

JUDGMENT OF THE COURT
10 November 1998 *

In Case C-360/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Gerechtshof te Arnhem (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Gemeente Arnhem,

Gemeente Rheden

and

BFI Holding BV,

on the interpretation of Articles 1(b) and 6 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),

* Language of the case: Dutch.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, P. J. G. Kapteyn, J.-P. Puissochet and P. Jann (Rapporteur) (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, D. A. O. Edward, L. Sevón, M. Wathelet, R. Schintgen and K. M. Ioannou, Judges,

Advocate General: A. La Pergola,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Gemeente Arnhem and Gemeente Rheden, by L. H. van Lennep, of the Hague Bar,
- BFI Holding BV, by P. Glazener, of the Amsterdam Bar, and J. J. M. Essers, of the Utrecht Bar,
- the Netherlands Government, by A. Bos, Legal Adviser, Ministry of Foreign Affairs, acting as Agent,
- the Danish Government, by P. Biering, Head of Directorate, Ministry of Foreign Affairs, acting as Agent,
- the French Government, by Catherine de Salins, Head of Sub-directorate in the Legal Directorate, Ministry of Foreign Affairs, and P. Lalliot, Secretary for Foreign Affairs, in the same Directorate, acting as Agents,

- the Austrian Government, by Wolf Okressek, Ministerialrat in the Federal Chancellor's Office, acting as Agent,
- the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

having regard to the written answers given to the questions put by the Court:

- for Gemeente Arnhem and Gemeente Rheden, by L. H. van Lennep,
- for BFI Holding BV, by P. Glazener,
- for the Netherlands Government, by J. G. Lammers, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,
- for the Danish Government, by J. Molde, Legal Adviser and Head of Directorate, Ministry of Foreign Affairs, acting as Agent,
- for the German Government, by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent,
- for the Spanish Government, by S. Ortiz Vaamonde, Abogado del Estado, acting as Agent,

- for the French Government, by K. Rispal-Bellanger, Head of Sub-directorate (International Economic Law and Community Law), in the Legal Directorate, Ministry of Foreign Affairs, acting as Agent, and P. Lalliot,
- for the Austrian Government, by W. Okresek,
- for the Finnish Government, by H. Rotkirch, Ambassador, Head of Legal Affairs in the Ministry of Foreign Affairs, acting as Agent,
- for the Swedish Government, by L. Nordling, Rättschef in the Ministry of Foreign Affairs, acting as Agent, and
- for the United Kingdom Government, by J. E. Collins, of the Treasury Solicitor's Department, acting as Agent, and K. P. E. Lasok QC and R. Williams, Barrister,
- for the Commission, by H. van Lier,

after hearing the oral observations of Gemeente Arnhem and Gemeente Rheden, represented by L. H. van Lennep; of BFI Holding BV, represented by P. Glazener and J. J. M. Essers; of the Netherlands Government, represented by J. S. van den Oosterkamp, Deputy Legal Adviser, Ministry of Foreign Affairs, acting as Agent; of the French Government, represented by P. Lalliot; of the Austrian Government, represented by M. Fruhmann, of the Federal Chancellor's Office, acting as Agent; of the United Kingdom Government, represented by J. E. Collins, K. P. E. Lasok QC and R. Williams; and of the Commission, represented by H. van Lier, at the hearing on 18 November 1997,

after hearing the Opinion of the Advocate General at the sitting on 19 February 1998,

gives the following

Judgment

- 1 By judgment of 29 October 1996, received at the Court Registry on 5 November 1996, the Gerechtshof (Regional Court of Appeal), Arnhem, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty seven questions on the interpretation of Articles 1(b) and 6 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).
- 2 Those questions were raised in proceedings brought by Gemeente Arnhem and Gemeente Rheden (Municipalities of Arnhem and Rheden, hereinafter 'the municipalities') against BFI Holding BV (hereinafter 'BFI'), which claims that the award of a contract for refuse collection should be subject to the procedure laid down in the abovementioned directive.

The applicable Community legislation

- 3 Article 1 of Directive 92/50 provides:

'For the purposes of this Directive:

...

- (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.

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 or of categories of such bodies governed by public law 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;

...'

- 4 Article 6 of Directive 92/50 provides:

'This Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.'

The Netherlands provisions

- 5 Directive 92/50 was transposed into Netherlands law by a framework law of 31 March 1993 (Stbl. 12) relating to the Community rules for the award of public contracts for the supply of goods, the execution of works and the supply of services, combined with Article 13 of the order of 4 June 1993 (Stbl. 305), as amended by the order of 30 May 1994 (Stbl. 379).
- 6 Articles 10.10 and 10.11 of the Wet Milieubeheer (Law on the Environment) require municipalities to ensure that, at least weekly, household refuse is collected from all properties in their districts where waste may regularly accumulate. The municipalities must designate an authority to undertake responsibility for such collection.

