JUDGMENT OF THE COURT (Fifth Chamber)
27 February 2003 *

In Case C-373/00,

REFERENCE to the Court under Article 234 EC by the Vergabekontrollsenat des Landes Wien (Austria) for a preliminary ruling in the proceedings pending before that court between

Adolf Truley GmbH

and

Bestattung Wien GmbH,

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

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans (Rapporteur), P. Jann, S. von Bahr and A. Rosas, Judges,

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

after considering the written observations submitted on behalf of:

— Adolf Truley GmbH, by S. Heid, Rechtsanwalt,

— Bestattung Wien GmbH, by P. Madl, Rechtsanwalt,

— the Austrian Government, by H. Dossi, acting as Agent,

— the French Government, by G. de Bergues, A. Bréville-Viéville and S. Pailler, acting as Agents,

— the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by R. Roniger, Rechtsanwalt,

— the EFTA Surveillance Authority, by E. Wright, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2002,

gives the following

Judgment

1 By order of 14 September 2000, received at the Court on 11 October 2000, the Vergabekontrollsenat des Landes Wien (Public Procurement Review Chamber of the *Land* of Vienna) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Article 1(b) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

2 Those questions have been raised in proceedings between Adolf Truley GmbH ('Truley'), established in Drosendorf an der Thaya, Austria, and Bestattung Wien GmbH ('Bestattung Wien'), established in Vienna, concerning the latter's decision not to accept the tender submitted by Truley in the procedure for award of a contract to supply coffin fixtures.

Legal framework

Community legislation

3 Article 1(b) of Directive 93/36 provides:

'For the purpose of this Directive:

...

(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;

"*a body governed by public law*" means any body:

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

and

— having legal personality,

and

— financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

the lists of bodies or of categories of such bodies governed by public law which fulfil the criteria referred to in the second subparagraph are set out in Annex I to Directive 93/37/EEC. These lists shall be as exhaustive as possible and may be reviewed in accordance with the procedure laid down in Article 35 of Directive 93/37/EEC.'

National legislation

Rules governing the award of public contracts

4 Under Austrian law, the regulation of public procurement falls partly within the competence of the State and partly within the competence of the federal units (the

Länder). In the *Land* of Vienna, that sector is governed by the Wiener Landesvergabegesetz (Law on the award of public contracts of the *Land* of Vienna, LGBl. 1995/36, as published in LGBl. 1999/30, hereinafter 'the WLVergG').

5 Paragraph 12(1) of the WLVergG provides:

'This Law shall apply to the award of contracts by contracting authorities. Contracting authorities within the meaning of this Law shall be:

1. Vienna as a *Land* or municipality and

2. bodies established under the law of the *Land* provided that they have been founded for the purpose of meeting needs in the general interest, not being commercial in character, if they have at least some legal capacity, and

   (a) more than half of whose managers are appointed by bodies of the City of Vienna or of another entity within the meaning of points 1 to 4 or are persons appointed by bodies of the said entities for this purpose or

   (b) whose management is subject to supervision by the City of Vienna or other entities within the meaning of points 1 to 4 or

(c) which are financed, for the most part, by the City of Vienna or other entities within the meaning of points 1 to 4,

3. ...

4. ... .'

The Vienna Municipal Constitution

6 Paragraph 71 of the Wiener Stadtverfassung (Vienna Municipal Constitution, LGBl. 1968/28, as published in LGBl. 1999/17, hereinafter 'the WStV') provides:

'1. Undertakings within the meaning of this Constitution are economic entities on which the Municipal Council has conferred the status of undertaking. The Municipal Council may also decide that an undertaking shall be composed of several component undertakings.

2. The undertakings shall not have legal personality. The administration of their assets shall be separate from that of the other assets of the municipality. The undertakings shall be managed in accordance with economic principles. Where an undertaking is entered in the registry of companies, its corporate name must clearly indicate its status as an undertaking of the City of Vienna.

