

JUDGMENT OF THE COURT (First Chamber)

10 November 2005<sup>\*</sup>

In Case C-29/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on  
28 January 2004,

**Commission of the European Communities**, represented by K. Wiedner, acting as  
Agent, with an address for service in Luxembourg,

applicant,

v

**Republic of Austria**, represented by M. Fruhmann, acting as Agent,

defendant,

<sup>\*</sup> Language of the case: German.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann (Rapporteur), J.N. Cunha Rodrigues, K. Lenaerts and M. Ilešič, Judges,

Advocate General: L.A. Geelhoed,  
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 21 April 2005,

gives the following

### **Judgment**

- 1 By its application, the Commission of the European Communities requests the Court to declare that, in that the contract for the disposal of the town of Mödling's waste was entered into without complying with the procedural and advertising rules laid down by Article 8, in conjunction with Articles 11(1) and 15(2) 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), the Republic of Austria has failed to fulfil its obligations under that directive.

## Legal background

2 Article 1 of Directive 92/50 states:

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

...

(b) *contracting authorities* shall mean 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.

...

(c) *service provider* shall mean any natural or legal person, including a public body, which offers services. ...

(d) *open procedures* shall mean those national procedures whereby all interested service providers may submit a tender;

(e) *restricted procedures* shall mean those national procedures whereby only those service providers invited by the authority may submit a tender;

(f) *negotiated procedures* shall mean those national procedures whereby authorities consult service providers of their choice and negotiate the terms of the contract with one or more of them;

...'

3 Article 8 of that directive provides:

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

4 Article 11(1) of the directive provides:

'In awarding public service contracts, contracting authorities shall apply the procedures defined in Article 1(d), (e) and (f), adapted for the purposes of this directive.'

5 According to Article 15(2) of Directive 92/50:

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

### **Facts and pre-litigation procedure**

6 On 21 May 1999 at a meeting of its municipal council, the town of Mödling decided to create a legally independent body to carry out its obligations under the Law of the Land of Lower Austria on Waste Management (Niederösterreichisches Abfallwirtschaftsgesetz) of 1992 (LGB1. 8240) with a view, in particular, to supplying services in the ecological waste management sector and to engaging in related commercial transactions, primarily in the waste disposal sector.

7 Consequently, on 16 June 1999, an instrument of incorporation was drawn up relating to the creation of the company Stadtgemeinde Mödling AbfallwirtschaftsgmbH (hereinafter ‘AbfallgmbH’), the share capital of which was held in its entirety by the town of Mödling. On 25 June 1999, the Mödling municipal council decided to make AbfallgmbH exclusively responsible for waste management in the municipality.

8 On 15 September 1999, by means of a contract which was concluded for an unlimited period and came into force with retrospective effect from 1 July 1999, the town of Mödling transferred exclusive responsibility for the collection and treatment

of its waste to AbfallgmbH. That contract stipulated the amount of the remuneration, namely a fixed sum per dustbin or container, which the town of Mödling was to pay to AbfallgmbH.

- 9 At its meeting on 1 October 1999, the Mödling municipal council decided to transfer 49% of the shares in AbfallgmbH to the company Saubermacher Dienstleistungs-Aktiengesellschaft (hereinafter 'Saubermacher AG'). According to the minutes of that meeting, following the decision taken on 25 June 1999, numerous meetings had taken place with representatives of companies interested in setting up a partnership in AbfallgmbH's field of business, in particular with Saubermacher AG.
- 10 On 6 October 1999, AbfallgmbH's instrument of incorporation was amended in order to allow the general assembly to adopt the majority of decisions by a simple majority and in order to set the quorum at 51% of the share capital. It was also decided that that company would be represented, in respect of its internal and external dealings, by two managing directors, each appointed by a partner, who would have joint authority to sign.
- 11 The abovementioned share transfer in fact took place on 13 October 1999. AbfallgmbH, however, began its operational activities only on 1 December 1999, that is to say at a time at which Saubermacher AG already held some of the shares in that company.
- 12 From 1 December 1999 to 31 March 2000, AbfallgmbH carried out its activities exclusively on behalf of the town of Mödling. Subsequently, after a waste transfer centre was put into operation, it also provided services to third parties, mainly to other municipalities in the district.

