JUDGMENT OF THE COURT (Sixth Chamber)

12 July 2001 *

In Case C-399/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by Tribunale Amministrativo Regionale per la Lombardia (Italy) for a preliminary ruling in the proceedings pending before that court between

Ordine degli Architetti delle Province di Milano e Lodi,

Piero De Amicis,

Consiglio Nazionale degli Architetti,

Leopoldo Freyrie

and

Comune di Milano,

and

Pirelli SpA,

Milano Centrale Servizi SpA,

Fondazione Teatro alla Scala, formerly Ente Autonomo Teatro alla Scala,

* Language of the case: Italian.

on the interpretation 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),

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris (Rapporteur), J.-P. Puissochet, R. Schintgen and F. Macken, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Ordine degli Architetti delle Province di Milano e Lodi and Piero de Amicis, by P. Mantini, avvocato,

— Consiglio Nazionale degli Architetti and L. Freyrie, by A. Tizzano, avvocato,

— City of Milan, by F.A. Roversi Monaco, G. Pittalis, S. De Tuglie, L.G. Radicati di Brozolo, avvocati, and A. Kronshagen, avocat,

— Pirelli SpA, by G. Sala, A. Pappalardo and G. Greco, avvocati,

— Milano Centrale Servizi SpA, by G. Sala, A. Pappalardo and L. Decio, avvocati,

— Fondazione Teatro alla Scala di Milano, by P. Barile, S. Grassi and V.D. Gesmundo, avvocati,

— Italian Government, by U. Leanza, acting as Agent, assisted by P.G. Ferri and subsequently by M. Fiorilli, Avvocati dello Stato,

— Commission of the European Communities, by P. Stancanelli and M. Nolin, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Ordine degli Architetti delle Province di Milano e Lodi, represented by P. Mantini; the Consiglio Nazionale degli Architetti, represented by F. Sciaudone, avvocato; the City of Milan, represented by L.G. Radicati di Brozolo; Pirelli SpA, represented by G. Sala, A. Pappalardo and G. Greco; Milano Centrale Servizi SpA, represented by L. Decio; Fondazione Teatro alla Scala, represented by V.D. Gesmundo; the Italian Government, represented by M. Fiorilli; and the Commission, represented by P. Stancanelli, at the hearing on 12 October 2000,

after hearing the Opinion of the Advocate General at the sitting on 7 December 2000,

gives the following

Judgment

1 By order of 11 June 1998, received at the Court on 9 November 1998, the Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court of Lombardy) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation 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, hereinafter 'the Directive').

2 Those questions were raised in the course of two actions brought against the City of Milan. The plaintiffs in the first action are the Ordine degli Architetti delle Province di Milano e Lodi (Order of Architects of the Provinces of Milan and Lodi; hereinafter 'the Order of Architects') and Piero de Amicis, an architect; the second action was brought by the Consiglio Nazionale degli Architetti (National Council of Architects; hereinafter 'the CNA') and Leopoldo Freyrie, an architect. Pirelli SpA (hereinafter 'Pirelli'), Milano Centrale Servizi SpA (hereinafter 'MCS') and the Fondazione Teatro alla Scala, formerly the Ente Autonomo Teatro alla Scala (hereinafter 'the FTS') were joined as defendants.

Legal background

Community legislation

3 The Directive was adopted on the basis of Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC), Article 66 of the EC Treaty (now Article 55 EC) and Article 100a of the EC Treaty (now, after amendment, Article 95 EC).

4 According to the second recital in the preamble to the Directive, 'the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts'.

5 According to the tenth recital, 'to ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community'.

6 Under Article 1(a), (b) and (c) of the Directive:

'For the purposes of this Directive:

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

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

...

(c) a "work" means the outcome of building or civil engineering, works taken as a whole that is sufficient of itself to fulfil an economic and technical function'.

7 The 'activities referred to in Annex II', mentioned in Article 1(a) of the Directive, are the building and civil engineering works in Class 50 of the general industrial

classification of economic activities within the European Communities (NACE). The construction of buildings is expressly listed among those activities.

8 Article 3(4) of the Directive provides:

'Member States shall take the necessary steps to ensure that a concessionaire other than a contracting authority shall apply the advertising rules listed in Article 11(4), (6), (7), and (9) to (13), and in Article 16, in respect of the contracts which it awards to third parties when the value of the contracts is not less than [EUR] 5 000 000'.

9 Articles 4 and 5 specify the types of contract to which the Directive does not apply, namely (i) contracts governed by Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1); (ii) works contracts which are declared secret or the execution of which must be accompanied by special security measures or when the protection of the basic interests of the Member State's security so requires; and (iii) public contracts governed by different procedural rules and awarded in pursuance of certain international agreements or pursuant to the particular procedure of an international organisation.