- 7 Under Article 2 of the Afvalstoffenverordening (Regulation on Waste) of Gemeente Rheden, as amended on 21 December 1993, the collecting authority is the Dienst Openbare Werken en Woningzaken, Afdeling Wegen en Reiniging, or such independent service as may replace it. Article 2 of the Regulation on Waste of Gemeente Arnhem, as amended on 4 July 1994, designates as the collecting authority the Dienst Milieu en Openbare Werken. It also states that '[a]s from 1 July 1994, that service shall be provided by the company ARA, an independent municipal cleaning service'.

The dispute in the main proceedings

- 8 In 1993 the municipalities planned merging the municipal refuse collection services and entrusting them to a new legal entity. By decisions of 6 and 28 June 1994 the Municipalities of Arnhem and Rheden decided to establish ARA, a public limited company, and to entrust to it a series of tasks defined by law in the field of waste collection and, in the case of Gemeente Arnhem, cleaning of the municipal road network.
- 9 ARA was incorporated on 1 July 1994. Article 2 of its statutes provides:

'1. The objects of the company shall be:

- (a) the performance of all economic operations aimed at collecting (or having collected and, so far as possible, recycling or having recycled), in an efficient, effective and environmentally responsible manner, waste such as household refuse, industrial waste and separable parts thereof to be specified, together with activities relating to the cleaning of highways, the elimination of vermin and disinfection;

(b) the (joint) setting up, cooperation with, participation in, the (joint) provision of management and supervision for, as well as the taking over and financing of, other undertakings whose activities have any connection with the objects set out under (a);

(c) the performance of all economic operations which are connected with the foregoing or may be conducive to the operations, activities and action defined above (provided that needs in the general interest are thereby met).

2. The company shall carry out such activities in a socially acceptable manner.'

¹⁰ Under Article 6 of its statutes, the shareholders of ARA may only be legal persons governed by public law or companies at least 90% of whose shares are held by such entities and, in addition, the company itself. Under Article 13(2) of the statutes, the municipalities are to appoint at least five of the minimum seven and maximum nine of the members of the supervisory board.

¹¹ The framework agreements which the municipalities concluded with ARA specify, in particular in their preambles, that the municipalities wish to have the tasks in question carried out exclusively by ARA, and accordingly they grant it concessions for that purpose.

- 12 As far as ARA's remuneration is concerned, Article 8 of the framework agreement between Gemeente Rheden and ARA provides, in particular:

'8.1 Rheden shall pay ARA remuneration for services rendered, at a rate to be specified.

8.2 The remuneration for services referred to in the preceding paragraph shall be defined in a financial clause to be added to the specifications and quality standards for each operation contained in the partial contracts.

8.3 The actual remuneration for services rendered will be fixed:

(a) either on the basis of the unit prices agreed beforehand for each operation, result or batch of work;

(b) or on the basis of a fixed price agreed beforehand for a particular task;

(c) or on the basis of an invoice for costs actually incurred.

...'

13 Article 9 of the framework agreement contains the following provisions:

‘9.1 Advances on the above remuneration shall be paid on dates to be specified or on the basis of groups of operations, results or batches of work. Such advances shall be deducted from the final payments.

9.2 If ARA invoices and/or carries out operations for which payment is collected on behalf of Gemeente Rheden or receives any other payment from third parties in the name of Gemeente Rheden, that income must be transferred to the municipality in accordance with procedures to be agreed upon. As regards risks associated with the payment of such amounts, more detailed rules shall also be adopted.’

14 The service agreement for the collection of household refuse concluded between Gemeente Rheden and ARA provides, in Article 7, that the remuneration to be paid to ARA by the municipality for the collection and transport of waste and the method of calculation of such remuneration are to be set out in the implementation plan.

15 The same procedures for remuneration were agreed between Gemeente Arnhem and ARA.

16 Although initially ARA carried out all collection of household refuse, street cleaning and collection of industrial waste, those activities were subsequently split between it and Aracom, a public limited company. Whilst ARA continues to collect household refuse, Aracom was entrusted with the collection of industrial waste. Also, a holding company, ARA Holding NV, was incorporated and holds all the capital of those two companies.

