OPINION OF ADVOCATE GENERAL COSMAS

delivered on 1 July 1999 *

I — Introduction

1. In this case the Tribunale Amministrativo Regionale per l'Emilia-Romagna, Sezione di Parma (Regional Administrative Court for Emilia-Romagna, Parma Division) has referred to the Court of Justice for a preliminary ruling a question on the interpretation of a provision of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts. [1]

II — Community legal context

2. Article 1(a) of Directive 92/50 provides that, for the purposes of that directive, 'public service contracts' are 'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority'. Article 1(b) provides that the term 'contracting authorities' means 'the State, regional or local authorities, bodies governed by public law, [and] associations formed by one or more of such authorities or bodies governed by public law'.

3. Article 2 of Directive 92/50 states that 'if a public contract is intended to cover both products within the meaning of Directive 77/62/EEC and services within the meaning of Annexes I A and I B to this Directive, it shall fall within the scope of this Directive if the value of the services in question exceeds that of the products covered by the contract'.

4. Article 6 of Directive 92/50 provides that the directive 'shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty'.

5. Article 7 of Directive 92/50 provides that the directive is to apply to public service contracts the estimated value of which, net of VAT, is not less than ECU 200 000 and sets out the basis on which, in the case of contracts which do

* Original language: Greek.

1 — OJ 1992 L 209, p. 1.

not specify a total price, the estimated contract value is to be estimated. [2]

6. As indicated by its title, Council Directive 93/36/EEC of 14 June 1993 concerns the coordination of procedures for the award of public supply contracts. [3] This directive repealed the previously applicable Council Directive 77/62/EEC of 21 December 1976. [4] However, Article 33 of Directive 93/36 states: 'Reference to the repealed [directive] shall be construed as reference to this Directive and should be read in accordance with the correlation table set out in Annex VI'.

7. Article 1(a) of Directive 93/36 provides that, for the purposes of that directive, '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'.

8. Article 1(b) provides that 'contracting authorities' are 'the State, regional or local authorities, bodies governed by public law, [and] associations formed by one or several of such authorities or bodies governed by public law'. [5]

9. Article 5(1)(a) of Directive 93/36 states, so far as is relevant to the point at issue here, that its provisions [6] apply to public supply contracts 'awarded by the contracting authorities referred to in Article 1(b) ... in so far as the products not covered by Annex II are concerned, provided that the

2 — Specifically, Article 7(5) provides that the basis for calculation shall be, in the case of fixed-term contracts of 48 months or less, the total contract value for its duration and, in the case of contracts of indefinite duration or with a term of more than 48 months, the monthly instalment multiplied by 48.

3 — OJ 1993 L 199, p. 1.

4 — OJ 1977 L 13, p. 1.

5 — The same provision goes on to explain that 'a body governed by public law' means any body (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, (b) having legal personality, and (c) financed, for the most part, by the State, 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.

6 — More specifically, Titles II, III and IV and Articles 6 and 7.

estimated value net of VAT is not less than ECU 200 000'.

10. Article 5(2), (3) and (5) specifies the method for calculating the estimated contract value. [7]

III — National legal context

A — *Italian Law No 142/90*

11. Under Article 22(1) of Italian Law No 142 of 8 June 1990 on the organisation of local authorities, [8] municipalities are to provide for the management of public services involving the production of goods and the performance of activities designed to achieve social purposes and promote economic and civil development of local communities. In accordance with Article 22(3), municipalities may ensure the provision of such local public services in various ways: on a work-and-materials basis, by way of concession to third parties, or using special undertakings, institutions or semi-public companies in which they hold shares.

12. Article 23 of Law No 142/90, which defines special undertakings and non-profit-making institutions, provides (in Article 23(1)) that a special undertaking is a body (*ente strumentale*) established by a regional or local authority, having legal personality, commercial autonomy and its own statutes as approved by the municipal or provincial council. Article 23(3) provides that the organs of such undertakings and institutions are to be a board of management, a chairman and a director who assumes managerial responsibility, detailed arrangements for appointment and removal of members of the board of management being laid down by the statutes of the regional or local authority. In addition, in performing their activities such undertakings and institutions must, under Article 23(4), meet criteria of effectiveness, efficiency and profitability; they must achieve a balanced budget by balancing costs and receipts, including transfers. Lastly, in accordance with Article 23(6)

7 — Article 5(2) provides that, in the case of contracts for the lease, rental or hire purchase of products, the basis for calculating the estimated contract value is to be: (a) in the case of fixed-term contracts, where their term is 12 months or less the total contract value for its duration or, where their term exceeds 12 months, its total value including the estimated residual value, and (b) in the case of contracts for an indefinite period or in cases where there is doubt as to the duration of the contracts, the monthly value multiplied by 48. Also, Article 5(3) provides that, in the case of regular contracts or of contracts which are to be renewed within a given time, the estimated contract value is to be established on the basis of either (a) the actual aggregate value of similar contracts concluded over the previous fiscal year or 12 months, adjusted, where possible, for anticipated changes in quantity or value over the 12 months following the initial contract, or (b) the estimated aggregate value during the 12 months following the first delivery or during the term of the contract, where this is greater than 12 months. Lastly, Article 5(5) provides that, in the case where a proposed procurement specifies option clauses, the basis for calculating the estimated contract value is to be the highest possible total of the purchase, lease, rental or hire purchase permissible, inclusive of the option clauses.