10 Article 6(1) states that the Directive applies to public works contracts whose estimated value net of VAT is not less than [EUR] 5 000 000.

11 With respect to the procedures for awarding public works contracts, Article 7(2) and (3) of the Directive specify the circumstances in which contracting authorities may employ negotiated procedures, these being defined in Article 1(g) of the Directive as procedures where 'contracting authorities consult contractors of their choice and negotiate the terms of the contract with one or more of them'.

12 Article 7(2) of the Directive lists three cases in which the negotiated procedure must be preceded by publication of a contract notice. Article 7(3) lists five cases in which prior publication of a contract notice is not necessary: (i) where an open or restricted procedure has proved unsuccessful; (ii) when, for practical or legal reasons, the works may only be carried out by a particular contractor; (iii) in cases of extreme urgency brought about by events unforeseen by the contracting authorities; (iv) in cases requiring additional works not provided for in a contract which has already been awarded; and (v) for works consisting in the repetition of similar works provided for under an earlier contract, awarded in accordance with the open procedure or the restricted procedure.

13 Article 7(4) of the Directive states that, in all other cases, contracting authorities are to award their public works contracts in accordance with the open procedure or the restricted procedure.

14 Under Article 11(2) of the Directive, a contracting authority which wishes to award a public works contract by open, restricted or negotiated procedure in one of the cases referred to in Article 7(2) must advertise that intention by means of a notice.

15 Under Article 11(9) of the Directive, the notice must be published in full in the *Official Journal of the European Communities*.

National legislation

Italian legislation on urban development

16 It is clear from the documents before the Court that in Italy construction is subject to the control of the public authorities. Under Article 1 of Law No 10 of 28 January 1977 laying down rules concerning the suitability of land for development (GURI No 27 of 29 January 1977, hereinafter 'Law No 10/77'), '[a]ny activity involving the urban development of municipal land and building works on such land entails liability to contribute to the related costs and the execution of such works is conditional upon permission being granted by the mayor'.

17 Article 3 of Law No 10/77 provides, under the heading, 'Charge for the grant of building permission', that 'the grant of permission entails liability to pay a proportion of the urban development and construction costs' (hereinafter 'the infrastructure contribution').

18 The infrastructure contribution is paid to the municipality when permission is granted. However, under Article 11(1) of Law No 10/77, 'by way of total or partial set-off against the amount due, the holder of the permission may

undertake to execute the infrastructure works directly, in accordance with the procedures and standards laid down by the municipality'.

19 Under Article 4(1) of Law No 847 of 29 September 1964 — entitled 'Authorisation for municipalities and groups of municipalities to arrange loans for the purchase of land for the purposes of Law No 167 of 18 April 1962' — as amended by Article 44 of Law No 865 of 22 January 1971 and Article 17 of Law No 67 of 11 March 1988 (hereinafter 'Law No 847/64'), primary infrastructure works comprise residential streets, leisure areas, parking space, sewers, networks for the distribution of water, electricity and gas, street lighting and formal parks and gardens.

20 Under Article 4(2) of Law No 847/64, secondary infrastructure works comprise pre-school facilities; primary and secondary schools; buildings and campuses to accommodate higher and further education facilities; local markets; municipal branch offices; churches and other religious buildings; local sports facilities; community centres; cultural and health and fitness facilities; and local parks and gardens.

21 Provisions similar to those in Article 11(1) of Law No 10/77, albeit relating solely to primary infrastructure works, were already included in Article 31(4) of Law No 1150 of 17 August 1942 on urban development (GURI No 244 of 17 August 1942), as amended by Framework Law No 765 of 6 August 1967 (hereinafter 'Law No 1150/42'), which provides that 'in no case shall permission to build be granted unless the primary infrastructure is already in place or unless the municipalities have made provision for its installation within three years thereafter or unless private persons undertake to execute those works at the same time as the construction work in respect of which they have been granted permission'.

22 Specifically with regard to the coordinated execution of a number of works under a single development plan — as in the present case — Article 28(5) of Law No 1150/42 provides:

'Permission from the municipality is conditional upon conclusion of an agreement, to be registered by or on behalf of the owner, under which:

(1) ... the land required for secondary infrastructure works shall be transferred free of charge, subject to the provisions of subparagraph (2) below;

(2) the owner shall undertake to bear the costs of the primary infrastructure works; the owner shall also undertake to meet part of the cost of the secondary infrastructure works involved in the development project or of the works necessary to link the area to the various public utilities; the amount payable shall be commensurate with the nature and extent of the project works;

(3) the works referred to in subparagraph (2) above must be completed within ten years;

...'.

