemeente Arnhem, Gemeente Rheden v BFI Holding* [1998] ECR I-6821, paragraph 41).
- 17 Consequently, the aim of the directives is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones (see, to that effect, Case C-44/96 *Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck* [1998] ECR I-73, paragraph 33, and *BFI Holding*, cited above, paragraphs 42 and 43).
- 18 According to Article 1(b), second subparagraph, of Directives 92/50, 93/36 and 93/37, a ‘body governed by public law’ means any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character (first indent), having legal personality (second indent) 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 (third indent).

- 19 In the main proceedings it is common ground that the University meets the two conditions mentioned in the first two indents of Article 1(b), second subparagraph, of the directives. Consequently, whether the University is to be included in the list for Annex I of Directive 93/37 depends in this case solely on the answer to the question whether that university is ‘financed for the most part’ by one or more contracting authorities within the meaning of the third indent of that provision.
- 20 As regards the alternative conditions set out in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37, paragraph 20 of the judgment in *Mannesmann Anlagenbau Austria* (cited above) indicates that each reflects the close dependency of a body on the State, regional or local authorities or other bodies governed by public law. The provision thus defines the three forms of body governed by public law as three types of ‘close dependency’ on another contracting authority.
- 21 Whilst the way in which a particular body is financed may reveal whether it is closely dependent on another contracting authority, it is clear that that criterion is not an absolute one. Not all payments made by a contracting authority have the effect of creating or reinforcing a specific relationship of subordination or dependency. Only payments which go to finance or support the activities of the body concerned without any specific consideration therefor may be described as ‘public financing’.
- 22 It follows that payments in the form of awards or grants for the support of research work, such as those referred to in paragraph (a) of the first question, may be regarded as financing by a contracting authority. Though the recipient of

such financing need not be the university itself, but a member of it in his capacity as a provider of services, we are concerned with financing that goes to the institution as a whole in the context of its research work.

- 23 Similarly, the grants referred to in paragraph (d) of the first question may be classified as ‘public financing’. Those payments constitute a social measure introduced for the benefit of certain students who by themselves would not be able to meet tuition fees which are sometimes very high. Since there is no contractual consideration for those payments, they should be regarded as financing by a contracting authority in the context of its educational activities.
- 24 The position is quite different in the case of the sources of financing referred to in paragraphs (b) and (c) of the first question. The sums paid by one or more contracting authorities constitute in that case consideration for contractual services provided by the university, such as the execution of particular research work or the organisation of seminars and conferences. It matters little in this context whether those activities of a commercial nature happen to coincide with the teaching and research activities of the university. The contracting authority has in fact an economic interest in providing the service.
- 25 Naturally, such a contractual relationship may also make the body concerned dependent on the contracting authority. However, as the Advocate General has noted in paragraph 46 of his Opinion, the nature of the relationship is not the same as that which would result from a mere subsidy. Rather, it is analogous to the dependency that exists in normal commercial relationships formed by reciprocal contracts freely negotiated between the contracting parties. Consequently, the payments referred to in paragraphs (b) and (c) of the first question do not fall within the concept of ‘public financing’.

26 Accordingly, the reply to the first question is that the expression 'financed ... by [one or more contracting authorities]' in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37, properly construed, includes awards or grants paid by one or more contracting authorities for the support of research work and student grants paid by local education authorities to universities in respect of tuition for named students. Payments made by one or more contracting authorities either in the context of a contract for services comprising research work or as consideration for other services such as consultancy or the organisation of conferences do not, by contrast, constitute public financing within the meaning of those directives.

Second question

27 The second question asks, in essence, what meaning is to be given to the expression 'financed for the most part' in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37.

28 For that purpose it is necessary to consider whether 'for the most part' means a specific percentage, or whether it is to have some other meaning.

29 Contrary to the submissions of the Commission and the Governments under Article 20 of the EC Statute of the Court of Justice, supporting a quantitative interpretation of the term 'for the most part', so that it would refer to public financing in excess of 50%, the University maintains that it is to be interpreted qualitatively. The University contends that account should be taken only of payments which confer on those making them control of procurement. However, if the interpretation should be quantitative, then the term must on any view be

taken to mean that the financing in question is predominant. This, according to the University, can only be the case where it represents three quarters of the total financing.

30 That interpretation cannot be upheld. Apart from the fact that there is no support for it in the wording of Directives 92/50, 93/36 and 93/37, it does not reflect the ordinary meaning of the phrase ‘for the most part’, which in normal usage always means ‘more than half’, without it being necessary for one group to be predominant or preponderant as regards another.

31 That is, moreover, borne out by the wording of Article 1(2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), which defines ‘public undertaking’ as, *inter alia*, an undertaking in which the public authorities hold, directly or indirectly, the majority of the undertaking’s subscribed capital or control, directly or indirectly, the majority of the votes attaching to shares issued by the undertaking. As the Advocate General noted in paragraph 58 of his Opinion, if such quantitative criteria are sufficient to classify an undertaking as a ‘public undertaking’, that must be the case *a fortiori* when determining the conditions under which public financing is to be regarded as ‘for the most part’.

32 In addition, interpreting ‘for the most part’ as meaning ‘more than half’ is consistent with the provisions in respect of one of the other cases referred to in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37. According to those provisions, the term ‘body governed by public law’ also includes any body 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.

33 Accordingly, the reply to the second question is that, on a proper construction, the term 'for the most part' in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37 means 'more than half'.

