JUDGMENT OF THE COURT (Second Chamber)
19 April 2007 *

In Case C-295/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal Supremo (Spain), made by decision of 1 April 2005, received at the Court on 21 July 2005, in the proceedings

Asociación Nacional de Empresas Forestales (Asemfo)

v

Transformación Agraria SA (Tragsa),

Administración del Estado,

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, R. Silva de Lapuerta, G. Arestis (Rapporteur) and L. Bay Larsen, Judges,

Advocate General: L.A. Geelhoed,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 15 June 2006,

after considering the observations submitted on behalf of:

— the Asociación Nacional de Empresas Forestales (Asemfo), by D.P. Thomas de Carranza y Méndez de Vigo, procuradora, and R. Vázquez del Rey Villanueva, abogado,

— Transformación Agraria SA (Tragsa), by S. Ortiz Vaamonde and I. Pereña Pinedo, abogados,

— the Spanish Government, by F. Díez Moreno, acting as Agent,

— the Lithuanian Government, by D. Kriaučiūnas, acting as Agent,

— the Commission of the European Communities, by X. Lewis and F. Castillo de la Torre, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 September 2006,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the question whether, having regard to Article 86(1) EC, a Member State may confer on a public undertaking a legal regime enabling it to carry out operations without being subject to Council

Directives 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), 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and 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), and whether those directives preclude such a regime.

2 That reference was made in the course of proceedings between the Asociación Nacional de Empresas Forestales (National Association of Forestry Undertakings, 'Asemfo') and the Administración del Estado (State Administration) over a complaint about the legal regime of Transformación Agraria SA ('Tragsa').

Legal background

Relevant provisions of Community law

3 Article 1 of Directive 92/50 stated:

'For the purposes of this Directive:

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

...

(b) contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

...'

4 Article 1 of Directive 93/36 provided:

'For the purposes of this Directive:

(a) "public supply contracts" are contracts for pecuniary interest concluded in writing involving the purchase, lease rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations;

(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;

...'

5 Article 1 of Directive 93/37 was worded as follows:

'For the purpose 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;

...'

The relevant provisions of national law

Legislation on public procurement

6 Article 152 of Ley 13/1995 de Contratos de las Administraciones Públicas of 18 May 1995 (Law 13/1995 on Public Procurement) (BOE No 119 of 19 May 1995, p. 14601), in its version codified by Real Decreto Legislativo 2/2000 of 16 June 2000 (BOE No 148 of 21 June 2000, p. 21775), (hereinafter 'Law 13/1995'), states:

'1. The Administation may carry out works using its own services and its own human or material resources, or in cooperation with private contractors, provided, in the latter case, that the value of the works in question is lower than ..., where one of the following situations obtains:

(a) Where the Administration has at its disposal factories, stocks, workshops or technical or industrial services suitable for the execution of the projected works, use should usually be made of that method of execution.

...'

7 Article 194 of Law 13/1995 provides:

'1. The Administration may manufacture movable property using its own services and its own human or material resources or in cooperation with private contractors, provided, in the latter case, that the value of the works in question is lower than the maximum amounts laid down in Article 177(2) where one of the following situations obtains:

(a) Where the Administration has at its disposal factories, stocks, workshops or technical or industrial services suitable for the execution of the projected works, use should usually be made of that method of execution.

...'

The body of rules governing Tragsa

8 Tragsa's constitution was authorised by Article 1 of Decreto Real (Royal Decree) 379/1977 of 21 January 1977 (BOE No 65 of 17 March 1977, p. 6202).

9 The body of rules governing Tragsa and established by that royal decree was successively amended until the adoption of Ley 66/1997 de Medidis Fiscales Adminstrativas y del Orden Social (Law 66/1997 concerning Fiscal, Administrative and Social Measures) of 30 December 1997 (BOE No 313 of 31 December 1997, p. 38589), as amended by Ley 53/2002 of 30 December 2002 (BOE No 313 of 31 December 2002, p. 46086), and Ley 62/2003 of 30 December 2003 (BOE No 313 of 31 December 2003, p. 46874), (hereinafter 'Law 66/1997').

10 Under Article 88 of Law 66/1997, entitled 'Legal status':

'1. [Tragsa] is a state company ... which provides essential services in the field of rural development and environmental protection, in accordance with the provisions of the present law.