23 Article 28(9) of Law No 1150/42 provides that 'infrastructure works for which the owner is responsible must be executed within ten years'.

24 At regional level, Article 8 of Lombard Regional Law No 60 of 5 December 1977 (Bolletino Ufficiale della Regione Lombardia, 2nd supplement, No 49, of 12 December 1977; hereinafter 'LRL No 60/77') provides that private persons may, in applications for permission, request 'authorisation to execute the primary or secondary infrastructure works directly, by way of total or partial set-off against the infrastructure contribution', such authorisation being granted by the municipality 'in so far as [it] is considered to be in the public interest'.

25 On the other hand, execution of the infrastructure works involved in a development plan is governed by Article 12 of LRL No 60/77, as amended by LRL No 31 of 30 July 1986 (*Bolletino Ufficiale della Regione Lombardia,* 2nd supplement, No 31, of 4 August 1986, hereinafter LRL No 31/86). Article 12(1) provides:

'[t]he agreement necessary for the grant of building permission in respect of the operations planned under the development project must provide for:

(a) ...;

(b) the execution, by or on behalf of the owners, of all the primary infrastructure works and part of the secondary infrastructure works or those necessary to link the area to public utilities;... where execution of those works involves costs lower than those estimated respectively for primary and secondary infrastructures within the meaning of the present Law, the balance must be paid; in any event, it shall be open to the municipality to require, rather than direct execution of the works, payment of a sum commensurate with the actual cost of the infrastructure works involved in the development projects and with the nature and extent of the building works, and in any event of an

amount not lower than the charges provided for in the municipal resolution referred to in Article 3 of the present Law'.

26 Cultural facilities are included in the list of secondary infrastructure works set out in Article 22(b) of Lombard Regional Law No 51 of 15 April 1975.

The Italian legislation relating to the administrative procedure

27 Under Article 11 of Law No 241 of 7 August 1990 introducing new rules governing administrative procedure and the right of access to administrative documents (GURI No 192 of 18 August 1990, hereinafter 'Law No 241/90'), the administrative authorities 'may conclude, without prejudice to the rights of third parties and in pursuit of the public interest, agreements with interested parties with a view to determining the discretionary terms of the final measure or, in cases for which the law so provides, to substituting such agreements for that measure'.

The dispute before the national court and the questions submitted for a preliminary ruling

28 It appears from the order for reference that the present request for a preliminary ruling has arisen in the course of two actions for the annulment of Resolution No 82/96 of 12 September 1996 and Resolution No 6/98 of 16 and 17 February 1998, adopted by the Milan City Council (hereinafter 'the contested resolutions').

29 By Resolution No 82/96 of 12 September 1996, the Milan City Council approved the 'Scala 2001 Project', a programme of works involving various separate operations.

30 The project provided for execution of the following works:

— restoration and conversion of the Teatro alla Scala, a historical building occupying an area of approximately 30 000 m^2;

— conversion of municipal buildings forming part of the Ansaldo complex;

— construction, in the area known as 'the Bicocca', of a new theatre (commonly known as the 'Teatro alla Bicocca', but officially called the 'Teatro degli Arcimboldi') with seating for 2 300, on a piece of land covering 25 000 m^2 (plus 2 000 m^2 parking space), intended initially, throughout the period required for the restoration and conversion of the La Scala opera house, to accommodate the activities normally housed there, and later to accommodate all the activities associated with the performance of dramatic works and other cultural events.

31 In the Bicocca area, according to the order for reference, a large-scale development project — privately promoted and known as the 'Bicocca project' — was already under way. This was aimed at transforming the old industrial estate of Bicocca and involved the conversion of a huge complex of buildings. Pirelli, together with other private operators, was the owner-developer of that project. At the material time, the project, which had been started in 1990, was nearing completion. One of the urban development measures planned by the

City of Milan for the Bicocca area was a 'multi-communal' general-purpose complex. It decided that the new theatre planned for under the 'Scala 2001 Project' should form part of that complex.

32 By Resolution No 82/96, the Comune di Milano (Milan Municipal Council) also assumed a number of commitments in relation to the Scala 2001 Project, concerning the execution of works, timetables and funding, when it approved a special agreement which the City of Milan had concluded with Pirelli, the Ente Autonomo Teatro alla Scala and MCS, as agent for the promoters of the Bicocca project. That agreement, which was signed on 18 October 1996, provided *inter alia* that the Bicocca element of the Scala 2001 Project would be executed in accordance with the following rules:

— Pirelli was to bear the cost of coordinating the preliminary and final stages of the project and its execution, as well as the building operations involved in the restoration of the La Scala opera house, the conversion of the buildings in the Ansaldo complex and the construction of the Teatro alla Bicocca; the actual task of coordination was to be entrusted to MCS;