- 13 After giving the Republic of Austria formal notice to submit its observations, the Commission delivered a reasoned opinion on 2 April 2003 in which it set out the infringement of the provisions of Directive 92/50, stemming from the fact that the town of Mödling had not arranged a call for tenders for the purpose of awarding the waste disposal contract in question although that contract was to be regarded as a public service contract within the meaning of that directive.
- 14 In reply to that reasoned opinion, the Republic of Austria maintained that the conclusion of that contract with AbfallgmbH did not come within the scope of the directives on public contracts on the ground that it involved an 'in-house' transaction between the municipality of Mödling and AbfallgmbH.
- 15 As it was not satisfied with that reply, the Commission decided to bring this action.

## **The action**

### *Arguments of the parties*

- 16 The Commission submits that, as the conditions for application of Directive 92/50 have been satisfied, the procedural rules set out in Article 11(1) of that directive and the advertising rules in Article 15(2) thereof are applicable in full.
- 17 According to the Commission, contrary to the claim of the Austrian Government in the pre-litigation procedure, there is no evidence to establish the existence of an

internal relationship between the municipality of Mödling and AbfallgmbH. In that regard, the Commission refers to Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50, in which the Court held that a call for tenders is not mandatory in a case where the public authority, which is a contracting authority, exercises over the distinct body concerned a control which is similar to that which it exercises over its own departments and that body carries out the essential part of its activities with the controlling public authority or authorities.

- 18 The Commission submits that even though that judgment was given in relation to Article 1(a) 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), the Court's finding can be applied to all the Community directives on public contracts. The Commission relies on *Teckal* in order to substantiate its argument that it is only where the contracting authority exercises unlimited control over the contractor that the directives on public contracts do not apply. If a private undertaking holds shares in the contracting company it must, according to the Commission, be assumed that the contracting authority is not able to exercise over that company 'a control which is similar to that which it exercises over its own departments' within the meaning of that judgment. A minority holding by a private undertaking is thus sufficient to preclude the existence of an 'in-house' transaction.
- 19 Furthermore, the Commission observes that, in this case, Saubermacher AG's minority holding implies the existence, to that company's advantage, of rights of veto and of the power to appoint one of the two managing directors having identical rights, which precludes the town of Mödling from exercising over AbfallgmbH a control which is similar to that which it exercises over its own departments.
- 20 In its defence the Austrian Government disputes, first, the admissibility of the Commission's action.



- 21 It maintains that the establishment of AbfallgmbH, the conclusion of the waste disposal contract and the share transfer constitute three separate transactions which should not have been examined in the light of the provisions of Directive 92/50 but directly in the light of the provisions of the EC Treaty. An infringement of that directive is thus conceivable only if those transactions were decided on in order to circumvent the application of Directive 92/50 or if the share transfer at issue may give rise to a transaction falling within the scope of the provisions on the award of public contracts.
- 22 In the course of the infringement proceedings, the Commission made no observation on those possibilities. It did not, in either the pre-litigation procedure or the application, define the subject-matter of the proceedings and nor did it establish that the contract at issue was entered into in breach of Directive 92/50 or state the reasons why it considers that the existence of an ‘in-house’ transaction is essential in this case.
- 23 Secondly, as to the substance, the Austrian Government alleges that the Commission overlooked the fact that, at the time the waste disposal contract was entered into with AbfallgmbH, the shares in that company were held 100% by the town of Mödling. Thus, faced with an ‘in-house’ transaction, a call for tenders was not required.
- 24 Furthermore, that government considers that the concept of ‘control similar to that exercised over its own departments’ within the meaning of *Teckal* means comparable control and not identical control. The town of Mödling retained such control even after the transfer of 49% of the shares in AbfallgmbH.

