

OPINION OF ADVOCATE GENERAL ALBER

delivered on 11 July 2002 ¹

I — Introduction

II — Legislative background

1. In these proceedings the Kilpailuneuvosto ² (Finnish Competition Council) seeks from the Court of Justice a preliminary ruling on a number of questions concerning the interpretation of the concept of contracting authority in the form of a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public contracts ³ (hereinafter ‘Directive 92/50’).

1. Directive 92/50

3. The decisive provisions of Article 1 of Directive 92/50 read as follows:

‘For the purposes of this Directive:

2. Of particular concern in this context is the definition of needs in the general interest not having an industrial or commercial character and the question whether this definition covers the activity of a share company which is owned by a municipality and builds industrial or commercial premises for private undertakings with a view to creating more favourable conditions for business activities in the municipality.

...

(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.

1 — Original language: German.

2 — Known as ‘Markkinaoikeus’ since 1 March 2002.

3 — OJ 1992 L 209, p. 1.

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

which fulfil the criteria referred to in the second subparagraph of this point are set out in Annex I to Directive 71/305/EEC. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 30b of that Directive;

...'

- having legal personality, and

2. Finnish transposing act

- 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.

4. Directive 92/50 was transposed into Finnish law by the Julkisista hankinnoista annettu laki (Law on public procurement) of 23 December 1992. The concept of bodies governed by public law is defined in Article 2 of that law on the basis of the wording of Article 1(b) of Directive 92/50.

5. In the Finnish law the term 'contracting authority' is defined as a legal person 'belonging to the public administration'. This requirement is deemed to be satisfied where the legal person

The lists of bodies or of categories of such bodies governed by public law

- (1) was established to look after tasks in the general interest with no industrial or commercial character and

(2) is financed primarily by a public authority or is under its supervision, or has an administrative, managerial or supervisory board over half of whose members are appointed by a public authority.

III — Facts of the initial proceedings

6. The main action concerns the award by the defendant, Varkauden Taitotalo Oy (hereinafter ‘Taitotalo’) of a contract concerning the design and construction services for a building project. The commercial complex to be constructed by Taitotalo in the town of Varkaus is to be subsequently leased to firms in the technology sector.

7. Taitotalo is a company wholly owned by the town of Varkaus. According to its statutes, its field of activity is the administration of properties and shares in property companies and their sale and lease and the organisation and supply of property maintenance services and other service activity necessary in the administration of properties. The board of the company comprises three ordinary members appointed by the general meeting. The town of Varkaus holds all the voting rights at the general meeting. All the board members are offi-

cials of the town of Varkaus. The company’s foundation document was signed on 21 January 2000; the company was entered in the commercial register on 6 April 2000.

8. Taitotalo is arranging for the construction of the ‘Tyyskän osaamiskeskus’ in district 1 of the town of Varkaus. The company intends to buy the land from the town when the site has been parcelled out. The building project comprises two or three office blocks and a multi-storey car park, which are to be leased to firms in the technology sector. Taitotalo is purchasing the project management service and marketing and coordination of the activity from Keski-Savon Teollisuuskylä Oy (hereinafter ‘Teollisuuskylä’).

9. Teollisuuskylä was established to build office premises for undertakings. According to its statutes, the company’s field of activity comprises the construction, acquisition and administration of buildings and land for commercial purposes on the basis of ownership and leasehold rights with a view to then ceding these properties at cost price primarily to undertakings. The company is a subsidiary of the development company Keski-Savon Kehittämisyhtiö Oy (hereinafter ‘Kehittämisyhtiö’), which has the task of promoting the development of industrial and commercial activities in the central Savo economic area. Nearly half of this company’s shares are owned by the town of Varkaus. Most of the other shares in Kehittämisyhtiö are owned by other municipalities in the region.

10. Teollisuuskylä originally called for tenders for the design of the Tyyskän osaamiskeskus by letter of 6 July 1999. The first stage of the project was to comprise the construction of the Tyyskä 1 building for Honeywell-Measurex Oy and the Tyyskä 2 building for a number of smaller undertakings. After the period for the submission of tenders had expired at the end of August 1999, however, Teollisuuskylä informed the tenderers that, owing to a change in the ownership structure of the property company that was to be established, tenders for the design and project management works would have to be invited in an open procedure in the *Official Journal of the European Communities*.

been awarded to JP-Terasto Oy and the design and project management of Tyyskä 2 to a group headed by Arkkitehtitoimisto Pekka Paavola Oy.

13. The applicant in the main proceedings, Arkkitehtuuritoimisto Riitta Korhonen Oy, applied to the requesting court, the Kilpailuneuvosto, for the annulment of Taitotalo's decision awarding the contract or, in the alternative, for compensation. In addition, Arkkitehtitoimisto Pentti Toivanen Oy and Rakennuttajatoimisto Vilho Tervomaa, who are also parties to the main proceedings, applied for compensation from Taitotalo on 26 April 2000.

