JUDGMENT OF THE COURT (Grand Chamber)

9 June 2009*

In Case C-480/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 24 November 2006,

Commission of the European Communities, represented by X. Lewis and B. Schima, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by M. Lumma and C. Schulze-Bahr, acting as Agents, and by C. von Donat, Rechtsanwalt,

defendant,

* Language of the case: German.

supported by:

Kingdom of the Netherlands, represented by C.M. Wissels and Y. de Vries, acting as Agents,

Republic of Finland, represented by J. Heliskoski, acting as Agent,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, K. Lenaerts and J.-C. Bonichot (Rapporteur), Presidents of Chambers, A. Borg Barthet, J. Malenovský, J. Klučka and U. Lõhmus, Judges,

Advocate General: J. Mazák,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 11 November 2008,

after hearing the Opinion of the Advocate General at the sitting on 19 February 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by reason of the fact that the *Landkreise* (administrative districts) Rotenburg (Wümme), Harburg, Soltau-Fallingbostel and Stade directly concluded with Stadtreinigung Hamburg (City of Hamburg Cleansing Department) a contract for waste disposal without there having been a call for tenders in the context of a formal tendering procedure at European Community level for that services contract, the Federal Republic of Germany has failed to fulfil its obligations under the combined provisions of Article 8 and Titles III to VI 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).

Legal context

Community law

2 Article 1 of Directive 92/50 provides:

‘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.

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.

…

(c) *service provider* shall mean any natural or legal person, including a public body, which offers services. A service provider who submits a tender shall be designated by the term *tenderer* and one who has sought an invitation to take part in a restricted or negotiated procedure by the term *candidate*.'

3 Pursuant to Article 11(3)(b) of Directive 92/50:

'Contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice in the following cases:

…

(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider.'

The factual background to the case and the pre-litigation procedure

4 Four *Landkreise* in Lower Saxony, namely Rotenburg (Wümme), Harburg, Soltau-Fallingbostel and Stade, concluded a contract on 18 December 1995 with Stadtreinigung Hamburg relating to the disposal of their waste in the new incineration facility at Rugenberger Damm, with a capacity of 320 000 tonnes per annum. That facility is intended to produce both electricity and heat and its construction was to be completed by 15 April 1999.

5 In that contract, Stadtreinigung Hamburg reserve a capacity of 120 000 tonnes per annum for the four *Landkreise* in question, for a price calculated using the same formula for each of the parties concerned. That price is to be paid to the facility's operator, the other party to the contract with Stadtreinigung Hamburg, through the intermediary of the latter. The contract is to run for 20 years. The parties agreed to open negotiations five years at the latest before the end of that contract in order to make a decision as to its extension.

6 The contract at issue was concluded directly between the four *Landkreise* and Stadtreinigung Hamburg without following the tendering procedure provided for in Directive 92/50.

7 By letter of formal notice sent on 30 March 2004, pursuant to the first paragraph of Article 226 EC, the Commission informed the German authorities that, by concluding a contract on waste disposal directly, without issuing a call for tenders or conducting a tendering procedure at European level, the Federal Republic of Germany had disregarded the combined provisions of Article 8 and of Titles III to VI of Directive 92/50.

8 By letter of 30 June 2004 to the Commission, the Federal Republic of Germany stated that the contract at issue finalised an agreement on the shared performance of a public service which was the responsibility of the *Landkreise* concerned and the City of

Hamburg. That Member State explained that the cooperation at district level at issue, the subject-matter of which was an activity taking place within the ambit of the State, did not affect the market and therefore did not fall within the scope of the law on public procurement.

9 Since it considered, despite these explanations, that the *Landkreise* concerned were public contracting authorities, that the contract on waste disposal was a contract for services for pecuniary interest, concluded in writing, which exceeded the threshold set for the application of Directive 92/50, and that, consequently, it fell within the scope of that directive, the Commission sent a reasoned opinion on 22 December 2004 to the Federal Republic of Germany pursuant to the first paragraph of Article 226 EC.

10 By letter of 25 April 2005, the Federal Republic of Germany reiterated its previous arguments.

11 Taking the view that that line of argument could not refute the claims set out in the reasoned opinion, the Commission decided, under the second paragraph of Article 226 EC, to bring this action.

The action

Arguments of the parties

12 The Commission submits, first, that the *Landkreise* concerned must be regarded as contracting authorities within the meaning of Directive 92/50 and that the contract at issue is a written contract for pecuniary interest exceeding the threshold set for the

application of that directive. In addition, waste disposal is an activity classified as a 'service' for the purposes of category 16 in Annex IA to that directive.