— MCS, as agent for the promoters of the development project, would be responsible for construction of the Teatro alla Bicocca (as well as the adjacent car-park) in the area covered by the development project and on the land earmarked for that purpose, which the promoters had undertaken to transfer free of charge to the City of Milan; that construction would be classed as secondary infrastructure and undertaken in return for reduction of the infrastructure contribution due to the City of Milan under Italy's national and regional legislation. MCS's responsibility was expressly confined to execution of the 'outer shell' of the building, ready for fitting out. One of MCS's obligations was to hand over the building before the end of 1998;

— Responsibility for fitting out the Teatro alla Bicocca, on the other hand, was to remain with the City of Milan, which would organise a tendering procedure for that purpose.

33 The Order of Architects and Mr De Amicis in his own right brought proceedings before the Regional Administrative Court of Lombardy for annulment of Resolution No 82/96.

34 Following changes in policy made at the beginning of 1998 by the new municipal administration, which wanted the Teatro alla Bicocca to be capable of accommodating larger audiences than the original La Scala building, the Comune di Milano adopted Resolution No 6/98 which, *inter alia*:

— approved the preliminary plan for construction of the new theatre in the Bicocca area;

— confirmed that execution of that work would in part be undertaken directly by the promoters 'in accordance with their contractual obligations under the development plan' — the associated costs being estimated at ITL 25 billion — and in part on the basis of a tendering procedure organised by the City of Milan;

— amended the agreement of 18 October 1996 with regard to the time-limits set for certain of the operations planned; in particular, the date set for completion of the Teatro alla Bicocca became 31 December 2000.

35 The CNA and Mr Freyrie, acting in his own right, brought actions before the Regional Administrative Court of Lombardy for annulment of Resolution No 6/98.

36 In both actions (joined for the purposes of the final judgment), the applicants challenge the validity of the contested resolutions both under Italian law on urban development and public procurement and under Community law. As regards the latter, they argue that the Teatro alla Bicocca is in the nature of public works and that the Comune di Milano ought therefore to have followed the Community procedure for inviting tenders. However, by the contested resolutions the Council had awarded the contract on the basis of private negotiations, thereby damaging the interests represented by the Order of Architects and the applicant architects.

37 In the order for reference, the national court concludes that the City of Milan correctly applied the Italian legislation, both national and regional, on urban development. However, suspecting that the Italian legislation should be disapplied — since it permits infrastructure works to a value higher than the ceiling fixed by the Directive to be executed without a prior call for tenders — the national court decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is national and regional legislation which allows a builder (who holds a building permit or approved development plan) to carry out infrastructure works directly, by way of total or partial set-off against the contribution payable (Article 11 of Law No 10/77, Articles 28 and 31 of Law No 1150 of 17 August 1942, Articles 8 and 12 of Law No 60 of the Lombardy Region of

5 December 1977), contrary to Directive 93/37/EEC, having regard to the strict tendering principles imposed on Member States by Community law in respect of all public works of a value of [EUR] 5 million or more?

2. Notwithstanding the principles concerning tendering referred to above, may agreements between the administrative authorities and a private person (generally permitted by Article 11 of Law No 241 of 7 August 1990) be regarded as compatible with Community law in areas where the procedure is that the administrative authorities choose a party with whom a contract for services is to be concluded, in cases where such services exceed the threshold laid down by the relevant directives?'

Question 1

Admissibility

38 The City of Milan and the FTS contend that the first question is unrelated to the subject-matter of the main proceedings.

39 They argue that, since the applicants in the main proceedings are either architects or professional bodies representing architects, the national court has confined admissibility of the main proceedings to issues arising from the award of contracts for the design of the Teatro alla Bicocca, to the exclusion of those for

building works. Design work constitutes the provision of services. However, the first question concerns the interpretation of Directive 93/37 which covers public works contracts, not public service contracts, which are governed by 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).

40 Moreover, the design work in question was, quite simply, provided free of charge to the City of Milan, which means that the cost of that work cannot be included in the cost of constructing the Teatro alla Bicocca, direct execution of which, by way of set-off against the infrastructure contribution, would damage the interests of architects.

41 It is settled law that in the context of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty, 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 in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, for example, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main proceedings or to their purpose, 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 (see, in particular, *PreussenElektra*, cited above, paragraph 39).

42 In the present case, it is clear from the order for reference that the applicants in the main proceedings seek annulment of the contested resolutions because they permitted a public work — the Teatro alla Bicocca — to be executed directly, without recourse to a Community tendering procedure, thus damaging the applicants' interests. It is also clear from the order for reference that those actions have been declared admissible.