- 17 BFI is a private undertaking whose business includes the collection and treatment of household and industrial waste.
- 18 On 2 November 1994 BFI brought proceedings before the Arrondissementsrechtbank (District Court), Arnhem, for a declaration that Directive 92/50 applied to the award of the contract granted to ARA, with the result that the municipalities should observe the tendering procedure laid down by that directive. By judgment of 18 May 1995 the Arrondissementsrechtbank, Arnhem, found in favour of BFI. It considered that the task in question had not been entrusted to an authority on the basis of an exclusive right which it enjoyed pursuant to a published law, regulation or administrative provision, so that the exception provided for in Article 6 of the directive was inapplicable.
- 19 The municipalities appealed against that decision to the Gerechtshof, Arnhem.
- 20 In its interlocutory judgment of 25 June 1996 the Gerechtshof, Arnhem, rejected the Arrondissementsrechtbank's interpretation to the effect that the contract had not been awarded to an authority on the basis of an exclusive right which it enjoyed pursuant to a published law, regulation or administrative provision within the meaning of Article 6 of Directive 92/50.
- 21 It took the view that, under the Wet Milieubeheer, the municipalities are under an obligation to ensure that household refuse is collected. In order to discharge that obligation, they appointed ARA, by orders of 6 and 28 June 1994, as sole operator responsible for waste collection. They also expressly amended their regulations on waste, which specifically grant ARA an exclusive right, since they prohibit any other body from collecting household refuse without the prior authority of the municipal council.

22 The Gerechtshof, Arnhem, therefore considered that ARA fell within the exception provided for in Article 6 of Directive 92/50 in so far as it was to be regarded as a body governed by public law within the meaning of Article 1(b) of Directive 92/50.

23 In those circumstances the national court stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

‘1. For the purposes of interpreting Article 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (the Directive), is the first indent of the second subparagraph of Article 1(b) of the Directive, which specifies that 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, to be interpreted as distinguishing

(i) between needs in the general interest and needs having an industrial or commercial character, or

(ii) 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?

2. If the answer to the first question is that the distinction to be drawn is that set out in (i),

(a) is the phrase “needs in the general interest” to be understood as meaning that there can be no question of meeting needs in the general interest where private undertakings meet such needs?

and

(b) if so, is the phrase “needs having an industrial or commercial character” to be understood as meaning that needs having an industrial or commercial character are met whenever private undertakings meet such needs?

3. If the answer to the first question is that the distinction to be drawn is that set out in (ii), is the difference 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” to be determined according to whether (competing) private undertakings meet such needs or not?

4. Is the requirement that the body must be established “for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character” to be interpreted as meaning that such a “specific purpose” can exist only where the body was established exclusively to meet such needs?

5. If not, must a body meet needs in the general interest, not having an industrial or commercial character, almost exclusively, substantially, preponderantly or to some other degree in order to be or remain able to meet the requirement that it must be established for the specific purpose of meeting such needs?

6. Does it make any difference to the answers to Questions 1 to 5 whether the needs in the general interest, not having an industrial or commercial character, which the body was set up to meet, derive from legislation in the formal sense, from administrative provisions, from acts of the administration or otherwise?

7. Does it make any difference to the answer to Question 4 if responsibility for the commercial activities is entrusted to a separate legal entity forming part of a single group or concern within which activities meeting needs in the general interest are also carried out?’

- 24 It must be noted at the outset that, in its written observations, the French Government submits that contracts between the municipalities and ARA may be regarded as public service concessions which, as such, fall outside the scope of Directive 92/50. It maintains that, for there to be a public service concession as defined in Community law, the contracting authority must be remunerated either on the basis of its right to operate the service or on the basis of that right and a price linked to it.
- 25 Without its being necessary to interpret the term public service concession, which is not at issue in the questions from the national court, it need merely be pointed out that it is clear from the information given by the municipalities in response to a question put to them by the Court, and in particular from Articles 8 and 9 of the framework agreement concluded between Gemeente Rheden and ARA and from Article 7 of the service agreement for the collection of household refuse concluded between the same parties, that the remuneration paid to ARA comprises only a price and not the right to operate the service.
- 26 The French Government also maintains that ARA should be classified as an association formed by one or more authorities within the meaning of Article 1(b) of Directive 92/50. Such an association is, in its view, a contracting authority *ipso jure*, there being no need to consider whether it is a body governed by public law.
- 27 It must be observed, as stressed by the Advocate General in points 40 and 41 of his Opinion, that an entity cannot fall simultaneously within both the categories described in Article 1(b) of Directive 92/50 and that the term association has only a residual function, a fact confirmed by its position in the wording of that provision. It is therefore necessary to consider whether a company such as ARA, although

set up on the initiative of two municipalities, can be characterised as a body governed by public law.