2. The Autonomous Communities may participate in the share capital of Tragsa by means of acquisitions of shares, the disposal of which requires authorisation by the Ministerio de Economía y Hacienda (Ministry of the Treasury), on the proposal of the Ministerio de Agricultura, Pesca y Alimentación (Ministry of Agriculture, Fisheries and Food) and of the Ministerio de Medio Ambiente (Ministry of the Environment).

3. Tragsa's objects are:

(a) The carrying out of all types of actions, works and supplies of services in respect of agriculture, stock-rearing, forestry, rural development, conservation and

protection of nature and the environment, of aquaculture and fisheries, as well as the actions necessary for the improvement of the use and of the management of natural resources, in particular, the carrying out of works of conservation and enrichment of the historic Spanish patrimony in the countryside ...;

(b) the preparation of studies plans and projects and of all types of advice and technical assistance and training in respect of agriculture, forestry, rural development, environmental protection and improvement, aquaculture and fisheries, nature conservation, as well as in respect of the use and management of natural resources;

(c) agricultural activities, stock-rearing, forestry and aquaculture and the marketing of the products thereof, administration and management of farms, mountains, agricultural, forestry environmental and nature protection centres and the management of open spaces and natural resources;

(d) the promotion, development and adaptation of new techniques, of new agricultural, forestry, environmental, aquacultural or fishery equipment and nature protection systems, and systems for the logical use of natural resources;

(e) the manufacture and marketing of moveable goods of the same character;

(f) the prevention of and campaign against plant and animal disasters and diseases and against forest fires and the performance of works and tasks of emergency technical support;

(g) the financing of the construction or exploitation of agricultural and environmental infrastructures and of equipment for rural populations as well as the formation of companies and participation in companies already formed with purposes corresponding to the social objects of the undertaking;

(h) the execution, at the request of third parties, of actions, works, technical assistance, advice and supplies of rural, agricultural, forestry and environmental services within and outside the national territory, directly or through its subsidiaries.

4. As an instrument and technical service of the Administration, Tragsa shall be required to execute exclusively, by itself or through its subsidiaries, the works entrusted to it by the Administración General del Estado (General Administration of the State), the Autonomous Communities or the public bodies subject to them in matters which come within the company's objects and, in particular, those which are urgent or which are ordered because of declared emergencies.

...

5. Neither Tragsa nor its subsidiaries may participate in public procurement procedures put in place by the public authorities whose instrument they are. However, in the absence of any tenderer, Tragsa may be entrusted with the execution of the activity which is the subject of the public call for tenders.

6. The value of the major works, projects, studies and supplies undertaken by Tragsa shall be determined by applying to the stages carried out the corresponding tariffs, which must be determined by the competent authority. Those tariffs shall be calculated so as to reflect the actual costs of carrying out the works and their application to the stages carried out shall be sufficient evidence of the investment made or services rendered.

7. Contracts for works, supplies, advice and assistance and services which Tragsa and its subsidiaries conclude with third parties shall remain subject to the provisions of [Law 13/1995], as regards publicity, procurement procedures and the forms thereof, provided that the value of the contracts is equal or superior to those laid down in Articles 135(1), 177(2) and 203(2) of [that law].'

11 Decreto Real 371/1999 of 5 March 1999 laying down the rules governing Tragsa (BOE No 64 of 16 March 1999, p. 10605, 'Royal Decree 371/1999') specifies the legal, financial and administrative rules governing that company and subsidiaries in their relations with the public authorities in respect of administrative action in or outside national territory, in their capacity as an instrument and technical service of those administrations.

12 Under Article 2 of Royal Decree 371/1999, Tragsa's entire share capital is to be held by persons governed by public law.

13 Article 3 of Royal Decree 371/1999, entitled 'Legal status', provides:

'1. Tragsa and its subsidiaries are an instrument and a technical service of the General Administration of the State and of those of each of the Autonomous Communities concerned.

The various departments or ministries of the Autonomous Communities of the aforementioned public administrations, as well as the bodies subject to them and the entities of any nature which are connected to them for the purposes of carrying out of their plans of action, may entrust Tragsa or its subsidiaries with works and activities necessary to the exercise of their powers and duties, and with complementary or ancillary works and activities in accordance with the regime established by this royal decree.

2. Tragsa and its subsidiaries shall be required to carry out the works and activities with which they are entrusted by the administration. That obligation covers, exclusively, the demands with which they are entrusted as an instrument and technical service in matters which come within its objects.

3. Emergency action decided upon in connection with catastrophes or disasters of any nature which is entrusted to them by the competent authority shall, for Tragsa and its subsidiaries, in addition to being obligatory, be a priority.