43 There is no doubt that, if a Community tendering procedure had to be organised for the construction of the Teatro alla Bicocca, it could also cover the related design work. The fact that such work is covered by the Directive is confirmed by the wording of Article 1(a), which defines 'public works contracts', for the purposes of the Directive, as contracts which have as their object either the execution, or both the execution and design, of works.

44 Consequently, the Court must reject the argument that the first question, in so far as it concerns the interpretation of the Directive, bears no relation to the subject-matter of the dispute in the main proceedings.

45 Accordingly, the fact that the design work on the Teatro alla Bicocca was provided free of charge does not cast any doubt on the relevance of the first question.

46 That question must therefore be answered.

Substance

47 The first question concerns the compatibility with the Directive of the national and regional legislation at issue in the main proceedings, under which infrastructure works may be executed directly in return for exemption, wholly or in part, from the contribution due.

48 It should be noted at the outset that, in the context of proceedings brought under Article 177 of the Treaty, the Court does not have jurisdiction to give a ruling on the compatibility of a national measure with Community law. However, it does have jurisdiction to supply the national court with a ruling on the interpretation of Community law so as to enable that court to determine whether such compatibility exists in order to decide the case before it (see, *inter alia*, Joined Cases C-37/96 and C-38/96 *Sodiprem and Others* [1998] ECR I-2039, paragraph 22).

49 The first question should therefore be understood as seeking to ascertain whether the Directive precludes national urban development legislation under which the holder of a building permit or of an approved development plan may execute infrastructure works directly, by way of total or partial set-off against the contribution payable in respect of the grant of such permission in cases where the value of that work is the same as or exceeds the ceiling fixed by the Directive.

50 In order to answer that question (thus understood), it must be determined whether the direct execution of infrastructure works, such as those at issue in the main proceedings, constitutes a public works contract within the meaning of Article 1(a) of the Directive.

51 According to the definition given in that provision, a public works contract necessarily comprises the following elements: a contract for pecuniary interest, concluded in writing, between a contractor and a contracting authority as defined in Article 1(b) of the Directive, which has as its object either the execution of a certain work or of works as defined by the Directive.

52 Since the existence of a 'public works contract' is a condition for application of the Directive, Article 1(a) must be interpreted in such a way as to ensure that the Directive is given full effect. It is clear from the preamble to the Directive and from the second and tenth recitals, in particular, that the Directive aims to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition. As the tenth recital states, the development of such competition entails the publication at Community level of contract notices.

53 Furthermore, the Directive gives definitions of 'contracting authority' (Article 1(b)), 'works' (Article 1(a) and Annex II) and 'a work' (Article 1(c)).

54 The definition given by the Community legislature confirms that those elements are closely related to the aim of the Directive. They must play a decisive role, therefore, when it falls to be determined whether a 'public works contract' exists for the purposes of the Directive.

55 This means that in circumstances involving the execution, or the design and execution, of works or the execution of a work for a contracting authority within the meaning of the Directive, the assessment of the situation in terms of the other elements referred to in Article 1(a) of the Directive must be made in such a way as to ensure that the Directive is not deprived of practical effect, particularly where that situation displays special characteristics because of the provisions of national law applicable to it.

56 Those are the criteria in the light of which it must be determined whether the notion of 'public works contracts' covers the direct execution of infrastructure works, such as the building of the outer shell of a theatre, under conditions such as those provided for by Italian urban development legislation.

The element relating to 'a contracting authority'

57 It is common ground that the municipality involved in the main proceedings constitutes a local authority within the meaning of Article 1(b) of the Directive and it therefore falls within the definition of contracting authority given in that provision.

The element relating to the execution of works or of a work as defined in Article 1(a) of the Directive

58 Under Article 1(a) of the Directive, public works contracts must have as their object:

— the execution, or both the execution and design, of works related to one of the activities referred to in Annex II; or

— the execution, or both the execution and design, of a work as defined in Article 1(c), that is to say the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic and technical function; or

— the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

59 Infrastructure works of the kind listed in Article 4 of Law No 847/64 constitute either building or civil engineering works, hence activities of the kind referred to in Annex II to the Directive, or works sufficient in themselves to fulfil an economic and technical function. They thus satisfy, at the very least, the criteria laid down in the first and second indents of paragraph 58 above.

60 Specifically, construction of the outer shell of a theatre (the activity at issue in the main proceedings) is an activity in Group 501 of the NACE, entitled 'Construction of ... buildings, both residential and non-residential', referred to in Annex II to the Directive.

61 Consequently, the execution of infrastructure works such as the construction of the outer shell of a theatre constitutes 'works' for the purposes of Article 1(a) of the Directive.

62 It thus follows from paragraphs 57 to 61 above that the situation at issue includes the two important elements — a 'contracting authority' and 'works' or 'a work' — which must both be present if it is to be concluded that a 'public works contract' exists.