- 28 In that connection, it is clear from the second subparagraph of Article 1(b) of Directive 92/50 that a body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law (see Case C-44/96 *Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck* [1998] ECR I-73, paragraph 20).
- 29 As the Court held in paragraph 21 of *Mannesmann Anlagenbau Austria*, cited above, the three conditions set out in that provision are cumulative.
- 30 The national court considers that the second and third conditions are fulfilled. Its questions thus relate only to the first condition.

The first question

- 31 By its first question, the national court seeks clarification as to the relationship between the terms 'needs in the general interest' and 'not having an industrial or commercial character'. It asks in particular whether the latter expression is intended to limit the term 'needs in the general interest' to those which are not of an industrial or commercial character or, on the contrary, whether it means that all needs in the general interest are not industrial or commercial in character.

- 32 In that regard, 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' as used in that provision.
- 33 In paragraphs 22 to 24 of *Mannesmann Anlagenbau Austria*, cited above, the Court adopted the same interpretation in relation to the second subparagraph of Article 1(b) 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), a provision which is, essentially, the same as the second subparagraph of Article 1(b) of Directive 92/50.
- 34 Moreover, the only interpretation capable of guaranteeing the effectiveness of the second subparagraph of Article 1(b) of Directive 92/50 is that it creates, within the category of needs in the general interest, a sub-category of needs which are not of an industrial or commercial character.
- 35 If the Community legislature had considered that all needs in the general interest were not of an industrial or commercial character it would not have said so because, in that context, the second component of the definition would serve no purpose.
- 36 The answer to the first question must therefore be that the second subparagraph of Article 1(b) of Directive 92/50 must be interpreted as meaning that the legislature drew 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.

The second question

- 37 The answer given to the first question makes it unnecessary to answer the second.

The third question

- 38 By its third question, the national court asks essentially whether the term 'needs in the general interest, not having an industrial or commercial character' excludes needs which are also met by private undertakings.
- 39 According to BFI, the possibility of a body governed by public law must be ruled out where private undertakings may carry out the same activities, such activities therefore being capable of being performed on a competitive basis. In this case, more than half the municipalities in the Netherlands entrust the collection of waste to private economic operators. There is thus a commercial market and the entities active in it do not constitute bodies governed by public law within the meaning of Article 1(b) of Directive 92/50.
- 40 It must first be emphasised here that the first indent of the second subparagraph of Article 1(b) of Directive 92/50 refers only to the needs which the entity must meet and does not say whether or not those needs may also be met by private undertakings.

- 41 Next, it must be borne in mind that the purpose of coordinating at Community level the procedures for the award of public service contracts is to eliminate barriers to the freedom to provide services and therefore to protect the interests of economic operators established in a Member State who wish to offer goods or services to contracting authorities in another Member State.
- 42 Consequently, the objective of Directive 92/50 is to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities (see, to that effect, *Mannesmann Anlagenbau Austria*, cited above, paragraph 33).
- 43 The fact that there is competition is not sufficient to exclude the possibility that a body financed or controlled by the State, territorial authorities or other bodies governed by public law may choose to be guided by other than economic considerations. Thus, for example, such a body might consider it appropriate to incur financial losses in order to follow a particular purchasing policy of the body upon which it is closely dependent.
- 44 Moreover, since it is hard to imagine any activities that could not in any circumstances be carried on by private undertakings, the requirement that there should be no private undertakings capable of meeting the needs for which the body in question was set up would be liable to render meaningless the term 'body governed by public law' used in Article 1(b) of Directive 92/50.
- 45 It is of no avail to object that, by recourse to Article 6 of Directive 92/50, the contracting authorities could evade competition from private undertakings which considered themselves capable of meeting the same needs in the general interest as the entity concerned. The protection of competitors of bodies governed by public law is already assured by Article 85 et seq. of the EC Treaty since the application of Article 6 of Directive 92/50 is subject to the condition that the laws, regulations or administrative provisions on which the body's exclusive right is based must be compatible with the Treaty.

- 46 It was for that reason that, in *Mannesmann Anlagenbau Austria*, cited above, paragraph 24, the Court held, without considering whether private undertakings might meet the same needs, that a State printer met needs in the general interest not having an industrial or commercial character.
- 47 It follows that Article 1(b) of Directive 92/50 may apply to a particular body even if private undertakings meet, or may meet, the same needs as it and that the absence of competition is not a condition necessarily to be taken into account in defining a body governed by public law.
- 48 It must be emphasised, however, that the existence of competition is not entirely irrelevant to the question whether a need in the general interest is other than industrial or commercial.
- 49 The existence of significant competition, and in particular the fact that the entity concerned is faced with competition in the marketplace, may be indicative of the absence of a need in the general interest, not having an industrial or commercial character.
- 50 Conversely, the latter needs are as a general rule met otherwise than by the availability of goods or services in the marketplace, as evidenced by the list of bodies governed by public law contained in Annex I to Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as amended by Directive 93/37, to which Article 1(b) of Directive 92/50 refers. Although not exhaustive, that list is intended to be as complete as possible.