11. Teollisuuskylä then again invited tenders for the design and project management works for the Tyyskän osaamiskeskus on 4 September 1999. The tender documents showed the town of Varkaus and Teollisuuskylä to be the contracting authorities. According to the request for a preliminary ruling, a reference to the call for tenders was also published in the *Official Journal of the European Communities, Series S — Invitations to Tender*, No 35 of 2 September 1999 under the heading 'Design contest'. This showed the town of Varkaus to be the contracting authority for a property company to be established.

14. The applicants in the main proceedings maintain that Taitotalo has infringed legislation on the award of contracts.

12. Taitotalo informed the tenderers on 6 April 2000 — the date on which it was entered in the commercial register — that the design and project management of the Honeywell-Measurex Oy building had

15. On 15 May 2000 Taitotalo applied to the Kilpailuneuvosto for the applicants' application to be declared inadmissible on the ground that it is not a contracting authority within the meaning of Paragraph 2 of the Julkisista hankinnoista annettu laki. Although the requirements of the second and third subparagraphs of Paragraph 2(2) were satisfied, the company had not been founded to meet needs in the general interest not having an industrial or commercial character, and it was not therefore a legal person governed by public law.

The public funds approved for the contract amounted to less than half the value of the contract. Taitotalo bases its reasoning on a ruling of the Korkein hallinto-oikeus (Finland's Supreme Administrative Court) of 1 December 1999.

IV — Questions submitted for a preliminary ruling

16. The Kilpailuneuvosto states in its decision to request a preliminary ruling that it has become the practice in Finland in recent years for the public authorities to carry out infrastructure measures such as those referred to in the main proceedings by employing share companies they own and manage as property owners and contracting authorities.

17. Given the frequency and significance of these cases, the Kilpailuneuvosto considers it very important to obtain an interpretation of the relevant provisions of Directive 92/50. It has therefore referred the following questions to the Court of Justice:

'Is a share company which a town owns and in which the town exercises control to be regarded as a contracting authority within the meaning of Article 1(b) of Council Directive 92/50/EEC relating to the coordination of procedures for the

award of public contracts, where the company acquires design and construction services for a building lot comprising offices to be leased to undertakings?

As a supplementary question, the Kilpailuneuvosto enquires whether it affects the decision on the point that the town's building project endeavours to create the conditions for business activity to be carried on in the town.

As a second supplementary question, the Kilpailuneuvosto enquires whether it affects the decision on the point that the offices to be built are leased to one undertaking only.'

V — Comments by the parties and legal analysis

18. The defendant, the Finnish, French and Austrian Governments and the Commission took part in the written proceedings before the Court. Before the hearing the Finnish Government was requested in writing by the Court to describe in greater detail the conditions under which 'development companies' operate and especially to explain whether these companies have a profit motive and bear their economic risk themselves. The Finnish Government and the Commission took part in the hearing.

1. *Admissibility of the request for a preliminary ruling*

19. In their written comments the French Government and the Commission express doubts about the admissibility of the request for a preliminary ruling on the ground that parts of the Kilpailuneuvosto's description of the facts in the initial proceedings are contradictory, incomplete and unclear.

20. The Commission's view is that it is not apparent what legislation in the main action formed the basis for the call for tenders and who formally acted as the contracting authority inviting the tenders. The request for a preliminary ruling did not reveal whether Taitotalo's activity amounted to no more than the activities described or whether the defendant had a further area of activity. Answering the abstract questions submitted for a preliminary ruling was also hampered by the fact that it was obviously a matter of subsuming to the scope of Directive 92/50 not one legal person but a group of legal persons. The Commission therefore wonders whether the Kilpailuneuvosto's explanation of the factual and legal context in which its questions arise is sufficiently clear within the meaning of the case-law of the Court of Justice.

21. The French Government points out that an organisation can be deemed to be a public body within the meaning of Directive 92/50 only if it has legal person-

ality at the time of the publication of the call for tenders and throughout the procedure. Taitotalo might not yet have had legal personality at the time when the call for tenders was published in September 1999, since it had not been entered in the commercial register until 6 April 2000. Clearly, the municipality of Varkaus had been both the body inviting tenders and the contracting authority. This, however, invalidated the Kilpailuneuvosto's questions. The French Government therefore proposes that the Court should ask the national court for clarification pursuant to Article 104(5) of the Court's Rules of Procedure.

22. The Court takes the view in settled case-law that it is solely for the national court before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision to determine, with due regard for the particular circumstances of the case, the need for a preliminary ruling to enable it to deliver judgment.⁴ This principle is justified, according to the Court of Justice, by the national court's direct and accurate knowledge of the facts of the case, which places it in the best position to decide on this question.⁵ Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling.⁶

4 — See, for example, the judgment in Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605, paragraph 18; judgment in Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, paragraph 17.