The element relating to the existence of a contract

63 According to the Milan City Council, Pirelli, MCS and the FTS, this element is lacking because the direct execution of infrastructure works is provided for by a rule contained in the Italian national and regional legislation on urban development, which differs from the Community public procurement legislation in terms of its subject-matter, purpose, characteristics and the interests protected.

64 The above parties also contend that the local authority has no power to choose the person to be given responsibility for executing works since, by operation of law, that person is the owner of the land to be developed.

65 Lastly, both the Comune di Milano and the other defendants in the main proceedings contend that, even if it were accepted that direct execution could be carried out on the basis of commitments incorporated in the development agreement, the contractual element would still be lacking. The development agreement is governed by public law and concluded in the exercise of public authority, not private initiative. It cannot, therefore, be a 'contract' for the purposes of the Directive. The municipality retains the powers delegated to it by the State for the management of its territory, 'one of which is the power to amend

or revoke development plans in the light of changing circumstances or to adopt new criteria of assessment which better meet those needs' (judgment No 6941 of 25 July 1994 of the Corte Suprema di Cassazione, Combined Chambers). For the same reason, they say, the typical elements constituting the '*raison d'être*' of a works contract are also lacking.

66 It should be noted, first, that the fact that the provision of national law allowing direct execution of infrastructure works forms part of a set of urban development regulations that are of a special nature and pursue a specific aim, separate from that of the Directive, is not sufficient to exclude the direct execution of works from the scope of the Directive when the elements needed to bring it within the scope of the Directive are present.

67 In that regard, as the national court pointed out, the infrastructure works referred to in Article 4 of Law No 847/64 are fully capable of constituting public works, partly because they are specifically designed to meet development requirements over and above the construction of housing and partly because they come wholly under the control of the competent administrative authority since it holds a legal right over the use of such works, so as to ensure that they remain at the service of all members of the local community.

68 These are important considerations because they confirm that the planned works are intended, as has always been maintained, for the benefit of the public.

69 Moreover, it is clear from the order for reference that Article 28(5) of Law No 1150/42 allows for the possibility of secondary infrastructure works being

executed directly as part of a development project and that, according to Article 12 of LRL No 60/77, as amended by Article 3 of LRL No 31/86, direct execution is the norm. However, those provisions do not preclude the existence of a contract, as required by Article 1(a) of the Directive.

70 By effect of the above provision of Lombard regional legislation, the municipal authorities retain at all times the power to require in lieu of the direct execution of works payment of a sum commensurate with the actual costs of the works and with the extent and nature of those works. Moreover, where infrastructure works are executed directly, a development agreement must always be concluded between the municipal authorities and the owner or owners of the land to be developed.

71 It is true that the municipal authorities are not free to choose the other party to the contract since by law that person must be the owner of the land in question. However, it does not follow that the relationship between the authorities and the developer does not constitute a contract, since it is the development agreement concluded between them which determines in each case the various infrastructure works to be undertaken, together with the related terms and conditions, including the requirement that the projects for such works be approved by the municipality. Furthermore, it is by virtue of the commitments assumed by the developer in that agreement that the municipality acquires legal rights over use of the works contracted for, so that they can be made available to the public.

72 In the main proceedings, that is borne out by the fact that pursuant to the contested resolutions the Teatro alla Bicocca must be brought into being partly through direct execution by the developers 'in accordance with their contractual obligations under the development plan' and partly through a tendering procedure organised by the City of Milan.

73 Lastly, contrary to the argument put forward by the Comune di Milano and the other defendants in the main proceedings, the fact that the development agreement is governed by public law and was concluded in the exercise of public power does not preclude, but rather militates in favour of, the existence of a contract as required by Article 1(a) of the Directive. In several Member States, any contract concluded between a contracting authority and a contractor is an administrative contract, which as such is governed by public law.

74 In the light of the above considerations, the terms of the development agreement and the agreements concluded under it are sufficient to provide the contractual element required by Article 1(a) of the Directive.

75 Moreover, that interpretation is consistent with the basic aim of the Directive which, as stated in paragraph 52 above, is to open up public works contracts to competition. Exposure to Community competition in accordance with the procedures provided for by the Directive ensures that the public authorities cannot indulge in favouritism. Accordingly, the fact that the public authorities are not free to choose the contractor cannot in itself justify non-application of the Directive, since that would ultimately preclude from Community competition the execution of works to which the Directive would otherwise apply.