Third question

34 In the third question, which is closely linked to the previous two, the national court asks, in essence, what is to be included in the basis for calculating the financing which is 'for the most part' public. In particular, it asks whether all sources of financing for the university are to be taken into account when determining whether financing is 'for the most part' public or whether regard should be had only to sources of finance for academic and related activities.

35 As to that, it is sufficient to note that when Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37 refers to financing which is 'for the most part' from public sources, that necessarily implies that a body may also be financed in part in some other way without thereby losing its character as a contracting authority.

36 The reply to the third question is therefore that in order to determine correctly the percentage of public financing of a particular body account must be taken of all of its income, including that which results from a commercial activity.

Fourth question

- 37 In the fourth question the national court asks what period is to be taken into consideration in calculating the university's financing and how account is to be taken of changes which may occur in the course of a procurement procedure, when determining whether the university is a 'contracting authority' for the purposes of a particular procurement.
- 38 It is to be noted at the outset that in the absence of an express provision to that effect in Directives 92/50, 93/36 and 93/37, the reply to both parts of this question must take into account the requirement of legal certainty, as stated by the Court in paragraph 34 of *Mannesmann Anlagenbau Austria* (cited above). Although in determining whether a body is to be regarded as a 'contracting authority' for the purposes of a specific procurement regard must be had to its precise financial situation, it is also necessary to ensure a measure of foreseeability for the procurement procedure, when the financing of a body such as the University may vary from one year to the next.
- 39 Although the directives are silent as to the period to be taken into consideration when determining whether a body is a 'contracting authority', they do contain provisions regarding the publication of indicative notices from time to time which may provide useful guidance for the reply to this question. Article 15(1) of Directive 92/50 and Article 9(1) of Directive 93/36 provide expressly that indicative notices are to be published by the contracting authorities 'as soon as possible after the beginning of the budgetary year' where the total amount of the procurement 'which they envisage awarding during the subsequent 12 months' is

equal to or greater than ECU 750 000. The provisions thus imply that the contracting authority retains that status for 12 months from the beginning of each budgetary year.

40 Accordingly, the decision as to whether a body such as the University is a 'contracting authority' must be made annually and the budgetary year during which the procurement procedure is commenced must be regarded as the most appropriate period for calculating how that body is financed.

41 That being so, legal certainty and transparency require that both the University and third parties concerned are in a position to know from the beginning of the budgetary year whether the procurement contracts they envisage awarding during that year fall within the scope of Directives 92/50, 93/36 and 93/37. It follows that for the purposes of deciding whether a university is a 'contracting authority' the way in which it is financed must be calculated on the basis of the figures available at the beginning of the budgetary year, even if they are only provisional.

42 As regards the second part of the fourth question, the national court asks, in essence, whether, and if so how, account is to be taken of any changes in financing which may occur during a procurement procedure compared with the way in which the body had been financed at the date of the commencement of the procedure.

43 As the Court noted in paragraph 34 of *Mannesmann Anlagenbau Austria* (cited above), the principle of legal certainty requires that the Community rules be clear and their application foreseeable for all those concerned. As a result of that requirement, and of those pertaining to the protection of the interests of tenderers, it is necessary for a body which on the date of the commencement of the procurement procedure constitutes a 'contracting authority' for the purposes

of Directives 92/50, 93/36 and 93/37 to remain, as far as that procurement is concerned, subject to the requirements of those directives until the relevant procedure has been completed.

- 44 Accordingly, the reply to the fourth question is that the decision as to whether a body such as the University is a 'contracting authority' must be made annually and the budgetary year in which the procurement procedure commences must be regarded as the most appropriate period for calculating the way in which that body is financed, so that the calculation must be made on the basis of the figures available at the beginning of the budgetary year, even if they are provisional. A body which constitutes a 'contracting authority' for the purposes of Directives 92/50, 93/36 and 93/37 when a procurement procedure commences remains, as far as that procurement is concerned, subject to the requirements of those directives until such time as the relevant procedure has been completed.

Costs

- 45 The costs incurred by the Governments of the United Kingdom, France, the Netherlands and Austria, and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court) by order of 21 July 1998, hereby rules:

1. The expression 'financed ... by [one or more contracting authorities]' in Article 1(b), second subparagraph, third indent, of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, properly construed, includes awards or grants paid by one or more contracting authorities for the support of research work and student grants paid by local education authorities to universities in respect of tuition for named students. Payments made by one or more contracting authorities either in the context of a contract for services comprising research work or as consideration for other services such as consultancy or the organisation of conferences do not, by contrast, constitute public financing within the meaning of those directives.
2. On a proper construction, the term 'for the most part' in Article 1(b), second subparagraph, third indent, of Directives 92/50, 93/36 and 93/37 means 'more than half'.

3. In order to determine correctly the percentage of public financing of a particular body account must be taken of all of its income, including that which results from a commercial activity.

4. The decision as to whether a body such as the University of Cambridge is a 'contracting authority' must be made annually and the budgetary year in which the procurement procedure commences must be regarded as the most appropriate period for calculating the way in which that body is financed, so that the calculation must be made on the basis of the figures available at the beginning of the budgetary year, even if they are provisional. A body which constitutes a 'contracting authority' for the purposes of Directives 92/50, 93/36 and 93/37 when a procurement procedure commences remains, as far as that procurement is concerned, subject to the requirements of those directives until such time as the relevant procedure has been completed.

Edward

Kapteyn

La Pergola

Jann

Ragnemalm

Delivered in open court in Luxembourg on 3 October 2000.

R. Grass

D.A.O. Edward

Registrar

President of the Fifth Chamber