3. The Municipal Council shall adopt articles of association for these undertakings taking account, in particular, of Paragraph 67(2). The provisions on internal procedure and the distribution of functions (Paragraph 91) shall apply to the undertakings only in so far as such provisions refer expressly to them. Taking into account considerations of expediency, economy and effectiveness as well as the greater degree of independence of the undertakings as compared with other units of the Magistrat [of the City of Vienna (municipal administration of the City of Vienna)], the articles of association shall lay down detailed provisions on the bodies, their areas of competence, their organisation and their administration, their management in accordance with economic principles and on the principles of accounting and the submission of accounts. The powers devolving on municipal bodies in relation to personnel matters shall also apply to the undertakings. As regards the determination of other areas of competence, the following are reserved:

1. to the municipal council:

(a) the conferment and withdrawal of the status of undertaking;

(b) the division of an undertaking into component undertakings;

(c) the determination of the main objects of the undertaking, guidelines, target planning and administrative programmes;

...

... .'

7 Paragraph 73 of the WStV concerning the tasks of the Kontrollamt der Stadt Wien (Monitoring Office of the City of Vienna, hereinafter 'the Kontrollamt'), which, in terms of organisation, forms part of the Magistrat of the City of Vienna, states further:

'(1) The Kontrollamt shall examine the overall conduct of the municipality and of the funds and foundations having legal personality and administered by municipal authorities for proper accounting, regularity, economy, efficiency and expediency (review of conduct)...

(2) The Kontrollamt shall also examine the conduct of commercial undertakings in which the municipality has a majority interest. Where such a commercial undertaking has a majority interest in another undertaking, the examination shall extend to that other undertaking. The Kontrollamt's powers of examination shall be assured by suitable measures.

(3) The Kontrollamt may further examine the conduct of entities (commercial undertakings, associations, etc.) in which the municipality has an interest other than that referred to in paragraph 2 or on whose organs the municipality is represented, provided that the municipality has reserved the right to carry out such a review. This shall also apply to entities which receive financial support from municipal resources or for which the municipality accepts liability.

...

(6) Upon decision of the Municipal Council or the Monitoring Committee or at the request of the Mayor or, in respect of the area of responsibility of his unit, of an office-holding city councillor, the Kontrollamt shall carry out special reviews of conduct and safety and shall inform the requesting authority of its findings.

... .'

The rules governing the exercise of the activity of funeral undertaker

8 The activity of funeral undertaker is governed at federal level by Paragraphs 130 to 134 of the Gewerbeordnung 1994 (Austrian Trade Regulations, BGBl. 1994/194, as published in BGBl. I, 1997/63, hereinafter 'the GewO'). Those provisions indicate that, under Austrian law, the activity of funeral undertaker is not reserved to specific legal persons such as the State, the *Länder* or the municipalities but that the exercise of such activity is subject to the issue of prior authority which is itself dependent on the existence of a current or future need. In this regard, Paragraph 131(2) of the GewO asks the authority competent to issue such authorisation to determine more specifically whether the municipality has adopted adequate provisions with regard to burials or cremations.

9 However, according to the information provided by the national court, the condition of the existence of a need is significant only in regard to obtaining authorisation to carry on a business as a funeral undertaker. If, subsequently, there is no longer a need, the administration cannot withdraw the authorisation previously granted.

10 Although the GewO also contains no provision restricting the exercise of the authorised activity to a particular geographical area, the Landeshauptmann (First Minister of the *Land*) is nevertheless competent, under Paragraph 132(1) of the GewO, to fix the maximum prices for funeral services either for the entire *Land* or by administrative unit or municipality.

11 In the *Land* of Vienna, the exercise of the activity of funeral undertaker is governed more specifically by the Wiener Leichen- und Bestattungsgesetz (Law of the *Land* of Vienna on the activity of funeral undertaker, LGBl. 1970/31, as published in LGBl. 1988/25, hereinafter 'the WLBG'). Paragraph 10(1) of that law provides:

'Where no arrangements are made for the funeral of the deceased within five days of the death certification being issued, the Magistrat [of the City of Vienna] shall arrange the funeral (by burial or cremation) at a funeral facility of the City of Vienna. The City of Vienna shall bear the costs of the funeral only in so far as they are not to be met by third parties or covered by the deceased's estate.'