The element relating to a contract for pecuniary interest

76 According to the Comune di Milano and the other defendants in the main proceedings, the contract is not bilateral, since no consideration is due from the municipality. The developer's right to obtain building permission is not the *quid*

pro quo for payment of the infrastructure contribution or the direct execution of infrastructure works, and the provision of services to the site, which takes place as part of the process of transforming the area, does not depend either on the benefits arising from that transformation or on the advantage gained by the holder of the building permit.

77 It must be pointed out that the pecuniary nature of the contract relates to the consideration due from the public authority concerned in return for the execution of the works which are the object of the contract referred to in Article 1(a) of the Directive and which will be at the disposal of the public authority.

78 In a case such as that before the national court, the question whether — in circumstances where infrastructure works have been executed directly — the contract is of a pecuniary nature for the municipal authorities must be considered from a specific viewpoint, because of the peculiarities of Italian urban development legislation.

79 Thus, under Article 28(5)(2) of Law No 1150/42 and Article 12(b) of LRL No 60/77, as amended by Article 3 of LRL No 31/86, it is the owners of the land to be developed who bear the costs of primary infrastructure works as well as a proportion of the costs of the secondary infrastructure works needed for the project or of other works needed in order to link the area concerned to public utilities.

80 That being so, Article 11(1) of Law No 10/77 provides that 'the holder of building permission may undertake to carry out the infrastructure works directly... by way of total or partial set-off against the amount payable' in respect of the infrastructure contribution, payment of which is linked to the grant of permission, pursuant to Article 3 of that Law.

81 The phrase 'by way of set-off' used in Article 11(1) of Law No 10/77 suggests that, in consenting to the direct execution of infrastructure works, the municipal authorities waive recovery of the amount due in respect of the contribution provided for in Article 3 of that Law.

82 However, several parties — the Comune di Milano and the other defendants in the main proceedings, and the Italian Government — contend that this interpretation is incorrect, primarily because provision is made for payment of the infrastructure contribution as an alternative to the direct execution of works and, consequently, it is erroneous to believe that there is a financial obligation towards the municipality in any event, which is waived in cases where the works are executed directly. The real effect of the direct execution of works is that it gives the owner-developer freedom to build, relieving him of the obligation to pay the infrastructure contribution due as a result of the grant of building permission. The term 'set-off' refers, therefore, to the fact that execution of the works discharges an obligation, not to consideration or some other benefit granted to the developers by the municipality.

83 Those objections concern the interpretation of Italian urban development legislation and the way in which the legislature envisaged the relationship between the direct execution of works and the obligation to pay the infrastructure contribution. Reference must be made, therefore, to the appraisal of that relationship made by the national court.

84 The national court states in the order for reference that, contrary to the arguments put forward by the defendants in the main proceedings, a holder of a building permit or an approved development plan who executes infrastructure works is not providing any service free of charge, since he is in fact settling a debt to the same value (but involving no cash adjustment) which arises towards the

municipality — namely, the infrastructure contribution — and the fact that that obligation may be met in either of two forms — a cash payment or direct execution of the works — does not mean that the basis of the obligation can be differentiated according to the alternative that is chosen (or predetermined by the legislature).

85 That interpretation of the national legislation is consistent with the aim of the Directive, referred to in paragraph 52 of this judgment, and is therefore conducive to ensuring that the Directive has full effect.

86 Accordingly, the requirement that the contract be of a pecuniary nature must be held to be satisfied.

The element relating to a contract concluded in writing

87 It is not contested that there is a written contract in the present case: the development agreement between the municipality and the owner(s)-developer(s) was concluded in writing.

The element relating to the contractor

88 According to the Comune di Milano, the other defendants in the main proceedings and the Italian Government, that element is lacking because the

developer is not necessarily the contractor or a construction undertaking, but derives his status from the fact that he owns the site to be developed. He is not required to satisfy particular conditions concerning his technical capabilities, solvency and so forth, save for the obligation to provide the municipality with appropriate guarantees in relation to the commitments entered into under the development agreement.

89 Furthermore, it is apparent from the replies to a question put by the Court that the responsibility of choosing the contractors to be entrusted with designing and executing the works lies solely with the developer holding the building permit. The works are executed in his name, not in the name of the municipality. He undertakes to hand over the infrastructure works to the municipality once they have been completed.

90 It should be noted that Article 1(a) of the Directive does not require that, in order to be classed as a contractor, a person who enters into a contract with a contracting authority must be capable of direct performance using his own resources. The person in question need only be able to arrange for execution of the works in question and to furnish the necessary guarantees in that connection.

91 Thus, Article 20 of the Directive states that '[i]n the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties'.

92 Along the same lines, the Court ruled that Directive 92/50 permits a service provider to establish that it fulfils the economic, financial and technical criteria

for participation in a tendering procedure for the award of a public service contract by relying on the standing of other entities, regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities which are necessary for performance of the contract (see Case C-176/98 *Holst Italia* [1999] ECR I-8607).