8 — Ordinamento delle Autonomie Locali (GURI No 135 of 12 June 1990).

the local administration is to provide the start-up capital, define objectives and policy, approve the documents of constitution, exercise supervision, monitor management results and cover any social costs which may arise.

13. Article 25 of Law No 142/90 makes express provision for the joint management of one or more services through the creation of consortia, in accordance with the provisions on special undertakings laid down in Article 23. For that purpose, each municipal council must approve, by absolute majority, a consortium agreement and at the same time the statutes of the consortium (consorzio). The general meeting of the consortium is to be composed of the representatives of its member entities (the mayor, the council chairman or their deputies). The general meeting elects the board of management and approves the documents of constitution prescribed by the statutes.

B — *AGAC*

14. Azienda Gas-Acqua Consorziale ('AGAC') is a consortium set up by a number of municipalities in the province of Reggio Emilia to manage energy and environmental services, pursuant to Article 25 of Law No 142/90. Under Article 1 of its statutes ('the Statutes'), it has legal personality and operational autonomy.

15. Article 3(1) of the Statutes states that the object of AGAC is to assume direct responsibility for, and manage, the public services listed, which include the production and distribution of methane gas and heating for civil and industrial purposes. Article 3(2) provides that AGAC may extend its activities to other related or ancillary services. Under Article 3(3) it may create, or hold shares or have interests in, public or private companies or public bodies (*enti*) for the management of related or ancillary activities. Under Article 3(4) the consortium may provide the abovementioned services to municipalities, private persons or public bodies which do not belong to the consortium.

16. Articles 9, 10 and 11 of the Statutes specify, among other things, the percentage participation of each member municipality in the general meeting of the consortium, and in the consortium's profits and losses. In accordance with Article 10(3), the percentage participation of the Municipality of Viano is set at 0.9%.

17. Under Articles 12 and 13 of the Statutes, the most important managerial acts, which include preparation of budgets and accounts, must be approved by the general meeting of the consortium, which is composed of representatives of the member municipalities. [9]

18. Article 25 of the Statutes, entitled 'Management criteria', provides that AGAC must achieve a balanced budget and operational profitability.

19. In accordance with Article 27, the municipalities provide AGAC with funds and assets, in respect of which it pays them annual interest.

20. Pursuant to Article 28, any profits in a given financial year may be allocated to various purposes as decided by the general meeting: in particular, they may be distributed between the member municipalities of the consortium, retained by the consortium to establish or increase reserve funds or reinvested in other AGAC activities.

21. Under Article 29, where a loss occurs the financial deficit may be corrected through, in particular, the injection of new capital by the municipalities.

IV — The facts and the question referred for a preliminary ruling

22. By its Decision No 18 of 24 May 1997 ('the Decision'), the Municipal Council of Viano entrusted to AGAC management of the heating installations of a number of municipal buildings and the supply of the necessary fuel. It also made the consortium responsible for carrying out improvements to heating installations located in the buildings in question. [10] It did not, however, issue any invitation to tender to interested businesses.

23. AGAC's remuneration was fixed at ITL 122 million for the period from 1 June 1997 to 31 May 1998. The value of the fuels to be supplied represented ITL 86 million while that of management and maintenance of the installations represented ITL 36 million.

24. Article 2 of the Decision provides that, on the expiry of the (one-year) period of management, AGAC undertakes to continue providing the service for a further

9 — In accordance with Article 8, apart from the general meeting the other organs of the consortium are the board of management, the chairman of the board of management and the general manager. They are not answerable to the consortium's member municipalities for their managerial acts. The natural persons who constitute these organs do not exercise any functions within the member municipalities.

10 — Article 1 of the Decision, entitled 'Matters for management', enumerates the tasks entrusted to AGAC.

period of three years, at the request of the municipality and following modification of the conditions set out in the Decision. Provision is also made for subsequent extension. [11]

25. Teckal Srl ('Teckal') is a private company operating in the heating services sector. It supplies private persons and public bodies in particular with heating oil which it purchases beforehand from producers. It also services oil-operated and gas-operated heating installations. Before those services were entrusted to AGAC, Teckal had provided them under a contract with the Municipality of Viano.