The main proceedings and the questions referred for a preliminary ruling

12 According to the order for reference, the provisions governing the business of funeral undertaker in Vienna have undergone significant amendments over the past few years.

13 Until 1999, those services were performed by Wiener Bestattung (Vienna Funerals), a component undertaking of the Wiener Stadtwerke (Vienna Public Utilities), which were themselves an undertaking of the City of Vienna within the meaning of Paragraph 71 of the WStV. As such, Wiener Bestattung — like Wiener Stadtwerke — lacked legal personality and formed part of the Magistrat of the City of Vienna. In connection with its activities, Wiener Bestattung had, on several occasions, organised calls for tenders in which Truley, which is a licensed funeral undertaker, had apparently participated successfully.

14 On 17 December 1998, the Municipal Council of the City of Vienna decided to separate the Wiener Stadtwerke from the municipal administration and to create a new company with its own legal personality, Wiener Stadtwerke Holding AG ('WSH'), which is wholly owned by the City of Vienna. That company comprises six operational subsidiaries which include, in particular, Bestattung Wien. According to the documents on the case-file, that company, the entire capital of which is held by WSH, has legal personality. The date on which its activity began was fixed, by order of the Magistrat of the City of Vienna, as being 12 June 1999.

15 Shortly after its creation, Bestattung Wien organised a tendering procedure, published both in the *Amtlicher Lieferanzeiger* (Official Bulletin of calls for tenders for supply contracts) and the *Amstblatt der Stadt Wien* (Official Journal of the City of Vienna), for the award of a public contract for the supply of coffin fittings. Truley submitted a tender during that procedure but was informed, by letter of 6 June 2000, that the contract had not been awarded to it on the ground that the price which it had quoted was too high.

16 Taking the view that the tender submitted by it was the only one which complied with the specifications in the call for tenders, Truley brought proceedings for review of the contract award procedure before the Vergabekontrollsenat des Landes Wien.

17 In those proceedings, Bestattung Wien claimed that it was no longer subject to the rules in Directive 93/36 and in the WLVergG as it had its own legal personality and was completely independent of the Magistrat of the City of Vienna, while Truley submitted that that directive and the WLVergG remained fully applicable by reason of the close ties which continued to bind that company to the City of Vienna. In that regard, Truley pointed out, *inter alia*, that all the shares in Bestattung Wien were held by WSH, which itself was wholly owned by the City of Vienna.

18 As it formed the view, in those circumstances, that the solution to the dispute pending before it depended on the interpretation of the concept of 'contracting authority' in Article 1(b) of Directive 93/36, particularly in light of the judgments in Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73 and Case C-360/96 *Gemeente Arnhem and Gemeente Rheden* v *BFI Holding* [1998] ECR I-6821, the Vergabekontrollsenat des Landes Wien decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Must the term "needs in the general interest" in Article 1(b) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts be interpreted as meaning that

(a) the definition of needs in the general interest must be derived from the national legal system of the Member State?

(b) the fact that a regional or local authority's obligation is subsidiary is in itself sufficient for the existence of a need in the general interest to be assumed?

2. In interpreting the requirement "meeting needs... not having an industrial or commercial character" laid down in Directive 93/36/EEC, is (a) the existence of significant competition an imperative condition or (b) are the factual or legal circumstances the determinant factors in that respect?

3. Is the requirement laid down in Article 1(b) of Directive 93/36/EEC that the management of the body governed by public law must be subject to supervision by the State or a regional or local authority also fulfilled by a mere review as provided for through the Kontrollamt of the City of Vienna?'

The admissibility of the questions referred for a preliminary ruling

19 Referring to Case C-186/90 *Durighello* [1991] ECR I-5773 and Case C-134/95 *USSL N° 47 Di Biella* [1997] ECR I-195, in which the Court held, *inter alia*, that a reference for a preliminary ruling made by a national court is to be rejected 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, Bestattung Wien submits that the question whether or not it has the status of an awarding authority is irrelevant to the case in the main proceedings.