13 The Federal Republic of Germany contends, for its part, that the contract at issue is the culmination of a transaction internal to the administrative authorities and that, consequently, it does not fall within the scope of Directive 92/50.

14 According to that Member State, the contracting parties concerned must be regarded as providing administrative cooperation in the performance of their public tasks. In that respect, Stadtreinigung Hamburg could be regarded not as a service provider acting in return for payment, but as a body governed by public law responsible for waste disposal and offering administrative cooperation to neighbouring local authorities in return for reimbursement of its operating costs.

15 In this connection, the Kingdom of the Netherlands, like the Federal Republic of Germany, bases its arguments on paragraphs 16 and 17 of the judgment in Case C-380/98 *University of Cambridge* [2000] ECR I-8035, concluding that 'provision of services' must be understood as referring exclusively to provision of services which may be offered on the market by operators under certain fixed conditions.

16 Those two Member States submit that the content of the contract at issue goes beyond what is provided for under a 'service contract' for the purposes of Directive 92/50, since it requires the *Landkreise* concerned, in return for treatment of waste in the Rugenberger Damm facility, to make available to Stadtreinigung Hamburg, at an agreed rate, landfill capacity which the *Landkreise* do not themselves use, in order to alleviate the lack of landfill capacity confronting the City of Hamburg.

17 The Federal Republic of Germany also points out that that legal relationship is described in the preamble to the contract as a 'regional cooperation agreement for waste disposal'. It paves the way for cooperation between the contracting parties who, if necessary, will assist each other in the performance of their legal obligation to dispose of waste and will therefore perform that service jointly in the region concerned. It is thus envisaged that, in certain circumstances, the *Landkreise* concerned will agree to reduce, for a specified period, the quantity of waste delivered in the event of the treatment facility malfunctioning. They thus agree to limit their right to performance of the contract.

18 According to the Commission, the services provided in the present case cannot be regarded as administrative cooperation, insofar as the refuse disposal services do not carry out their activities under statute or other unilateral measures, but on the basis of a contract.

19 The Commission adds that the only permitted exceptions to the application of the directives on public procurement are those which are exhaustively and expressly mentioned therein (see, Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 43, concerning Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1)). It submits that, in Case C-84/03 *Commission* v *Spain* [2005] ECR I-139, paragraphs 38 to 40, the Court confirmed that contracts for horizontal cooperation concluded by local authorities, such as that which the present case concerns, are subject to the law on public procurement.

20 The Federal Republic of Germany disputes that interpretation of the judgment in *Commission* v *Spain*, taking the view that in the case which gave rise to those proceedings the Court did not expressly hold that all agreements concluded between administrative bodies fell within the scope of public procurement law but merely criticised the Kingdom of Spain for its general exclusion of agreements concluded between public law bodies from the scope of that law.

21 Secondly, the Commission does not accept that the Federal Republic of Germany can rely on the 'in house' exception, according to which contracts awarded by a contracting authority where, first, the public body exercises over the other contracting party, which is a person legally distinct from that public body, control similar to that which it exercises over its own departments and in so far as, secondly, that person carries out the essential part of its activities with the public body do not fall within the scope of the public procurement directives (see, to that effect, *Teckal*, paragraphs 49 and 50). According to the Commission, the condition relating to the existence of such control is not fulfilled in the present case, since none of the contracting bodies concerned exercises any power over the management of Stadtreinigung Hamburg.

22 By contrast, the Federal Republic of Germany takes the view that, in the context of the Hamburg Metropolitan Region, the requirement relating to the intensity of the control exercised, which must be measured against the yardstick of the public interest (see, to that effect, Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 50), is satisfied since the authorities concerned exercise reciprocal control over each other. Any divergence from the objectives jointly defined would cause the cooperation to cease altogether. The principle of 'give and take' implies that Stadtreinigung Hamburg and the *Landkreise* concerned have an interest in maintaining that cooperation and, consequently, in complying with the objectives jointly defined.

23 On the basis of the judgment in Case C-295/05 *Asemfo* [2007] ECR I-2999, the Kingdom of the Netherlands submits that the condition relating to the intensity of the control exercised may be fulfilled even if the control exercised by the public body concerned is more limited than that exercised over its own departments. It does not regard that condition as implying identical control. Only similar control is required.

24 In the Commission's opinion, that judgment does not constitute a relaxation of the case-law resulting from *Teckal*. It finds only that the criterion relating to the intensity of the control exercised may also be satisfied where a specific legal framework establishes a relationship of dependency and subordination, allowing similar control to be exercised by several contracting authorities. That is not the situation in the present case.