26. Teckal brought proceedings against the Municipality of Viano and AGAC before the Tribunale Amministrativo Regionale per l'Emilia-Romagna, Sezione di Parma, seeking the annulment of the Decision of the Municipal Council of Viano. It contended that the municipality should have followed the procedures for the award of contracts required under Community legislation.

27. The national court first posed the question as to which of Directive 92/50 and Directive 93/36 was applicable in the action pending before it. It was of the opinion that the threshold of ECU 200 000 laid down in both directives was, in any event, exceeded.

28. In view of the fact that AGAC was entrusted, first, with providing various services and, second, with supplying fuel, the national court formed the view that it could not rule out that Article 6 of Directive 92/50 applied. More specifically, it considered that the composite nature of the management operation entrusted to AGAC and the strictly complementary nature of the activities of (a) operation and maintenance, which fell under the heading of services, and (b) supplying fuel made it impossible to say that one was ancillary to the other and to hold that Article 6 of Directive 92/50 was not relevant, or to interpret that article precisely.

29. The national court concluded that, in order for the action pending before it to be decided, it was necessary to interpret Article 6 of Directive 92/50 by way of a preliminary ruling and to settle in that way the question whether, in directly placing the contract with AGAC, the municipality was released from the obligation to observe the award procedure laid down by the directive, on the basis of the derogation contained in that article.

30. In addition, the national court raised the question of the compatibility with the provisions of the Treaty of the exclusive

11 — This is possible subject to a request being communicated to AGAC at least three months before the expiry of the period concerned.

right to provide the 'heating service' granted to AGAC by Article 3 of the Statutes in the light of Articles 22 to 25 of Law No 142/90, given that Article 6 of Directive 92/50 provides, among other conditions for its applicability, that national provisions granting an exclusive right must be compatible with the Treaty.

31. In those circumstances, the national court stayed proceedings and referred to the Court of Justice for a preliminary ruling a question on the interpretation of Article 6 of Directive 92/50 from the points of view set out in the grounds of its order for reference.

V — My views on the case

A — *Admissibility*

32. AGAC considers that an issue of admissibility arises because the question referred by the national court essentially concerns the interpretation of provisions of national law.[12] It further contends that Article 6 of Directive 92/50 cannot be applicable since its applicability presupposes the existence of a public service contract. That is not the case here, because the reason for entrusting the provision of the services to AGAC lies in the relationship of subordination between that consortium and one of its member municipalities. The municipality concerned did not entrust to a third party the service consisting in the management of heating installations, but chose a different way of organising the direct management of that service.

33. The Austrian Government also raises the issue of admissibility on the ground that the order for reference does not contain a question referred for a preliminary ruling. It maintains that in the field of public procurement law it is particularly important that questions should be formulated precisely, because otherwise it is impossible to adopt a view on the particular problem of interpretation confronting the national court.

34. First of all, it must be borne in mind that it is for the national court, which has a better and fuller knowledge of the facts of the case, to decide whether it is necessary to make a reference to the Court of Justice for a preliminary ruling and to determine which provisions of Community legislation need to be interpreted so as to enable it to

12 — More specifically, AGAC considers that the national court is asking the Court of Justice to decide whether the management of a municipality's heating installations can be classed as a public service of a local nature within the meaning of Article 22 of Law No 142/90, so as to enable it to determine whether or not Article 6 of Directive 92/50 is applicable. According to AGAC, the national court is essentially asking whether or not provisions of national law (Articles 23 and 25 of Law No 142/90) involve the award of a public service contract to a body which is itself a contracting authority.

give judgment in the action pending before it. [13]

35. However, in the context of Article 177 of the EC Treaty (now Article 234 EC) the Court of Justice has no jurisdiction to rule either on the interpretation of national laws or regulations or on their conformity with Community law. [14] It can only supply the national court with a ruling on the interpretation of Community law to enable that court to resolve the legal problem before it. [15]

36. In my view, the basic problem posed by this case is the vagueness with which the national court's question is formulated. That vagueness does not, however, render the question inadmissible. The Court has held that, in the context of the procedure provided for in Article 177, where questions are formulated imprecisely it may extract from all the information provided by the national court and from the documents concerning the main proceedings the provisions of Community law which require interpretation, having regard to the subject-matter of those proceedings. [16]

37. In addition the Court, on each occasion for the purpose of giving the national court a useful answer, has interpreted provisions whose interpretation was not requested by the national court [17] or has reformulated the questions referred and thus deduced the provisions which it is for the Court to interpret. [18]

38. However, before establishing the issue whose consideration will be helpful to the national court, it is necessary to examine a further issue raised by AGAC regarding the admissibility of the reference for a preliminary ruling. AGAC contends that the value of the contract is below the threshold of ECU 200 000 laid down in the Community provisions and that the Community legislation on the matter therefore cannot apply. [19]

39. The national court took the view that the subject-matter of the dispute before it, whether from the point of view of a

13 — See, for example, Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, paragraph 25, and Case C-343/90 *Lourenço Dias* v *Director da Alfândega do Porto* [1992] ECR I-4673, paragraph 15.