20 In its view, it is clear from the actual wording of Paragraph 99 of the WLVergG that the Vergabekontrollsenat des Landes Wien is only competent to find, after the award of a contract, that the contract was not awarded to the tenderer who submitted the best tender as a result of an infringement of the provisions of that law and that review proceedings can be brought only if the decision which is alleged to be unlawful was decisive for the outcome of the procurement procedure. In the main proceedings, the tender submitted by Truley was given the

second to last place in terms of the prices quoted for coffin fittings, with the result that it has no legal interest in obtaining the remedy it seeks as it was, in any event, not the best bidder within the meaning of Paragraph 99(1) of the WLVergG and, consequently, the contract could never have been awarded to it.

21 Suffice it to point out in this regard that, according to the settled case-law of the Court, in particular the above judgment in *Durighello*, cited by Bestattung Wien, it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court (*Durighello*, paragraph 8). Consequently, since the questions referred involve the interpretation of Community law, the Court is, in principle, obliged to give a ruling.

22 Moreover, the Court has also consistently held that it 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 that is sought bears no relation to the actual facts of the main action or its 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 to it (see, *inter alia*, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39, and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19).

23 In the present case, it is not entirely obvious that the questions referred by the national court fall within one of those situations.

24 First, there are no grounds for arguing that the interpretation of Community law sought bears no relation to the actual facts or the purpose of the main action since the assessment of the lawfulness of the decision on the award of the contract at issue in the main proceedings depends on whether the defendant can be treated as a contracting authority within the meaning of Article 1(b) of Directive 93/36.

25 Second, the national court has furnished the Court with all the material necessary to enable it to give a useful answer to the questions referred.

26 It follows that the reference for a preliminary ruling is admissible.

The first question

27 By its first question, which can be divided into two limbs, the national court essentially raises the question of the scope of the term 'needs in the general interest' in the second subparagraph of Article 1(b) of Directive 93/36.

The first limb of the first question

28 By the first limb of its first question, the national court asks whether the term 'needs in the general interest' is to be defined by Community law or by the national legal system of each Member State.

Observations submitted to the Court

29 According to Truley and the Austrian Government, the term 'needs in the general interest' is a Community law concept which must be assessed independently without reference to the national legal systems of the Member States. In that regard, they rely on, first, the purpose of the Community directives on the coordination of public procurement procedures, which is to introduce competition to previously closed-off national markets and to inform interested parties established in the Community of the bodies which are to be regarded as contracting authorities. Second, they rely on the judgment in *BFI Holding*, cited above, in which the Court declared that the term 'needs in the general interest' must be appraised objectively, without regard to the legal forms of the provisions in which those needs are mentioned.

30 On that basis, Truley submits that, having regard to the principle of legal certainty, it is unacceptable that the same activity may be regarded either as being in the general interest or as not being so, depending on the Member State in which it is exercised, while the Austrian Government claims that the case-law of the Court, in particular Case 327/82 *Ekro* [1984] ECR 107 and Case C-273/90 *Meico-Fell* [1991] ECR I-5569, shows that terms of Community law must be interpreted by reference to national concepts only in those — exceptional — cases in which reference is expressly or implicitly made to definitions laid down by the legal systems of the Member States, which is not the case here.

31 Whilst they share the view of Truley and the Austrian Government that the term 'needs in the general interest' is a Community-law concept, Bestattung Wien, the

French Government and the EFTA Surveillance Authority nevertheless take the view that application of that term to specific cases falls rather within the competence of the Member States, depending on the tasks which those States wish to carry out. They refer in particular in this connection to the purpose of the relevant Community directives, which is to coordinate — but not harmonise — the national rules on the award of public contracts, and to Annex I to 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), which contains a list of the bodies fulfilling the criteria laid down in Article 1(b) of Directive 93/36. According to Bestattung Wien, such a list of bodies regarded as being contracting authorities would serve no purpose whatever if the concept of general interest were conceived as being purely a Community-law concept. It is thus for each Member State, when determining the aims of its corporate policy, to state definitively what constitutes the general interest and, in each individual case, the legal and factual situation of the body concerned must be examined in order to assess whether or not there is a need in the general interest.