In emergencies, in which the public authorities must take immediate action, they shall be able to call directly on Tragsa and its subsidiaries and instruct them to take the action necessary to provide the most effective possible protection for persons and goods and the maintenance of services.

To that end, Tragsa and its subsidiaries shall be integrated into the present arrangements for the prevention of dangers and into action plans and shall be subject to implementing protocols. In that type of situation, they shall mobilise, on demand, all the means at their disposal.

4. In connection with their relationships of collaboration or cooperation with other authorities or bodies governed by public law, the public authorities may suggest the services of Tragsa and its subsidiaries, regarded as their instrument, in order that those other authorities or bodies governed by public law shall use them as their instrument ...

5. ... the functions of organisation, supervision and control concerning Tragsa and its subsidiaries shall be exercised by the Ministerio de Agricultura, Pesca y Alimentación (Ministry of Agriculture, Fisheries and Food) as well as by the Ministerio de Medio Ambiente (Ministry of the Environment).

6. Tragsa's and its subsidiaries' relations with other authorities as an instrument and technical service are instrumental and not contractual in nature. Consequently, they are, in every respect, internal, dependent, and subordinate.'

14 Article 4 of Royal Decree 371/1999, entitled 'Financial structure', is worded as follows:

'1. In accordance with Article 3 of the present royal decree, Tragsa and its subsidiaries shall receive, in return for the works, technical assistance and advice, and for the supplies of goods and services with which they are entrusted, an amount corresponding to the expenses which they have incurred by applying the system of tariffs established by this article ...

2. The tariffs shall be calculated and applied by stages of execution and in such a way as to reflect the total actual costs, be they direct or indirect, of executing them.

...

7. New tariffs, modification of existing tariffs and the procedures, mechanisms and formulae for revising them shall be adopted by each public authority of which Tragsa and its subsidiaries are an instrument and technical service.

...'

15 Finally, Article 5 of Royal Decree 371/1999, entitled 'Administrative rules for action', provides:

'1. Mandatory action which is entrusted to Tragsa or its subsidiaries, shall form the subject, as appropriate, of drafts, memoranda or other technical documents ...

2. Before finalising the demand, the competent organs shall approve those documents and follow the mandatory procedures and the technical, legal, budgetary, supervisory and approval formalities in respect of the expense.

3. The demand for each mandatory action shall be formally communicated by the authorities to Tragsa or its subsidiaries, by means of an instruction containing, in addition to the appropriate information, the name of the authority, the period within which the instruction is to be carried out, its value, the budgetary heading corresponding to it and, if appropriate, the annual amounts on which the financing is based and the respective amount relating to it, as well as the director designated for the action to be executed. ...

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 The facts, as set forth in the order for reference, may be summarised as follows.

17 On 23 February 1996, Asemfo lodged a complaint against Tragsa for a declaration that Tragsa was abusing its dominant position in the Spanish forestry works, services and projects market because of non-compliance with the award procedures laid down in Law 13/1995. According to Asemfo, Tragsa's special status enabled it to carry out a large number of works at the direct demand of the Administration, in breach of the principles relating to public procurement and to free competition, which eliminates any competition on the Spanish market. Being a public undertaking for the purposes of Community law, Tragsa could not be entitled,

under the pretext of being a technical service of the Administration, to privileged treatment as regards the rules governing public procurement.

18 By decision of the competent authority of 16 October 1997, that complaint was rejected on the ground that Tragsa was a service of the Administration, without any independent decision-making powers and was required to carry out the works demanded of it. Tragsa operating outside the market, its activities do not, therefore, come under the law of competition.

19 Asemfo appealed against that decision before the Tribunal de Defensa de la Competencia (Competition Court). By judgment of 30 March 1998, that court dismissed the appeal, holding that the operations carried out by Tragsa were executed by the Administration itself and that, therefore, there could be no breach of competition law unless that company was acting independently.

20 Asemfo appealed to the Audiencia Nacional (National High Court) which, in its turn, by a judgment of 26 September 2001, upheld the judgment at first instance.

21 Asemfo appealed on a point of law against that judgment to the Tribunal Supremo (Supreme Court) arguing that Tragsa, as a public undertaking, could not be treated as a service of the Administration, which would enable it to derogate from the rules of public procurement, and that the company's legal status, as defined in Article 88 of Ley 66/1997, could not be compatible with Community law.

22 Having held that Tragsa is an 'instrument' of the Administration and that it confines itself to carrying out the instructions of the public authorities, without being able to refuse them or fix the price of its activities, the Tribunal Supremo has harboured doubts as regards the compatibility of Tragsa's legal status with Community law in the light of the Court's case-law on the application to public undertakings of the provisions of Community law relating to public procurement and free competition.