5 — See the judgment in Case C-83/91 *Metlicke* [1992] ECR I-4871, paragraph 23.

6 — See, for example, the judgment in Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59.

23. However, the Court of Justice also emphasises in settled case-law the need for the national court to define the factual and legislative context of the questions it is asking or, at the very least, to explain the assumptions of fact on which those questions are based so that the Court of Justice may arrive at an interpretation of Community law which will be of use to the national court.⁷ Article 234 EC does not assign to the Court of Justice the task of giving a ruling on a question referred to it by a national court where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.⁸

24. Thus the Court of Justice refuses to give a ruling on questions referred to it if it finds that the provisions of Community law are not applicable to the action.⁹ It also refuses to express an opinion when its answer would not have any bearing on the main proceedings¹⁰ or the interpretation requested is not relevant to the outcome of the action.¹¹

25. In its request for a preliminary ruling¹² the Finnish Competition Council makes it abundantly clear that it considers the interpretation of Article 1(b) of the Directive to be important because this provision of Community law is linked to the award procedure in the main action. The parties cannot agree in the main action whether Taitotalo is a legal person within the meaning of the Finnish transposing act, Paragraph 2(2) of the Julkisista hankinnoista annettu laki, established for the purpose of looking after tasks in the general interest with no industrial or commercial character. If this company is to be regarded as part of the public administration, its award of contracts is, in the Kilpailuneuvosto's view, governed by the legislation on the award of public contracts.

26. Although the presentation of the facts pertinent to the interpretation to be undertaken could be more complete, the description of the activities of the defendant, Taitotalo, and its relations with the town of Varkaus is sufficiently comprehensible for a judicial appraisal of the questions submitted for a preliminary ruling to be possible.

27. As a useful answer is therefore by no means impossible, the request for a preliminary ruling is admissible.

7 — See the judgment in Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* [1993] ECR I-393, paragraph 6.

8 — See the judgment in Joined Cases *Agorà and Excelsior* (cited in footnote 4, paragraph 20); judgment in Case 244/80 *Foglia* [1981] ECR 3043, paragraph 18.

9 — See the judgments in Case 51/74 *Hulst* [1975] ECR 79, paragraphs 38 to 42, and Case 172/84 *Celestri* [1985] ECR 963, paragraphs 12 to 16.

10 — Judgment in Case C-291/96 *Grado and Bashir* [1997] ECR I-5531, paragraphs 15 and 16.

11 — See the judgment in Case C-297/93 *Grau-Hupka* [1994] ECR I-5535, paragraph 18.

12 — Order for reference, pp. 8 and 9.

2. Interpretation of Article 1(b) of Directive 92/50

28. In its main question the Kilpailuneuvosto asks whether companies limited by shares which are controlled by public authorities are engaging in an industrial or commercial activity if they construct industrial or commercial premises for private undertakings, with the result that they cannot be deemed to have been established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character.

29. In agreement with the parties to the main proceedings, the parties who have submitted comments on the request for a preliminary ruling largely take the view that the defendant in the initial proceedings, Taitotalo, satisfies the third as well as the second requirement of the second subparagraph of Article 1(b) of Directive 92/50. In the French Government's view, these requirements have at least been met since the date on which Taitotalo was entered in the commercial register.

30. As the description of the facts in the request for a preliminary ruling reveals, Taitotalo is a company limited by shares with legal personality whose management is subject to the supervision of the town of Varkaus. The town appoints all the members of the management bodies since it holds all the shares in the company.

31. At the hearing the representative of the Finnish Government stated in response to a question from the Judge-Rapporteur that it was possible and normal practice under Finnish law for the founders of a company to act on its behalf even before it had been entered in the commercial register. The newly created legal person then subsequently assumed the liabilities thus accrued, which were treated as if they had existed as company liabilities from the outset. Until that time, however, the liability of the founders of the company was unlimited.

32. This leaves only one requirement attached to the concept of a body governed by public law in need of interpretation in the present case: has an undertaking such as the defendant been established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character?

(a) Comments by the parties

33. The French Government shares the view of the defendant, Taitotalo, that the latter is not a contracting authority within the meaning of Directive 92/50. It maintains that Taitotalo was not established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character.

34. Taitotalo does not, in its opinion, create general conditions (infrastructure) for economic activities in the municipality, but carries out building projects for individual undertakings in accordance with their specific interests. It had a commercial purpose in that it operated at normal market prices.