*Findings of the Court*

## — Admissibility

- 25 It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission (see, inter alia, Case C-152/98 *Commission v Netherlands* [2001] ECR I-3463, paragraph 23, and Case C-439/99 *Commission v Italy* [2002] ECR I-305, paragraph 10).
- 26 It follows that, first, the subject-matter of proceedings under Article 226 EC is delimited by the pre-litigation procedure governed by that provision and that consequently the reasoned opinion and the application must be founded on identical charges. If a charge was not included in the reasoned opinion, it is inadmissible at the stage of proceedings before the Court (see, inter alia, *Commission v Italy*, cited above, paragraph 11).
- 27 Second, the reasoned opinion must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the Treaty (see, inter alia, Case C-207/96 *Commission v Italy* [1997] ECR I-6869, paragraph 18, and Case C-439/99 *Commission v Italy*, cited above, paragraph 12).
- 28 In the present case, in point 16 of its reasoned opinion and point 13 of its letter of formal notice, the Commission claimed that the sequence of events, from the

Mödling municipal council's decision to make AbfallgmbH exclusively responsible for management of that municipality's waste up to the transfer of 49% of the shares in that company to Saubermacher AG, showed that the period during which the town of Mödling held 100% of the shares in AbfallgmbH constituted in reality only a transitional stage leading to the acquisition by a private undertaking of a holding in that company. The Commission thus clearly stated in the course of the pre-litigation procedure that it disputed the town of Mödling's argument based on the existence of three separate transactions.

29 The Commission thus gave a cogent and detailed exposition of the reasons why, taking the view that the provisions of Directive 92/50 were applicable, the conclusion of the contract transferring exclusive responsibility to AbfallgmbH for the collection and treatment of the town of Mödling's waste could not be regarded as an 'in-house' transaction and should have been the subject of a public tendering procedure.

30 In those circumstances, the inevitable conclusion is that the subject-matter of the action was clearly defined and that the plea of inadmissibility raised by the Austrian Government must be rejected.

— Substance

31 In this case, the Commission is essentially alleging that the Austrian authorities permitted the award by a municipality of a public service contract to a company which is legally distinct from that municipality and 49% owned by a private undertaking without the public tendering procedure provided for in Directive 92/50 being implemented.

- 32 It must be stated at the outset that the conditions for application of that directive were fulfilled in the present case. The town of Mödling is regarded, *qua* local authority, as a 'contracting authority', within the meaning of Article 1(b) of Directive 92/50, which entered into a contract for pecuniary interest with AbfallgmbH, which is a 'service provider' within the meaning of Article 1(c) of that directive. Services for the collection and treatment of waste constitute services within the meaning of Article 8 of that directive and Annex I A thereto. Furthermore, according to the findings of the Commission, which have not been disputed by the Austrian Government, the threshold laid down in Article 7(1) of Directive 92/50, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) was exceeded in the present case.
- 33 Consequently, the award of a contract in respect of those services could, under Article 8 of Directive 92/50, occur only in compliance with the rules laid down in Titles III to VI of that directive, in particular in Articles 11 and 15(2) thereof. Under the latter provision it was for the contracting authority concerned to publish a contract notice.
- 34 However, according to the Court's case-law, a call for tenders is not mandatory, even though the other contracting party is an entity legally distinct from the contracting authority, where the public authority which is a contracting authority exercises over the separate entity concerned a control which is similar to that which it exercises over its own departments and that entity carries out the essential part of its activities with the controlling public authority or authorities (*Teckal*, paragraph 50, and Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 49).
- 35 The Austrian Government maintains that that was the case in this instance so that there was no need to apply the procedures for the award of public service contracts provided for in Directive 92/50.

36 First, that government contends that the conclusion of the waste disposal contract with AbfallgmbH, which occurred while the shares in that company were still entirely held by the town of Mödling, was not intended to establish a relationship between independent legal persons given that that local authority was able to exercise over AbfallgmbH a control similar to that which it exercises over its own departments. Consequently, that contract does not come within the scope of Directive 92/50 and there is no obligation on the town of Mödling to arrange a public call for tenders.