- 51 An analysis of that list shows that in general the needs in question are ones which, for reasons associated with the general interest, the State itself chooses to provide or over which it wishes to retain a decisive influence.
- 52 In this case it is undeniable that the removal and treatment of household refuse may be regarded as constituting a need in the general interest. Since the degree of satisfaction of that need considered necessary for reasons of public health and environmental protection cannot be achieved by using disposal services wholly or partly available to private individuals from private economic operators, that activity is one of those which the State may require to be carried out by public authorities or over which it wishes to retain a decisive influence.
- 53 In the light of the foregoing, the answer to the third question must be that the term 'needs in the general interest, not having an industrial or commercial character' does not exclude needs which are or can be satisfied by private undertakings as well.

The fourth, fifth and seventh questions

- 54 By its fourth, fifth and seventh questions, the national court asks whether the condition that a body must have been set up for the specific purpose of meeting needs in the general interest means that the activity of that body must, to a considerable extent, be concerned with meeting such needs.
- 55 It must be borne in mind here that, in *Mannesmann Anlagenbau Austria*, cited above, paragraph 25, the Court held that it was immaterial whether, in addition to its duty to meet needs in the general interest, an entity was free to carry out other

activities. The fact that meeting needs in the general interest constitutes only a relatively small proportion of the activities actually pursued by that entity is also irrelevant, provided that it continues to attend to the needs which it is specifically required to meet.

- 56 Since the status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character, it is *a fortiori* immaterial that commercial activities may be carried out by a separate legal person forming part of the same group or concern as it.
- 57 Conversely, the fact that one of the undertakings of a group or concern is a body governed by public law is not sufficient for all of them to be regarded as contracting authorities (see, to that effect, *Mannesmann Anlagenbau Austria*, cited above, paragraph 39).
- 58 The answer to the fourth, fifth and seventh questions must therefore be that the status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character. It is likewise immaterial that commercial activities may be carried out by a separate legal person forming part of the same group or concern as it.

The sixth question

- 59 By its sixth question, the national court, finally, wishes to ascertain what inferences are to be drawn from the fact that the provisions setting up the entity in question

and specifying the needs which it must meet are in the nature of laws, regulations or administrative or other provisions.

60 It must be stated here that, whilst the requirement that the exclusive right be based on published laws, regulations or administrative provisions must be met for Article 6 of Directive 92/50 to be applicable, it forms no part of the definition of a body governed by public law.

61 The wording of the second subparagraph of Article 1(b) of Directive 92/50 makes no reference to the legal basis of the activities of the entity concerned.

62 Furthermore, it must be borne in mind that, with a view to giving full effect to the principle of freedom of movement, the term 'contracting authority' must be interpreted in functional terms (see, to that effect, Case 31/87 *Beentjes v Netherlands State* [1988] ECR 4635, paragraph 11). In view of that need, no distinction should be drawn by reference to the legal form of the provisions setting up the entity and specifying the needs which it is to meet.

63 The answer to the sixth question must therefore be that the second subparagraph of Article 1(b) of Directive 92/50 must be interpreted as meaning that the existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal form of the provisions in which those needs are mentioned being immaterial in that respect.

Costs

- 64 The costs incurred by the Netherlands, Danish, German, Spanish, French, Austrian, Finnish, Swedish and United Kingdom Governments and by the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Gerechtshof, Arnhem, by judgment of 29 October 1996, hereby rules:

1. 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 service contracts must be interpreted as meaning that the legislature drew 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.
2. The term 'needs in the general interest, not having an industrial or commercial character' does not exclude needs which are or can be satisfied by private undertakings as well.

3. The status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character. It is likewise immaterial that commercial activities may be carried out by a separate legal person forming part of the same group or concern as it.
4. The second subparagraph of Article 1(b) of Directive 92/50 must be interpreted as meaning that the existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal form of the provisions in which those needs are mentioned being immaterial in that respect.

Rodríguez Iglesias

Kapteyn

Puissochet

Jann

Mancini

Moitinho de Almeida

Edward

Sevón

Wathelet

Schintgen

Ioannou

Delivered in open court in Luxembourg on 10 November 1998.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President