32 Finally, the Commission takes the view that the term 'needs in the general interest' must be defined solely on the basis of national law. It relies in this regard on *Mannesmann Anlagenbau Austria*, cited above, in which the Court based its finding that the Austrian State printing office was established for the purpose of meeting needs in the general interest, not having an industrial or commercial character, on the relevant national provisions and on *BFI Holding*, in which the Court ruled, on the basis of, in particular, the list set out in Annex I to Directive 93/37, that the removal and treatment of household refuse is one of the services which a Member State may require to be carried out by public authorities or over which it wishes to retain a decisive influence.

The Court's reply

33 First of all, it should be noted that Directive 93/36 does not define the term 'needs in the general interest'.

34 The second subparagraph of Article 1(b) of that directive merely states that such needs must not have an industrial or commercial character, while it is clear from an overall reading of that article that meeting needs in the general interest which are not industrial or commercial in character is a necessary, but not sufficient, condition for designating a body as a 'body governed by public law' and, therefore, a 'contracting authority' within the meaning of Directive 93/36. In order to be covered by that directive, the body must also have legal personality and depend heavily, for its financing, management or supervision, on the State, regional or local authorities or other bodies governed by public law (see, with respect to the cumulative nature of the criteria laid down, in the same terms, in 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 (OJ 1992 L 209, p. 1) and the second subparagraph of Article 1(b) of Directive 93/37, *Mannesmann Anlagenanbau Austria*, paragraphs 21 and 38, *BFI Holding*, paragraph 29, Case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraph 40, and Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605, paragraph 26).

35 According to settled case-law, the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the

purpose of the legislation in question (see, *inter alia*, *Ekro*, cited above, paragraph 11, Case C-287/98 *Linster and Others* [2000] ECR I-6917, paragraph 43, and Case C-357/98 *Yiadom* [2000] ECR I-9265, paragraph 26).

36 In the present case, it is common ground that the second subparagraph of Article 1(b) of Directive 93/36 makes no express reference to the law of the Member States, with the result that the abovementioned terms must be given an autonomous and uniform interpretation throughout the Community.

37 That finding is not invalidated by the fact that the third subparagraph of Article 1(b) of Directive 93/36 refers to Annex I to Directive 93/37, which lists the bodies and categories of such bodies governed by public law which, in each Member State, fulfil the criteria laid down in the second subparagraph of Article 1(b) of Directive 93/36.

38 The Court notes, first, that that annex itself contains no definition of the term 'needs in the general interest' featuring, in particular, in Article 1(b) of Directive 93/36 and in Article 1(b) of Directive 93/37.

39 Second, while it is clear from the wording of Article 1(b) of Directive 93/36 that the list in Annex I to Directive 93/37 is intended to be as complete as possible and may be revised pursuant to the procedure provided for in Article 35 of Directive 93/37, that list is in no way exhaustive (see, *inter alia*, *BFI Holding*, paragraph 50, and *Agorà and Excelsior*, paragraph 36) as its accuracy varies considerably from one Member State to another.

40 It follows that the term 'needs in the general interest' in Article 1(b) of Directive 93/36 is a Community-law concept and must be interpreted in the light of the context of that article and the purpose of that directive.

41 The Court has already ruled on several occasions that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, in particular, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16, Case C-237/99 *Commission* v *France*, cited above, paragraph 41, Case C-92/00 *HI* [2002] ECR I-5553, paragraph 43, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 51).

42 Furthermore, settled case-law also shows that the purpose of the Community directives coordinating procedures for the award of public contracts is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones (see, in particular, *University of Cambridge*, cited above, paragraph 17, *Commission* v *France*, cited above, paragraph 42, and *Universale-Bau*, cited above, paragraph 52).

43 Given the double objective of introducing competition and transparency, the concept of a body governed by public law must be interpreted as having a broad meaning.

44 Accordingly, if a specific body is not listed in Annex I to Directive 93/37, its legal and factual situation must be determined in each individual case in order to assess whether or not it meets a need in the general interest.

45 In light of the foregoing, the answer to the first limb of the first question must be that the term 'needs in the general interest' in the second subparagraph of Article 1(b) of Directive 93/36 is an autonomous concept of Community law.