35. In support of its arguments Taitotalo refers to the Court's judgments in Case C-44/96 *Mannesmann Anlagenbau Austria and Others*¹³ and Case C-360/96 *BFI Holding*.¹⁴ In the former judgment it had been found that an undertaking which carried out economic activities should not be classified as a public body within the meaning of the Directive solely because it had been established by a contracting authority or because the latter provided the undertaking with funds stemming from activities in the general interest not having an industrial or commercial character. In Taitotalo's view, the Court confirmed in this ruling that an undertaking belonging to the public authorities did not fall within the scope of the Directive if it had not been established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character. The link that existed between a contracting authority and an undertaking because of the ownership structure and financing was not enough in itself to make the undertaking a public body.

36. The French Government similarly refers to the judgment in Case C-44/96

Mannesmann Anlagenbau Austria and Others.¹⁵ It believes that the Court had considered in particular whether the activity of an entity was associated with sovereign powers with a view to determining whether that entity was meeting needs in the general interest not having an industrial or commercial character. In the French Government's view, the defendant's activity in the present case has nothing to do with sovereign powers. In this respect the defendant's activity clearly differed from the activities of other entities on whose classification as contracting authorities the Court had already been called upon to give a ruling.¹⁶

37. To make the distinction, the French Government also refers to the judgment in Case C-237/99 *Commission v France*,¹⁷ in which it was ruled that the building and letting of low-rent housing meet needs in the general interest not having an industrial or commercial character. The building of low-rent housing was not, however, comparable in this respect to the construction and leasing of industrial or commercial premises.

38. The Finnish Government, on the other hand, takes the view that a company such as the defendant has been established for the specific purpose of meeting needs in the general interest of the citizens of the municipality within the meaning of Directive 92/50.

13 — [1998] ECR I-73.

14 — [1998] I-6821.

15 — Judgment cited in footnote 14.

16 — Judgment in *BFI Holding* (cited in footnote 14).

17 — [2001] ECR I-939.

39. It refers to the objectives of Directive 92/50. The coordination of procedures for the award of public service contracts in the Community was meant to remove the obstacles to the freedom to provide services and so to protect the interests of economic operators established in one Member State wanting to offer goods or services to contracting authorities established in another Member State. A further objective was to preclude any disorder in public finances, there being no controls over public contracts as there was in the case of private financing. The practical effectiveness of Directive 92/50 was threatened if a company such as that involved in the main action should not be classified as a contracting authority. Local authorities might be inclined to establish in their areas of activity companies whose contract award procedures were not then subject to the rules of the Directive.

'special' tasks. The 'special' tasks included those performed by the municipalities on the basis of specific legal provisions, examples being education, health and medical care and also regional planning and the technical implementation of infrastructure measures. The 'general' sphere, on the other hand, included the tasks which a municipality might perform on the basis of the right of self-government which it was guaranteed by the Constitution, although they must concern 'common matters'. Such matters served the interests and the physical and spiritual needs of the inhabitants of a municipality and were of relevance to the whole community.

40. In its comments the Finnish Government refers in particular to the legal status and the tasks of the municipalities in Finland. Paragraph 121 of the Finnish Constitution stated that Finland was divided into municipalities whose administration must be based on self-government by their inhabitants. This provision guaranteed the local authorities a comprehensive right to govern themselves which was enshrined in law. On this legal basis the municipalities provided a large proportion of public services in Finland. Within the municipalities' area of activity a distinction should be made between 'general' and

41. The policy of economic promotion, according to the Finnish Government, is one of the essential tasks for which the Finnish municipalities are generally responsible. Creating infrastructure for economic activities was regarded as a common matter which was in the interests of the municipality's inhabitants. Undertakings of the defendant's type were meant to create industrial and commercial infrastructure in the area of their local authority by constructing and leasing industrial and commercial premises and offering comparable services. Finnish local authorities set up 'development companies' comparable to the defendant with a view to attracting new branches of industry and commerce and promoting the development of business activities, especially when no one in the private sector could be found to create such infrastructure.

42. At the hearing the representative of the Finnish Government stated in response to the Court's written question that, while a municipality might make profits through its own economic activity, this was not intended and was merely a secondary aim. The activity of companies owned by municipalities was committed to the common good. Furthermore, Finnish law prohibited the municipalities to undertake purely economic activities. As 'development companies' in principle bore their economic risk themselves, bankruptcy was a possibility, but this was normally prevented by their owners, the municipalities, as long as there was a municipal interest in the continued existence of the company.

43. Services like those offered by the defendant might also be provided for purely private-sector purposes. The purpose for which a company was established could not therefore be inferred from its activity; in particular, the area of activity of a development company could not be unequivocally deduced even from the commercial register.

44. The Finnish Government maintains that it is the defendant's task to provide the inhabitants of the municipality of Varkaus with services in connection with economic activities and therefore in the general interest. It was for this that it had been established by the municipality. It

made no difference whether the municipality provided the services itself, or through an interposed company belonging to it, or purchased the service from a third party.