23 In addition, while recalling that, in Case C-349/97 *Spain* v *Commission* [2003] ECR I-3851, the Court held, in respect of Tragsa, that it must be regarded as a means by which the Administration acts directly, the referring court states that, in the case which is now before it, there are factual circumstances which were not considered in that judgment, such as the strong public participation on the agricultural works market, which causes it significant disruption, even if Tragsa's activities are, in law, unconnected to the market, inasmuch as from a legal point of view it is the Administration which acts.

24 Those were the circumstances in which the Tribunal Supremo decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 86(1) EC permit a Member State of the European Union to grant *ex lege* to a public undertaking a legal status which allows it to execute public works without being subject to the general rules on the award of public contracts by tender, where there are no special circumstances of urgency or public interest, both below and above the financial threshold laid down by the European Directives in this regard?

(2) Is such a legal regime compatible with the provisions of Council Directives 93/36/EEC and 93/37/EEC and European Parliament and Council Directive 97/52/EC of 13 October 1997 [(OJ 1997 L 328, p. 1)] and Commission Directive 2001/78 [EC of 13 September 2001 (OJ 2001 L 285, p. 1)] amending the three previous directives — legislation recently recast by European Parliament and Council Directive 2004/18/EC of 31 March 2004 [on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)]?

(3) Are the statements contained in the judgment ... in *Spain* v *Commission* applicable in any event to Tragsa and its subsidiaries, in the light of the rest of the case-law of the Court regarding public procurement and in view of the fact that the Administration entrusts to Tragsa a large number of works which are not subject to the rules governing free competition, and that this situation might cause considerable distortion of the relevant market?'

The questions referred for a preliminary ruling

Admissibility

25 Tragsa, the Spanish Government and the Commission of the European Communities challenge the Court's jurisdiction to give a preliminary ruling on the reference and, relying on several arguments, cast doubt on the admissibility of the questions referred by the national court.

26 First of all, those questions relate only to the evaluation of national measures and, therefore, they do not come within the jurisdiction of the Court,

27 Next, those questions are hypothetical inasmuch as they seek an answer to problems which are not relevant or germane to the outcome of the main proceedings. If the only relevant plea in law invoked by Asemfo were a breach of the rules concerning public procurement, such a breach cannot, by itself, found an allegation that Tragsa abuses a dominant position on the market. In addition, it does not seem that the Court could be persuaded to interpret the directives relating to public procurement for the purposes of national proceedings intended to establish whether that company has abused an allegedly dominant position.

28 Finally, the order of reference contains no information relating to the relevant market or to Tragsa's allegedly dominant position upon it. Nor does it contain any detailed argument on the applicability of Article 86 EC and offers no comment on its application in conjunction with Article 82 EC.

29 It is appropriate in the first place to recall that, according to settled case-law, even though it is true that it is not for the Court to rule on the compatibility of national rules with the provisions of Community law in proceedings brought under Article 234 EC since the interpretation of such rules is a matter for the national courts, the Court does have jurisdiction to supply the latter with all the guidance as to the interpretation of Community law necessary to enable them to rule on the compatibility of such rules with the provisions of Community law (Case C-506/04 *Wilson* [2006] ECR I-8613, paragraphs 34 and 35, and the case-law there cited).

30 Secondly, under equally settled case-law, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, 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. Consequently, where questions submitted by national courts concern the interpretation of a provision of Community law, the Court of Justice is bound, in principle, to give a ruling (see, in particular, Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, paragraph 27, and Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraphs 16 and 17, and the case-law there cited).

31 Thirdly, it is settled case-law that a reference from a national court may be refused only if it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 17, and the case-law there cited).

32 Furthermore, the Court has also held that the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (Case C-205/05 *Nemec* [2006] ECR I-10745, paragraph 25, and *Confederación Española de Empresarios de Estaciones de Servicio*, paragraph 26, and the case-law there cited).

33 In that regard, according to the case-law of the Court, it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and on the link it establishes between those provisions and the national legislation applicable to the dispute (*Nemec*, paragraph 26, and Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 38).

34 In the case in the main proceedings, while it is admittedly true that the Court cannot itself rule on the compatibility of Tragsa's legal status with Community law, there is nothing to prevent it from providing the canons of construction of Community law which will enable the referring court itself to rule on the compatibility of Tragsa's legal status with Community law.