93 According to the documents before the Court, in a situation such as that at issue in the main proceedings, the developer holding a building permit has an obligation by virtue of the commitments entered into under the development agreement with the municipality to give the latter sufficient guarantees that the completed works will be handed over to the municipality and that the operator selected to execute the works will subscribe to the agreements concluded with the municipal authorities. That is the position in the present case, in so far as MCS signed the agreements entered into by the City of Milan with Pirelli.

94 In those circumstances, neither the fact that the developer is unable to execute the work using his own resources nor the fact that the operator who will be entrusted to carry out the work is chosen by the developer holding the building permit rather than by the municipal authorities means that the abovementioned element is lacking.

95 Furthermore, the fact that the infrastructure works are carried out by the holder of the building permit in his own name, before being handed over to the municipality, is not sufficient to divest the latter of its status as contracting authority in relation to the execution of such works.

96 Consequently, the 'contractor' element must also be regarded as present.

97 In the light of the foregoing, it must be concluded that the direct execution of infrastructure works in the circumstances provided for by the Italian legislation on urban development constitutes a 'public works contract' within the meaning of Article 1(a) of the Directive.

98 It follows that, when the estimated value, net of VAT, of such works is equal to or exceeds the ceiling fixed by Article 6(1) thereof, the Directive applies.

99 Consequently, the municipal authorities are under an obligation to comply with the procedures laid down in the Directive whenever they award a public works contract of that nature.

100 That does not mean that, in cases concerning the execution of infrastructure works, the Directive is complied with only if the municipal authorities themselves apply the award-of-contract procedures laid down therein. The Directive would still be given full effect if the national legislation allowed the municipal authorities to require the developer holding the building permit, under the agreements concluded with them, to carry out the work contracted for in accordance with the procedures laid down in the Directive so as to discharge their own obligations under the Directive. In such a case, the developer must be regarded, by virtue of the agreements concluded with the municipality exempting him from the infrastructure contribution in return for the execution of public infrastructure works, as the holder of an express mandate granted by the municipality for the construction of that work. Article 3(4) of the Directive expressly allows for the possibility of the rules concerning publicity to be applied by persons other than the contracting authority in cases where public works are contracted out.

101 With regard to the procedures laid down by the Directive, it is clear from Articles 7(4) and 11(2) and (9), read together, that contracting authorities which

wish to award a public works contract must advertise their intention by publishing a notice in the *Official Journal of the European Communities*, except in any of the cases exhaustively listed in Article 7(3) of the Directive where the contracting authority is authorised to use the negotiated procedure without first publishing a contract notice.

102 In the present case, there is nothing in the documents before the Court to suggest that the direct execution of infrastructure works under the conditions laid down by the Italian legislation on urban development is capable of falling within one of the cases contemplated in Article 7(3).

103 It should therefore be stated in answer to the first question that the Directive precludes national urban development legislation under which, without the procedures laid down in the Directive being applied, the holder of a building permit or approved development plan may execute infrastructure works directly, by way of total or partial set-off against the contribution payable in respect of the grant of the permit, in cases where the value of that work is the same as or exceeds the ceiling fixed by the Directive.

Question 2

104 The CNA maintains that this question is irrelevant. Since none of the conditions provided for by Article 11 of Law No 241/90 is satisfied in the case before the national court and having regard to the fact that the agreements concluded for the award of public contracts outside the procedures laid down by the relevant

directives undoubtedly impair the rights of contractors or of members of a profession seeking to have the contract awarded to them, Article 11 of Law No 241/90 does not apply in circumstances such as those at issue.

105 Without there being any need to evaluate the CNA's arguments, it must be observed that the national court has not identified the provisions of Community law of which it seeks an interpretation; nor does it specify precisely which aspects of the relevant Italian legislation raise difficulties in terms of Community law when applied in the case before it.

106 In the absence of such information, it is not possible to identify the specific problem arising in the main proceedings concerning the interpretation of Community law.

107 It must therefore be concluded that the second question is inadmissible.

Costs

108 The costs incurred by the Italian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Tribunale Amministrativo Regionale per la Lombardia by order of 11 June 1998, hereby rules:

Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts precludes national urban development legislation under which, without the procedures laid down in the Directive being applied, the holder of a building permit or approved development plan may execute infrastructure works directly, by way of total or partial set-off against the contribution payable in respect of the grant of the permit, in cases where the value of that work is the same as or exceeds the ceiling fixed by the Directive.

Gulmann Skouris Puissochet

Schintgen Macken

Delivered in open court in Luxembourg on 12 July 2001.

R. Grass C. Gulmann

Registrar President of the Sixth Chamber