45. In reply to the question when a need has an industrial or commercial character, the Finnish Government refers to the judgment in *BFI Holding*,¹⁸ in which the Court ruled that the fact that an entity competed with private suppliers in the market concerned might indicate that the need had an industrial or commercial character. In the present case, there appeared to be no significant competition in the area in which the companies concerned operated.

46. Like the Finnish Government, the Austrian Government takes the view that the spirit and purpose of the legislation should be taken into account when determining the personal scope of the directives on the award of public contracts. In the context of the interpretation of the concept of general interest the Austrian Government refers to its written comments in Case C-373/00 *Adolf Truley*.¹⁹ The restriction of those benefiting from a given activity did not, in its view, mean that the activity itself did not serve the general interest. The promotion of

18 — Judgment in Case C-360/96 (cited in footnote 14).

19 — See my Opinion in this case, [2003] ECR I-1931, I-1935.

the location of technology undertakings in the municipality benefited consumers and the local population since, for example, the range of products and services available became wider or tax revenue was increased. Taitotalo's activity should therefore be regarded as meeting a need in the general interest.

47. Having regard to the Court's ruling in Joined Cases C-223/99 and C-260/99,²⁰ the Commission shares the view that Taitotalo's activity can be deemed to be in the general interest if it 'stimulates trade' which is in the general interest. The Commission's representative explicitly pointed out at the hearing, however, that this appraisal might be different and the stimulus was perhaps purely hypothetical.

48. Both the Commission and the Austrian Government believe that the absence of any profit motive is an indication of the existence of a need which does not have an industrial or commercial character. An industrial or commercial activity was, in the final analysis, characterised by the fact that the undertaking bore the economic risk of its activity, with the result that, if the worst came to the worst, the company in question might become insolvent.

49. At the hearing the Commission's representative also reaffirmed that the Kilpai-

luneuvosto's partly unclear statement of the facts of the case made it impossible to determine with certainty whether a company limited by shares, such as Taitotalo, was a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 92/50. The statutes of the Taitotalo company did not, at least, make formal provision for a mechanism to enable the public authorities to make good any financial losses. This did not in any way mean that the public authorities did not in fact provide securities or vouch for the defendant.

50. In the Austrian Government's view the Kilpailuneuvosto needs to make an overall assessment of the competitive situation in which Taitotalo operates. It should not, in any case, be automatically inferred from the industrial or commercial activity of the undertakings benefiting from the building projects that Taitotalo's activity was industrial or commercial.

(b) Analysis

51. What is first required is an interpretation of the term 'need in the general interest' so that it may be decided whether a company such as Taitotalo is meeting needs of this nature. Account must be taken in this process of the special features of the

²⁰ — Cited in footnote 4.

specific case so that a useful interpretation may be given. Only then is it possible to comply with the Court's requirement that 'contracting authorities' be defined in functional terms.²¹

52. The next step is to consider whether the satisfaction of the need concerned by a company such as Taitotalo is of an industrial or commercial character.

(i) Need in the general interest

53. None of the directives on the award of public contracts²² contains a legal definition of this vague legal concept. Vague legal concepts usually make interpretation difficult, since specific legal entities cannot be unequivocally assigned to them in either positive or negative terms.

54. As regards the principle of legal certainty inherent in Community law, which requires a legal provision to be clear and its

application to be predictable for all concerned,²³ this finding is problematical. An interpretation must therefore lead to objective and transparent criteria for the definition of a need as being in the general interest. But if the authors of the directive had specified needs in the general interest, a functional interpretation as to the purpose of the directive would have been far from easy. Given the objectives of the directives on the award of public contracts, however, the concept must be more accurately defined to ensure the practical effectiveness of the principles of the free movement of goods and the freedom to provide services, as the Court has ruled on several occasions in connection with the legal form of entities or the underlying provisions.²⁴

55. Hitherto the Court has described needs in the general interest as being needs closely linked to the institutional operation of the State.²⁵ They are needs which the State itself chooses to provide or over which it wishes to retain a decisive influence.²⁶

56. As I pointed out in my Opinion in Case C-373/00 *Truley v Bestattung Wien*,²⁷ the Court has meanwhile classified a number of

21 — See the judgment in *BFI Holding* (cited in footnote 14, paragraph 62), with a reference to the judgment in Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 11.

22 — Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ 1993 L 199, p. 1; 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; 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; 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.

23 — See the judgment in Case C-143/93 *Van Es Douane Agenten* [1996] ECR I-431, paragraph 27.

24 — See the judgments in *BFI Holding* (cited in footnote 14, paragraph 62), *Beentjes* (cited in footnote 21, paragraph 11), and Case C-306/97 *Commemara Machine Turf* [1998] ECR I-8761, paragraph 31.