37 That argument cannot be upheld.

38 In the present case, the relevant date in order to determine whether the provisions of Directive 92/50 should have been applied is not the actual date on which the public contract at issue was awarded, and it is not necessary to resolve the issue of whether the municipality of Mödling's holding of the whole of the capital in AbfallgmbH on the date on which the public service contract was awarded was sufficient to establish that that local authority exercised over AbfallgmbH a control similar to that which it exercises over its own departments. Even though it is true that for reasons of legal certainty it is, in general, appropriate to consider the contracting authority's possible obligation to arrange a public call for tenders in the light of the circumstances prevailing on the date on which the public contract at issue is awarded, the particular circumstances of this case require the events which took place subsequently to be taken into account.

39 It must be borne in mind that the transfer of 49% of the shares in AbfallgmbH took place shortly after that company was made responsible, exclusively and for an unlimited period, for the collection and treatment of the town of Mödling's waste. Furthermore, AbfallgmbH became operational only after Saubermacher AG took over some of its shares.

- 40 Thus, it is not disputed that, by means of an artificial construction comprising several distinct stages, namely the establishment of AbfallgmbH, the conclusion of the waste disposal contract with that company and the transfer of 49% of its shares to Saubermacher AG, a public service contract was awarded to a semi-public company 49% of the shares in which were held by a private undertaking.
- 41 Accordingly, the award of that contract must be examined taking into account all those stages as well as their purpose and not on the basis of their strictly chronological order as suggested by the Austrian Government.
- 42 To examine, as the Austrian Government suggests, the award of the public contract at issue only from the standpoint of the date on which it took place, without taking account of the effects of the transfer within a very short period of 49% of the shares in AbfallgmbH to Saubermacher AG, would prejudice the effectiveness of Directive 92/50. The achievement of the objective of that directive, namely the free movement of services and the opening-up to undistorted competition in all the Member States, would be jeopardised if it were permissible for contracting authorities to resort to devices designed to conceal the award of public service contracts to semi-public companies.
- 43 Secondly, the Austrian Government submits that, even after having transferred 49% of the shares in AbfallgmbH to Saubermacher AG, the town of Mödling retained a control identical to that exercised over its own departments. In view of the judgment in *Teckal*, that factor exempted it from arranging a public call for tenders on the ground that the conclusion of the waste disposal contract constituted an 'in-house' transaction.

44 In this respect, it must be noted that, in the present case, the contract at issue, relating to services within the material scope of Directive 92/50, was concluded for pecuniary interest between a contracting authority and a company governed by private law, which is legally distinct from the authority and in the capital of which that contracting authority has a majority holding.

45 In *Stadt Halle and RPL Lochau*, the Court has already considered the question of whether, in such circumstances, the contracting authority is obliged to apply the public tendering procedures laid down by Directive 92/50 merely because a private company has a holding, albeit a minority one, in the capital of the company with which it concludes the contract.

46 It held that the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority concerned is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments (*Stadt Halle and RPL Lochau*, paragraph 49).

47 The relationship between a public authority which is a contracting authority and its own departments is governed by considerations and requirements proper to the pursuit of objectives in the public interest. Any private capital investment in an undertaking, on the other hand, follows considerations proper to private interests and pursues objectives of a different kind (*Stadt Halle and RPL Lochau*, paragraph 50).

48 The award of a public contract to a semi-public company without calling for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment of the persons concerned, referred to in Directive 92/50,

in that such a procedure would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors (*Stadt Halle and RPL Lochau*, paragraph 51).

49 The Court held that, where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of Directive 92/50 with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, the public award procedures laid down by that directive must always be applied (*Stadt Halle and RPL Lochau*, paragraph 52).

50 Thus, having regard to the foregoing, it must be found that, in that the contract for the disposal of the town of Mödling's waste was entered into without complying with the procedural and advertising rules laid down by Article 8, in conjunction with Articles 11(1) and 15(2) of Directive 92/50, the Republic of Austria has failed to fulfil its obligations under that directive.

## Costs

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



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

1. **Declares that, in that the contract for the disposal of the town of Mödling's waste was entered into without complying with the procedural and advertising rules laid down by Article 8, in conjunction with Articles 11(1) and 15(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, the Republic of Austria has failed to fulfil its obligations under that directive;**
  
2. **Orders the Republic of Austria to pay the costs.**

[Signatures]