25 Thirdly, the Commission submits that the Federal Republic of Germany has not proved that, for technical reasons, solely Stadtreinigung Hamburg was in a position to conclude the contract at issue and that, consequently, it could rely on the derogation provided for in Article 11(3)(b) of Directive 92/50.

26 The Federal Republic of Germany submits that, had a call for tenders been issued, Stadtreinigung Hamburg would not necessarily have been able to submit a tender because, in 1994, that city did not have the capacity to recover waste that could have prompted it to participate in such a call for tenders. It is only in the light of the need of the *Landkreise* concerned to recover their waste, which only later became apparent, and of the assurance that the *Landkreise* would use a future facility that the construction of Rugenberger Damm facility was envisaged.

27 That Member State also points out that the said *Landkreise* were assured that the facility planned by Stadtreinigung Hamburg would be commissioned within a foreseeable period, an assurance that no other tenderer would have been able to provide.

28 Fourthly, the Commission rejects the arguments of the Federal Republic of Germany that the application of Directive 92/50 must be excluded, pursuant to Article 86(2) EC, where, as in the present case, it leads to the performance by public bodies of the task of waste disposal assigned to them being obstructed.

29 The Federal Republic of Germany considers that the interpretation of Directive 92/50 adopted by the Commission would lead, first, to the *Landkreise* concerned being unable to entrust waste disposal — which is a task in the public interest at Community level — to Stadtreinigung Hamburg, and to their having to entrust that task to the operator providing the most economically advantageous offer, without any guarantee that the

public service would be carried out satisfactorily or on a permanent basis, and, secondly, to the capacities of the new plant not being used profitably.

30 That Member State points out that if the contract at issue had not been concluded, none of the parties would have been able to perform its public task. The City of Hamburg, in particular, would not have been able to build a facility with extra capacity in order to then try, without any guarantee of success, on economic grounds to sell unused capacity on the market.

Findings of the Court

31 First of all, it must be observed that the Commission's action concerns only the contract concluded between Stadtreinigung Hamburg and four neighbouring *Landkreise* for reciprocal treatment of waste, and not the contract governing the relationship between Stadtreinigung Hamburg and the operator of the Rugenberger Damm waste treatment facility.

32 Pursuant to Article 1(a) of Directive 92/50, public service contracts are contracts for pecuniary interest concluded in writing between a service provider and one of the contracting authorities listed in Article 1(b) of that directive, which includes regional or local authorities such as the *Landkreise* concerned in this action for failure to fulfil obligations.

33 Under Article 1(c) of that directive, the service provider party to the contract may be 'any natural or legal person, including a public body'. Thus, the fact that the service

provider is a public entity distinct from the beneficiary of the services does not preclude the application of Directive 92/50 (see, to that effect, *Commission* v *Spain*, paragraph 40, regarding a public supply and works contract).

34 However, the Court's case-law shows that a call for tenders is not mandatory where a public authority which is a contracting authority exercises over the separate entity concerned control similar to that which it exercises over its own departments, provided that that entity carries out the essential part of its activity with the public authority or with other controlling local or regional authorities (see, to that effect, *Teckal*, paragraph 50, and *Stadt Halle and RPL Lochau*, paragraph 49).

35 Likewise, the Court has held, in respect of the delegation by a municipality of a public service to an inter-municipal cooperative the object of which was exclusively to provide services to the affiliated municipalities, that that could legally take place without a call for tenders, since it considered that, notwithstanding the autonomous aspects of that cooperative's management by its board, the affiliated municipalities had to be regarded as together exercising control over it (see, to that effect, Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 41).

36 However, it is undisputed in the present case that the four *Landkreise* concerned do not exercise any control which could be described as similar to that which they exercise over their own departments, whether over the other contracting party, namely Stadtreinigung Hamburg, or over the operator of the Rugenberger Damm waste incineration facility, which is a company whose capital consists in part of private funds.

37 It must nevertheless be observed that the contract at issue establishes cooperation between local authorities with the aim of ensuring that a public task that they all have to perform, namely waste disposal, is carried out. That task relates to the implementation of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), which requires the Member States to draw up plans for waste management providing, in particular for 'appropriate measures to encourage rationalisation of the collection, sorting and treatment of waste', one of the most important of such measures being,

pursuant to Article 5(2) of Council Directive 91/156/EEC of 18 March 1991, amending Directive 75/442 (OJ 1991 L 78, p. 32), ensuring that waste be treated in the nearest possible installation.