The second limb of the first question

46 By the second limb of its first question, the national court asks essentially whether the activity of funeral undertaker meets a need in the general interest. In that regard, it asks more specifically whether the fact that a regional or local authority is under a statutory obligation to arrange funerals — and, if necessary, to bear the costs of those funerals — where they have not been arranged within a certain period after a death certificate has been issued is sufficient, in itself, to establish a presumption that there is a need in the general interest.

Observations submitted to the Court

47 While, as an extension of their observations on the first limb of the first question, Truley and the Austrian Government argue that an obligation such as that laid

down in Paragraph 10(1) of the WLBG is irrelevant to the question whether or not there is a need in the general interest, inasmuch as the decisive criterion for the assessment of that term is, in their view, one of Community and not national law, they nevertheless submit that there is no doubt that funeral services do in fact meet a need in the general interest. In that regard, they rely on Annex I to Directive 93/37, which, in regard to the Federal Republic of Germany, contains an express reference to cemeteries and burial services, and on the judgment in *BFI Holding*, in which the Court declared that the removal and treatment of household refuse was one of the activities which a Member State may require to be carried out by public authorities or over which it wishes to retain a decisive influence. According to Truley, funeral services are also part of the 'hard core' of basic services provided by the State in the public interest.

48 That point of view is partially contested by the defendant in the main proceedings. Although Bestattung Wien, like Truley and the Austrian Government, considers Paragraph 10(1) of the WLBG to be irrelevant to the assessment of the possible existence of a need in the general interest, it none the less contends that, in the present case, that concept covers only burial services in the narrow sense of the term, namely, in its view, the interment and exhumation of bodies, cremation and the management of cemeteries and columbaria. On the other hand, services such as the issuing of death certificates, the placing and printing of death and funeral notices, the exposition of the deceased, the washing, dressing and placing in the coffin of the deceased, the transport of the deceased to his final resting place and the maintenance of graves — all activities which the defendant in the main proceedings classes as funeral services 'in the broad sense of the term' — are not among those over which the State intends to retain influence and are therefore not covered by the term 'needs in the general interest'. Bestattung Wien submits in particular that, in Austria, the activity of funeral undertaker is not subject to any particular supervision other than the authority conferred on the first ministers of the *Länder* to impose maximum prices for certain services.

49 Finally, according to the French Government, the Commission and the EFTA Surveillance Authority, a subsidiary legal obligation such as that provided for by Paragraph 10(1) of the WLBG does constitute strong evidence of the existence of a need in the general interest inasmuch as that paragraph provides for both the actual arrangement of funerals by the City of Vienna and the assumption by it of the costs of those funerals, where those are not covered by the deceased's estate.

The Court's reply

50 The Court has already held that needs in the general interest, not having an industrial or commercial character, within the meaning of Article 1(b) of the Community directives coordinating the award of public contracts are generally needs which are satisfied otherwise than by the availability of goods and services in the marketplace and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence (see *BFI Holding*, paragraphs 50 and 51, and *Agorà and Excelsior*, paragraph 37).

51 It cannot be disputed that the activities of funeral undertakers may indeed be regarded as meeting a need in the general interest.

52 First, such activities are linked to public policy in so far as the State has a clear interest in exercising close control over the issue of certificates such as birth and death certificates.

53 Second, the State may be justified in retaining influence over those activities and in taking measures such as those provided for in Paragraph 10(1) of the WLBG on manifest grounds of hygiene and public health where funerals have not been arranged within a certain period after the death certificate has been issued. The very existence of such a provision therefore constitutes evidence that the activities in question meet a need in the general interest.

54 In that context, it is, *inter alia*, appropriate to reject the interpretation advocated by the defendant in the main proceedings that, in contrast to funeral services 'in the broad sense of the term' such as the placing of death notices, the placing of the deceased in the coffin or the transport of the deceased, only the burial or cremation of the body and the management of cemeteries and columbaria — classified as funeral services 'in the narrow sense of the term' — are covered by the concept of needs in the general interest. Such a distinction is artificial as all or most of those services are normally provided by the same undertaking or public authority.