35 In those circumstances, it is necessary to examine whether, in the light of the case-law referred to in paragraphs 31 to 33 of the present judgment, the Court has before it the factual and legal material necessary to give a useful answer to the questions submitted to it.

36 As regards the second and third questions, it is important to point out that the order of reference sets out, briefly but precisely, the facts which gave rise to the main proceedings and the relevant provisions of the applicable national law.

37 Indeed, it is clear from that decision that those proceedings arose following a complaint lodged by Asemfo concerning Tragsa's legal status, since the latter can, according to Asemfo, carry out a large number of operations at the direct demand of the Administration, without compliance with the rules in respect of publicity set out in the directives relating to public procurement. In those proceedings, Asemfo maintains also that Tragsa, being a public undertaking, cannot be entitled, under the pretext of being a technical service of the Administration, to privileged treatment as regards the rules governing public procurement.

38 In addition, in connection with the second and third questions, the order of reference sets out, referring to the Court's case-law, first, the reasons for which the national court requests the interpretation of the directives relating to public procurement and, second, the link between the relevant Community legislation and the national legislation applicable to the matter.

39 As regards the first question, which concerns the point whether the body of rules governing Tragsa is contrary to Article 86(1) EC, it is appropriate to point out that, according to that article, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States are not to enact or maintain in force any measure contrary to the rules contained in the EC Treaty, in particular to those rules provided for in Articles 12 EC and 81 EC to 89 EC inclusive.

40 It follows from the clear terms of Article 86(1) EC that it has no independent effect in the sense that it must be read in conjunction with the relevant rules of the Treaty.

41 It follows from the order of reference that the relevant provision referred to by the national court is Article 86(1) EC in conjunction with Article 82 EC.

42 In that regard, there is no precise information in the order for reference concerning the existence of a dominant position, its unlawful exploitation by Tragsa or the effect of such a position on trade between the Member States.

43 In addition, it seems that, by the first question, the national court refers, in essence, to operations capable of being regarded as public contracts, a premise on which the Court is, in any event, requested to rule in the second question.

44 It follows therefore from the foregoing that, in contrast to the second and third questions, the Court does not have before it the factual and legal material necessary to give a useful answer to the first question.

45 It follows that, whilst the first question must be declared to be inadmissible, the reference for a preliminary ruling is admissible as regards the two other questions.

Substance

The second question

46 By its second question, the referring court asks the Court whether a body of rules such as that governing Tragsa, which enables it to execute operations without being subject to the regime laid down by those directives, is contrary to Directives 93/36 and 93/37.

47 At the outset, it must be stated that, notwithstanding the references made by the national court to Directives 97/52, 2001/78 and 2004/18, in view both of the context and of the date of the facts of the dispute in main proceedings and the nature of Tragsa's activities, as described in Article 88(3) of Ley 66/1997, it is appropriate to examine that second question having regard to the rules set forth in the directives relating to public procurement, namely, Directives 92/50, 93/36 and 93/37, which are relevant in this case.

48 In that regard, it must be observed that, according to the definitions given in Article 1(a) of each of the Directives mentioned in the preceding paragraph, a public service, supply or works contract assumes the existence of a contract for pecuniary interest in writing between, first, a service provider, a supplier or a contractor and, second, a contracting authority within the meaning of Article 1(b) of those directives.

49 In this case it is appropriate to hold , first of all, that, under Article 88(1) and (2) of Ley 66/1997 Tragsa is a State company the share capital of which may also be held by the Autonomous Communities. Article 88(4) and the first subparagraph of Article 3(1) of Royal Decree 371/1999 state that Tragsa is an instrument and a technical service of the General State Administration and of the administration of each of the Autonomous Communities concerned.

50 Next, as is clear from Articles 3(2) to (5), and 4(1), (2) and (7) of Royal Decree 371/1999, Tragsa is required to carry out the orders given it by the General State Administration, the Autonomous Communities and the public bodies subject to them, in the areas covered by its company objects, and it is not entitled to fix freely the tariff for its actions.

51 Finally, under Article 3(6) of Royal Decree 371/1999, Tragsa's relations with those public bodies, inasmuch as that company is an instrument and a technical service of those bodies, are not contractual, but in every respect internal, dependent and subordinate.

52 Asemfo submits that the legal relationship which flows from the orders which Tragsa receives, even though it is formally unilateral, reveals in fact, as is clear from the Court's case-law, an indisputable contractual link with the limited partner. Asemfo refers, in that regard, to Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409. In those circumstances even if Tragsa seems to act on the instructions of the public authorities, it is, in fact, a party contracting with the Administration, so that the rules for public procurement ought to be applied.