25 — Judgment in *Mannesmann Anlagenbau Austria and Others* (cited in footnote 13, paragraph 24).

26 — Judgment in *BFI Holding* (cited in footnote 14, paragraph 51).

27 — Cited in footnote 19, paragraph 64.

very different needs as being in the general interest. Like the list of bodies governed by public law contained in Annex I to Directive 71/305/EEC,²⁸ these examples from case-law may provide some indications for an interpretation.

purchase and leasing of industrial and commercial premises, are intended to meet needs which are regarded as a matter for the local authorities in Finland. Seen through Finnish eyes, they are, then, needs which the local authorities and thus the State would themselves like to meet so that they may influence the location of industrial and commercial undertakings in the areas over which they have jurisdiction.

57. In my Opinion on Case C-373/00 *Truley v Bestattung Wien*²⁹ I also explained why I consider an interpretation of needs in the general interest depending on how the Member State itself defines its area of activity to be incompatible with the purpose of the directives on the award of public contracts. Both the autonomy of Community law and the goal of its uniform application argue for the concept of needs in the general interest to be understood and interpreted as an autonomous concept in Community law. This view is endorsed by the purpose of the directives on the award of public contracts, which is to contribute to the completion and operation of the internal market. At the same time, however, I pointed out that an autonomous interpretation of the concept based on Community law must not result in national law becoming irrelevant.

59. The Finnish Government has also explained what needs a municipality may seek to meet solely on the basis of its constitutional right of self-government, alongside its specific statutory duties: they must serve the interests and needs of the inhabitants of a municipality and be of relevance to the whole community.

60. National law thus requires that the municipalities' activities benefit their inhabitants. This suggests that the activities of municipal companies should always be classified as being in the general interest.

58. The Finnish Government has emphasised that the services offered by a company such as Taitotalo, i.e. the acquisition,

61. Taitotalo has emphasised, however, that its activities are guided primarily by the needs of its client undertakings. The question which then arises is whether this client orientation is inconsistent with an activity in the general interest. It should be

28 — Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, OJ 1971 L 185, p. 5.

29 — Cited in footnote 19, paragraphs 42 to 45.

remembered in this context that companies such as the defendant are likely to be at pains to offer suitable premises to any undertaking seeking them in the area under a municipality's jurisdiction, especially where, as in the main action, they are planning whole business centres.

62. In its judgment in *Agorà and Excel-sior*³⁰ the Court found that the organiser of a trade fair acts not only in the immediate interest of the exhibitors and those visiting the fair but also in the interest of third parties, such as consumers. This analysis also provides indicators for the facts of the main action. Here too, as in the organisation of a trade fair, it does not seem justified to infer from the restriction of the group of client undertakings that the service offered by a company such as the defendant is not in the general interest.

63. The representative of the Finnish Government stated at the hearing that the municipalities establish development companies to attract business and so to promote economic activity in their area.

64. The first supplementary question, which reveals the background against

which the construction projects in Varkaus are to be implemented, should also be considered at this juncture. I feel there is no doubt that, as a rule, the conditions for industrial or commercial activities are created not only for the sake of the undertakings themselves but primarily because the municipality hopes, among other things, that the location of industrial or commercial firms in its area will stimulate trade, generate employment opportunities for its inhabitants and increase its tax revenue. The activity of a company which succeeds in attracting business to the area is therefore helping to meet the needs of the inhabitants of the municipality and thus of the community at large.

65. The Commission argued at the hearing, on the other hand, that this stimulus might be hypothetical and the impact no more than indirect. The objection to this is that the location of undertakings in a municipality is indeed encouraged by the activities of 'development companies'.

66. An intermediate conclusion to be drawn is that companies limited by shares which are controlled by the public authorities and build industrial or commercial premises for private undertakings to create more favourable conditions for business activities in a municipality can be regarded as having been established for the specific purpose of meeting needs in the general interest. The question is, however, whether the needs do not have an industrial or commercial character.

³⁰ — Cited in footnote 4, paragraph 34.

(ii) Meeting needs not having an industrial or commercial character

69. In its past case-law the Court has outlined the following guides for interpreting the term:

67. In its judgment in *BFI Holding*³¹ the Court points out that it is clear from the second subparagraph of Article 1(b) of Directive 92/50, in its different language versions, that the absence of an industrial or commercial character is a criterion intended to clarify the meaning of the term 'needs in the general interest'. In the same judgment it also ruled that the second subparagraph of Article 1(b) of the directive draws a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character.³²

68. However, these statements simply enable the relationship among the various requirements set out in the second subparagraph of Article 1(b) of Directive 92/50 to be understood. They do not make it possible to define 'needs having an industrial or commercial character'. The question remains, then, how needs in the general interest having an industrial or commercial character can be distinguished from those not having an industrial or commercial character and whether the need met by Taitotalo for the acquisition and administration of industrial or commercial premises with a view to their being sold or leased to firms in the technology sector is or is not of an industrial or commercial character.