55 Furthermore, as the Advocate General has pointed out in paragraph 68 of his Opinion, funeral services are governed by a single law of the Land of Vienna, namely the WLBG. Paragraph 33(4) of that law expressly provides that 'the employees of the legal entity or the employees of the undertaking appointed by the legal entity shall carry out the funeral ceremony..., transport the body or ashes to the grave... They shall also open and close all graves, lower the body or ashes and carry out exhumations...'.

56 In any event, even if funeral services 'in the narrow sense of the term' constitute only a relatively unimportant part of the services provided by a funeral undertaker, that fact is irrelevant since that undertaking continues to meet needs in the general interest. According to settled case-law, 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 (see *Mannesmann Anlagenanbau Austria*, paragraphs 25, 26 and 31, and *BFI Holding*, paragraphs 55 and 56).

57 In light of the foregoing, the answer to the second limb of the first question must therefore be that the activities of funeral undertakers may meet a need in the general interest. The fact that a regional or local authority is legally obliged to arrange funerals — and, where necessary, to bear the costs of those funerals — where they have not been arranged within a certain period after a death certificate has been issued constitutes evidence that there is such a need in the general interest.

The second question

58 By its second question, the national court asks whether the activity of funeral undertaker meets a need in the general interest not having an industrial or commercial character within the meaning of Article 1(b) of Directive 93/36. Pointing out in this regard that more than 500 undertakings are active in the funeral-services sector in Austria but that, according to the applicant in the main proceedings, there is no competition on the local market in Vienna, the national court asks essentially whether the existence of significant competition is itself sufficient to justify the conclusion that there is no need in the general interest, not having an industrial or commercial character, or whether account must be taken of all the relevant legal and factual circumstances in each individual case.

59 In that regard, it is sufficient to observe that, faced with a similar question, the Court held, in paragraph 47 of *BFI Holding*, that the absence of competition is not a condition which must necessarily be taken into account in defining a body governed by public law. The requirement that there should be no private undertakings capable of meeting the needs for which the body financed by the State, regional or local authorities or other bodies governed by public law was set up would be liable to render meaningless the term 'body governed by public law' used in Article 1(b) of Directive 93/36 (see, to that effect, *BFI Holding*, paragraph 44).

60 However, the Court stated, in paragraphs 48 and 49 of that judgment, 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. 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.

61 It follows from the same wording used in the judgment in *BFI Holding* that, although not entirely irrelevant, the existence of significant competition does not, of itself, permit the conclusion that there is no need in the general interest not having an industrial or commercial character.

62 In the present case, it is common ground that the activity of funeral undertaker is not reserved in Austria to specific legal persons and that the exercise of that activity is not, in principle, subject to any territorial restriction.

63 In contrast, it is clear from both the order for reference and the observations submitted to the Court that the exercise of that activity is subject to the grant of

prior authorisation, which is dependent on the existence of a need in the general interest and on the provisions adopted by the municipalities in relation to funerals, and that the First Minister of the *Land* has competence to fix maximum prices for funeral services either for the entire *Land* or by administrative unit or municipality.

64 Furthermore, under Paragraph 10(1) of the WLBG, the City of Vienna is obliged to bear the costs of funerals where they have not been arranged by third parties or are not covered by the estate of the deceased.

65 That being so, the national court must, for the purpose of determining the exact nature of the needs met by Bestattung Wien, analyse all the legal and factual circumstances governing the activity of that company, as described in paragraphs 62 to 64 of the present judgment, the conditions of the separation from Wiener Stadtwerke and the transfer of the activities of Wiener Bestattung to Bestattung Wien and the terms of the exclusivity agreement which, according to the applicant in the main proceedings, links Bestattung Wien to the City of Vienna.

66 In light of the foregoing, the answer to the second question must be that the existence of significant competition does not, of itself, allow the conclusion to be drawn that there is no need in the general interest, not having an industrial or commercial character. The national court must assess whether or not there is such a need, taking account of all the relevant legal and factual circumstances, such as those prevailing at the time of establishment of the body concerned and the conditions under which it exercises its activity.

The third question

67 Finally, by its third question, the national court seeks clarification of the scope of the criterion, in the third indent of the second subparagraph of Article 1(b) of Directive 93/36, of supervision of the management of the body concerned by the State, regional or local authorities or other bodies governed by public law. It wishes to know, more specifically, whether that criterion is satisfied in the case of a mere review of the management of the body in question.