53 In that regard, it is appropriate to observe that, in paragraph 205 of the judgment in *Spain* v *Commission*, the Court held, in a different context from that of the main proceedings, that being an instrument and technical service of the Spanish Administration, Tragsa is required to implement, itself or using its subsidiaries, only work entrusted to it by General Administration of the State, the Autonomous Communities or the public bodies subject to them.

54 It must be observed that, if, which it is for the referring court to establish, Tragsa has no choice, either as to the acceptance of a demand made by the competent authorities in question, or as to the tariff for its services, the requirement for the application of the directives concerned relating to the existence of a contract is not met.

55 In any event, it is important to recall that, according to the Court's settled case-law, a call for tenders, under the directives relating to public procurement, is not compulsory, even if the contracting party is an entity legally distinct from the contracting authority, where two conditions are met. First, the public authority which is a contracting authority must exercise over the distinct entity in question a control which is similar to that which it exercises over its own departments and, second, that entity must carry out the essential part of its activities with the local authority or authorities which control it (see Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50; Case C-26/03 *Stadt Halle and RPL Loclau* [2005] ECR I-1, paragraph 49; Case C-84/03 *Commission* v *Spain* [2005] ECR I-139, paragraph 38; Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705, paragraph 34; and Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 33).

56 Accordingly, it is appropriate to examine whether the two conditions required by the case-law cited in the preceding paragraph are met in Tragsa's case.

57 As regards the first condition, relating to the public authority's control, it follows from the Court's case-law that the fact that the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer tends to indicate, generally, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments (*Carbotermo and Consorzio Alisei*, paragraph 37).

58 In the case in the main proceedings, it is clear from the case file, but subject to confirmation by the referring court, that 99% of Tragsa's share capital is held by the

Spanish State itself and through a holding company and a guarantee fund, and that four Autonomous Communities, each with one share, hold 1% of such capital.

59 In that regard, the argument cannot be accepted that that condition is met only for contracts performed at the demand of the Spanish State, excluding those which are the subject of a demand from the Autonomous Communities as regards which Tragsa must be regarded as a third party.

60 It appears to follow from Article 88(4) of Ley 66/1997 and Articles 3(2) to (6) and 4(1) and (7) of Royal Decree 371/1999 that Tragsa is required to carry out the orders given it by the public authorities, including the Autonomous Communities. It also seems to follow from that national legislation that, as with the Spanish State, in the context of its activities with those Communities, as an instrument and technical service, Tragsa is not free to fix the tariff for its actions and that its relationships with them are not contractual.

61 It seems therefore that Tragsa cannot be regarded as a third party in relation to the Autonomous Communities which hold a part of its capital.

62 As regards the second condition, relating to the fact that the essential part of Tragsa's activities must be carried out with the authority or authorities which own it, it follows from the case-law that, where several authorities control an undertaking, that condition may be met if that undertaking carries out the essential part of its

activities, not necessarily with any one of those authorities, but with all of those authorities together (*Carbotermo and Consorzio Alisei*, paragraph 70).

63 In the case in the main proceedings, as is clear from the case-file, Tragsa carries out more than 55% of its activities with the Autonomous Communities and nearly 35% with the State. It thus appears that the essential part of its activities is carried out with the public authorities and bodies which control it.

64 In those circumstances, but subject to confirmation by the referring court, it must be held that the two conditions required by the case-law cited in paragraph 55 of the present judgment are met in this case.

65 It follows from the entirety of the foregoing considerations that the reply to the second question must be that a body of rules such as that governing Tragsa which enables it, as a public undertaking acting as an instrument and technical service of several public authorities, to execute operations without being subject to the regime laid down by those directives, is not contrary to Directives 92/50, 93/36 and 93/37, since first, the public authorities concerned exercise over that undertaking a control similar to that which they exercise over their own departments, and, second, such an undertaking carries out the essential part of its activities with those same authorities.

The third question

66 Having regard to the reply given to the second question referred by the national court, there is no need to reply to the third question.

Costs

67 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Council Directives 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts and 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts do not preclude a body of rules such as that governing Tragsa, which enable it, as a public undertaking acting as an instrument and technical service of several public authorities, to execute operations without being subject to the regime laid down by those directives, since, first, the public authorities concerned exercise over that undertaking a control similar to that which they exercise over their own departments, and, second, such an undertaking carries out the essential part of its activities with those same authorities.

[Signatures]