70. The existence of significant competition, and in particular the fact that the entity concerned is faced with competition in the relevant market, may be indicative of the satisfaction of a need having an industrial or commercial character.³³ That a given need can also be met by private undertakings does not exclude the possibility of this need not having an industrial or commercial character within the meaning of the second subparagraph of Article 1(b) of Directive 92/50.³⁴ In the Court's view, needs not having an industrial or commercial character are generally, first, those which are met otherwise than by the availability of goods or services in the market and, second, those which, for reasons associated with the general interest, the State itself chooses to meet or over which it wishes to retain a decisive influence.³⁵

71. Whether a company such as Taitotalo, which is in issue in the main proceedings, operates in a competitive environment is for the national court to verify, having regard to all its activities, as the Austrian

31 — Cited in footnote 14, paragraph 32.

32 — Cited in footnote 14, paragraph 36.

33 — Judgment in *BFI Holding* (cited in footnote 14, paragraph 49).

34 — *BFI Holding* (cited in footnote 14, paragraph 53).

35 — See, for example, the judgment in *Agorà and Excelsior* (cited in footnote 4, paragraph 3^o), with a reference to the judgment in *BFI Holding* (cited in footnote 14, paragraphs 50 and 51).

Government has proposed.³⁶ This presupposes a definition both of the market for the services in question and its geographical extent.³⁷ This is a task for the requesting court to perform in full knowledge of the facts of the case.

72. The comments of the parties suggest that there is no significant competition in the area of activity of the company concerned. This is, however, an assumption. As the existence of competition is no more than an indication, a statement about it is not essential for an interpretation of the term ‘needs having an industrial or commercial character’.

73. All the parties agree that the activity of a company such as the defendant in the main action consists of the provision of services which may also be offered by a private undertaking. The views of the parties differ, on the other hand, when it comes to analysing the need which is satisfied.

74. Taitotalo’s statutes are not available to the Court as an indication of the legal basis of its tasks. According to the statements made by the Kilpailuneuvosto and the Finnish Government, companies such as

the defendant in the main action do not have a profit motive. The representative of the Finnish Government has submitted that Finnish local government law forbids the municipalities to establish companies on purely economic grounds to make profits. This argues against an economic activity, since business activity is, as a general rule, geared to the making of a corporate profit. If the municipalities are prevented by law from establishing companies with a profit motive, the conclusion must be that there is little or no room for the establishment of companies to meet needs having an industrial or commercial character.

75. Taitotalo, on the other hand, emphasises that it implements building projects for individual undertakings in accordance with their specific interests and that it does so at normal market prices. The French Government’s view that what is decisive for the assessment of the task of companies such as Taitotalo is the activity of the entity concerned and not the activity of those for whom the buildings are constructed must be endorsed in this context.

76. It has already been pointed out during the discussion of needs in the general interest that limiting the direct beneficiaries or recipients of an activity or service does not argue against the activity being offered in the interest of the community at large. Nor can it be inferred from the fact that the beneficiaries or recipients of an activity or service are undertakings operating com-

³⁶ — See, for example, the judgment in *Agorà and Excelsior* (cited in footnote 4, paragraph 42).

³⁷ — See the judgment in Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 31, on a point of competition law.

mercially that the entity offering them a certain activity or service is also doing so commercially. It is possible, after all, to conceive of many needs not having an industrial or commercial character which the State chooses, for reasons of public welfare, to meet itself or through entities forming part of it, in order to retain a decisive influence and which arise only in the case of undertakings operating commercially.

economic operators established in one Member State who wish to offer goods or services to contracting authorities established in another Member State. The risk of preference being given to domestic tenderers or certain applicants in the award of contracts by contracting authorities — possibly without due regard for the economic and financial consequences — is to be avoided. The Community legislature intended that the directives should be applied to entities which escape market forces in whole or in part.³⁹

77. I have proposed, first in my Opinion in *Agorà and Excelsior* and latterly in my Opinion in *Truley*, that one of the relevant factors when considering whether an entity meets needs not having an industrial or commercial character is whether it bears the financial risk inherent in its decisions. If it must bear the financial consequences of its decisions itself, that is likely to indicate an industrial or commercial activity.³⁸

78. This criterion enables the spirit and purpose of Directive 92/50 to be taken into account in its interpretation. According to its recitals, the aim of Directive 92/50 is to remove obstacles to the freedom to provide services and so to protect the interests of

79. The determining factor in the examination of the requirements for the existence of a body governed by public law is therefore whether there is a danger of its being guided in its decisions on the award of contracts by other than economic considerations.⁴⁰ If this is the case, the achievement of the freedom to provide services is at risk, justifying the application of the directives on public contracts.⁴¹ Where, however, an entity has to bear the economic risk of its activity itself, it is in principle compelled to allow itself to be guided by economic considerations and will choose its contractual partners accordingly.