68 In that regard, suffice it to note that, according to the settled case-law of the Court (see, *inter alia*, *University of Cambridge*, paragraph 20, and *Commission* v *France*, paragraph 44), each of the alternative conditions set out in the third indent of the second subparagraph of Article 1(b) of Directives 92/50, 93/36 and 93/37 reflects the close dependency of a body on the State, regional or local authorities or other bodies governed by public law.

69 More specifically, as regards the criterion of management supervision, the Court has held that that supervision must give rise to dependence on the public authorities equivalent to that which exists where one of the other alternative criteria is fulfilled, namely where the body in question is financed, for the most part, by the public authorities or where the latter appoint more than half of the members of its administrative, managerial or supervisory organs, enabling the public authorities to influence their decisions in relation to public contracts (see *Commission* v *France*, paragraphs 48 and 49).

70 In the light of that case-law, the criterion of managerial supervision cannot be regarded as being satisfied in the case of mere review since, by definition, such

supervision does not enable the public authorities to influence the decisions of the body in question in relation to public contracts.

71 However, as the Advocate General has pointed out in paragraphs 109 to 114 of his Opinion, the evidence supplied by the national court suggests that, in the present case, the supervision of Bestattung Wien's activities by the City of Vienna largely exceeds that of a mere review.

72 First, Bestattung Wien is, pursuant to Paragraph 73 of the WStV, subject to direct supervision by the City of Vienna as a result of its ownership by a company, WSH, which is wholly owned by that municipality.

73 Second, it is also apparent from the order for reference that Paragraph 10.3 of the shareholders' agreement governing Bestattung Wien expressly provides that the Kontrollamt is authorised to examine not only the annual accounts of the company but also its 'conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency'. That paragraph of the shareholders' agreement governing Bestattung Wien also authorises the Kontrollamt to inspect the company's business premises and facilities and to report the results of those inspections to the competent bodies and to the company shareholders and

the City of Vienna. Such powers therefore enable the Kontrollamt actively to control the management of that company.

74 In light of the foregoing, the answer to the third question must be that a mere review does not satisfy the criterion of management supervision in the third indent of the second subparagraph of Article 1(b) of Directive 93/36. That criterion is, however, satisfied where the public authorities supervise not only the annual accounts of the body concerned but also its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency and where those public authorities are authorised to inspect the business premises and facilities of that body and to report the results of those inspections to a regional authority which holds, through another company, all the shares in the body in question.

Costs

75 The costs incurred by the Austrian and French Governments and by the Commission and the EFTA Surveillance Authority, 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 (Fifth Chamber),

in answer to the questions referred to it by the Vergabekontrollsenat des Landes Wien by order of 14 September 2000, hereby rules:

1. The term 'needs in the general interest' in the second subparagraph of Article 1(b) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts is an autonomous concept of Community law.

2. The activities of funeral undertakers may meet a need in the general interest. The fact that a regional or local authority is legally obliged to arrange funerals — and, where necessary, to bear the costs of those funerals — where they have not been arranged within a certain period after a death certificate has been issued constitutes evidence that there is such a need in the general interest.

3. The existence of significant competition does not, of itself, allow the conclusion to be drawn that there is no need in the general interest, not having an industrial or commercial character. The national court must assess

whether or not there is such a need, taking account of all the relevant legal and factual circumstances, such as those prevailing at the time of establishment of the body concerned and the conditions under which it exercises its activity.

4. A mere review does not satisfy the criterion of management supervision in the third indent of the second subparagraph of Article 1(b) of Directive 93/36. That criterion is, however, satisfied where the public authorities supervise not only the annual accounts of the body concerned but also its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency and where those public authorities are authorised to inspect the business premises and facilities of that body and to report the results of those inspections to a regional authority which holds, through another company, all the shares in the body in question.

Wathelet Timmermans Jann

von Bahr Rosas

Delivered in open court in Luxembourg on 27 February 2003.

R. Grass M. Wathelet

Registrar President of the Fifth Chamber