38 In addition, it is common ground that the contract between Stadtreinigung Hamburg and the *Landkreise* concerned must be analysed as the culmination of a process of inter-municipal cooperation between the parties thereto and that it contains requirements to ensure that the task of waste disposal is carried out. The purpose of that contract is to enable the City of Hamburg to build and operate a waste treatment facility under the most favourable economic conditions owing to the waste contributions from the neighbouring *Landkreise*, making it possible for a capacity of 320 000 tonnes per annum to be attained. For that reason, the construction of that facility was decided upon and undertaken only after the four *Landkreise* concerned had agreed to use the facility and entered into commitments to that effect.

39 The subject-matter of that contract, as expressly indicated in the first clauses thereof, is primarily the undertaking given by Stadtreinigung Hamburg that it would make available annually to the four *Landkreise* concerned a treatment capacity of 120 000 tonnes of waste with a view to thermal utilisation in the Rugenberger Damm facility. As is subsequently stated in the contract, Stadtreinigung Hamburg does not assume any responsibility for the operation of that facility and does not offer any guarantee in that regard. In the event of the facility ceasing to operate or malfunctioning, its obligations are limited to offering replacement capacity, that obligation being conditional, however, in two respects. First, the disposal of the City of Hamburg's waste has to take priority and, secondly, some capacity must be available in other facilities to which Stadtreinigung Hamburg has access.

40 In return for the treatment of their waste in the Rugenberger Damm facility, as described in the preceding paragraph of this judgment, the four *Landkreise* concerned are to pay Stadtreinigung Hamburg an annual fee, the method of calculation and means of payment of which are specified in the contract. The waste delivery and removal

capacity are to be agreed upon for each week between Stadtreinigung Hamburg and a representative designated by those *Landkreise*. It is also apparent from the contract that Stadtreinigung Hamburg, which has a right to the payment of damages against the operator of the facility, undertakes, should those *Landkreise* have suffered damage, to defend the latter's interests against that operator by means of litigation if necessary.

41 The contract at issue also provides for some commitments on the part of the contracting local districts that are directly related to the public service objective. While the City of Hamburg assumes responsibility for most of the services forming the subject-matter of the contract concluded between it and the four *Landkreise* concerned, the latter are to make available to Stadtreinigung Hamburg the landfill capacity which they do not use themselves in order to alleviate the lack of landfill capacity of the City of Hamburg. They also agree to take for disposal in their landfill the quantities of slag remaining after incineration that cannot be utilised in proportion to the quantities of waste which they have delivered.

42 Moreover, under the contract, the parties thereto must, if need be, assist each other in the context of the performance of their legal obligation to dispose of waste. It is thus provided, inter alia, that in some circumstances, for example where the facility concerned has temporarily exceeded its capacity, the four *Landkreise* concerned agree to reduce the amount of waste delivered and thus to restrict their right of access to the incineration facility.

43 Lastly, the supply of waste disposal services gives rise to payment to the operator of the facility only. By contrast, the terms of the contract at issue show that the cooperation which the latter establishes between Stadtreinigung Hamburg and the four *Landkreise* concerned does not give rise to any financial transfers between those entities other than those corresponding to the reimbursement of the part of the charges borne by those *Landkreise* but paid by Stadtreinigung Hamburg to the operator.

44 It thus appears that the contract in question forms both the basis and the legal framework for the future construction and operation of a facility intended to perform a public service, namely thermal incineration of waste. That contract was concluded solely by public authorities, without the participation of any private party, and does not provide for or prejudice the award of any contracts that may be necessary in respect of the construction and operation of the waste treatment facility.

45 The Court has pointed out, in particular, that a public authority has the possibility of performing the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities not forming part of its own departments, and that it may do so in cooperation with other public authorities (see *Coditel Brabant*, paragraphs 48 and 49).

46 The Commission stated at the hearing, moreover, that, had the cooperation at issue here taken place by means of the creation of a body governed by public law to which the various local authorities concerned entrusted performance of the task in the public interest of waste disposal, it would have accepted that the use of the facility by the *Landkreise* concerned did not fall under the rules on public procurement. It takes the view, however, that, in the absence of such a body for inter-municipal cooperation, a call for tenders should have been issued for the service contract concluded between Stadtreinigung Hamburg and the *Landkreise* concerned.

47 It must be observed though, first, that Community law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks. Secondly, such cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors (see, to that effect, *Stadt Halle and RPL Lochau*, paragraphs 50 and 51).

48 It must, furthermore, be stated that there is nothing in the information in the file submitted to the Court to indicate that, in this case, the local authorities at issue were contriving to circumvent the rules on public procurement.

49 In the light of all those factors, and without there being any need to rule on the other pleas of the Federal Republic of Germany in its defence, the Commission's action must be dismissed.

Costs

50 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Federal Republic of Germany applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]