38 — Opinions in Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3607, paragraph 67, and in *Adolf Truley* (cited in footnote 19, paragraph 95).

39 — As already stated by Advocate General Léger in his Opinion in Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraph 69.

40 — Judgment in Case C-237/99 *Commission v France* (cited in footnote 17, paragraph 42); judgment in Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 17.

41 — Judgment in *Commission v France* (cited in footnote 17, paragraph 41); judgment in *University of Cambridge* (cited in footnote 40, paragraph 16).

80. In the case of undertakings which meet needs in the general interest not having an industrial or commercial character there are always likely to be means by which the public authorities can offset any losses so that it does not become impossible for such undertakings to perform the tasks entrusted to them. The public authorities will refuse to give their support only when they have no further interest in the needs being met because they have ceased to be in the general interest.

81. Applying this yardstick to the defendant in the main proceedings, the referring court should begin by considering the extent to which Taitotalo's statutes require the town of Varkaus to make good any deficits incurred by Taitotalo. An obligation of this nature might also ensue from the Member State's relevant legislation or from customary practice. What should be considered in this context is not only whether there is an explicit provision on the offsetting of deficits but also standard practice. If, for example, the town of Varkaus does in fact make good or stand surety for any deficits incurred by the defendant in the main proceedings, the referring court must take this into account.

82. The Finnish Government's comments at the hearing indicate that the municipalities usually prevent companies they own from becoming bankrupt.

83. If, however, Taitotalo does indeed bear its economic and financial risk itself, without any prospect of assistance from the public authorities, it is meeting a need which has an industrial or commercial character.

84. The conclusion is therefore that the answer to the Kilpailuneuvosto's question is that a company limited by shares which is owned and controlled by a town and which provides design and construction services for a building project that includes industrial or commercial premises which are leased to undertakings in the general interest should be regarded as a contracting authority within the meaning of Article 1(b) of Directive 92/50/EEC relating to the coordination of procedures for the award of public contracts if it is not required to bear the economic risk of its activity alone, because there is a possibility of any losses being offset by the town.

3. *First supplementary question*

(a) Comments by the parties

85. All parties who have submitted comments on this supplementary question believe that the fact that the town's building project is intended to create the conditions for industrial or commercial activities in a municipality is relevant to the assessment of the matter at issue.

86. Taitotalo emphasises, however, that this question has nothing to do with the case in which the Kilpailuneuvosto is in fact required to give a ruling, since it does not concern any building project of the town itself, as the supplementary question might indicate, but the improvement it — the defendant — achieves in the business activities of individual undertakings by implementing the project.

(b) Analysis

87. The supplementary question concerning the general interest has essentially been answered in the context of the interpretation of Article 1(b) of Directive 92/50.

88. The location of new industrial and commercial activities and the associated promotion of the economy are needs in the general interest and so form part of the requirement set out in the first indent of the second subparagraph of Article 1(b) of Directive 92/50, which must be satisfied if an entity is to be defined as a body governed by public law within the meaning of the legislation.

89. It is therefore relevant to the assessment of the matter at issue that a building project implemented by the town is meant to create the conditions for business activities in the municipality, because a need in the general interest is then satisfied.

4. *Second supplementary question*

(a) Comments by the parties

90. Taitotalo and the Commission take the view that the leasing of the premises to be built to only one undertaking means that Taitotalo is not meeting needs in the general interest.

91. The Finnish, French and Austrian Governments, on the other hand, believe that the leasing of the buildings to be constructed to only one undertaking is irrelevant to the matter at issue.

(b) Analysis

92. As has already been stated, the general interest in the meeting of a need cannot be determined from the number of those directly benefiting from an activity or service.

93. The answer to the second supplementary question must therefore be that the leasing of the buildings to be constructed to only one undertaking is irrelevant to the assessment of the matter at issue.

VI — Conclusion

94. In view of the above deliberations I propose that the questions submitted by the Kilpailuneuvosto should be answered as follows:

A company limited by shares which is owned and controlled by a town and which awards contracts for design and construction services for a building project that includes industrial and commercial premises leased to undertakings in the general interest must be regarded as a contracting authority within the meaning of Article 1(b) of Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts if it is not required to bear the economic risk of its activity alone, because there is a possibility of any losses being offset by the town.

It is relevant to the assessment of the matter at issue that a building project implemented by the town is meant to create the conditions for industrial or commercial activities in the municipality, because a need in the general interest is then met.

It is not relevant to the assessment of the matter at issue that the buildings to be constructed are leased to only one undertaking.