14 — See, for example, Case 77/72 *Capolongo* v *Maya* [1973] ECR 611, paragraph 8, and *Lourenço Dias*, cited above, paragraph 19.

15 — See, for example, Case C-17/92 *Distribuidores Cinematográficos* v *Spanish State* [1993] ECR I-2239, paragraph 8, and, less recently, Case 9/74 *Casagrande* v *Landeshauptstadt München* [1974] ECR 773, paragraph 4.

16 — See, for example, Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 20 and, in particular, paragraph 21, and Case 251/83 *Haug-Adrion* v *Frankfurter Versicherungs-AG* [1984] ECR 4277, paragraph 9.

17 — See, for example, Case 70/77 *Simmenthal* v *Amministrazione delle Finanze dello Stato* [1978] ECR 1453, paragraph 57, Case C-114/91 *Claeys* [1992] ECR I-6559, paragraphs 10 and 11, and Case C-280/91 *Viessmann* [1993] ECR I-971, paragraph 17.

18 — See, for example, Case C-381/89 *Sindesmos Melon tis Eleftheras Evangelikis Ekklisias and Others* [1992] ECR I-2111, paragraph 19 et seq., and Case 38/77 *Enka* v *Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 2203.

19 — More specifically, it submits that the price of the fuel should be deducted from the amount corresponding to the services, inasmuch as AGAC, which is a contracting authority, acquires its fuel through public tendering procedures. It further contends that the contract in question is not one of indefinite duration. This is because renewal of the contract upon expiry of the initial period is at the absolute discretion of the municipality, subject to an obligation to specify the financial terms and conditions. Lastly, an aggregate value was fixed for the period from 1 June 1997 to 31 May 1998, and that, it contends, also precludes classifying the contract as one of indefinite duration. The latter conclusion is also confirmed by the fact that the contract at issue terminated definitively on 31 May 1998, since the Municipality of Viano decided to provide for the operation of the service by other means.

contract for the provision of services (heating) or from that of a contract for the supply of goods (fuel), exceeded the threshold of ECU 200 000 laid down in the Community legislation in order for public service and public supply contracts to be caught by Directives 95/20 and 93/36 respectively. More specifically, it considered that this was so because the contract was, in the first case, a contract for services of indefinite duration [20] and, in the second, a supply contract with an express option clause. [21]

40. In my opinion, the Court of Justice has jurisdiction to indicate to the national court the method to be used for calculating the value of the contract in accordance with Community legislation. That method is laid down in Article 7 of Directive 92/50 and Article 5 of Directive 93/36. The application of those provisions to a specific case is a matter for the national court, [22] which is aware both of the content of the contractual terms and of the conditions under which the contract may be extended beyond expiry of the one-year period of management.

41. It follows from the above that the Court of Justice is not empowered to substitute its own appraisal for that of the national court as regards the question whether the threshold fixed by the Community legislature is actually exceeded, but must restrict itself to the factual situation as described by the national court and the assessments made by it. To do otherwise would entail the Court itself determining the value of the contract at issue, a step alien to the role assigned to it under Article 177, which does not involve review of the content of an order for reference but cooperation and dialogue with the national court.

B — *Reformulation of the question referred for a preliminary ruling*

42. In order, therefore, to provide the national court with a useful answer, it is in my view necessary to reformulate its question in the light of the subject-matter of the dispute and the information contained in the order for reference.

43. One point needs to be established clearly at the outset. Article 2 of Directive 92/50 [23] provides that, if a public contract is intended to cover both products within the meaning of Directive 77/62 (now Directive 93/36) and services within the meaning of Directive 92/50, it will fall within the scope of the latter if the value of the services in question exceeds that of the

20 — The national court explains in the order for reference that, according to Article 2 of the Decision of the Municipal Council of Viano, upon expiry of its (one-year) management period AGAC undertook to continue to provide the service concerned for a period of three further years, if so requested by the authority, after updating of the conditions laid down in the Decision. The national court also pointed out that the same applied to subsequent periods, provided that any such request was notified to AGAC at least three months before the expiry of the relevant period.

21 — The national court explains that, if on the other hand supplies are the main component, the updating of the conditions provided for would mean that AGAC was entitled to adjustment of the consideration in line with the market price of the fuel to be supplied, an operation which, being automatic, did not exclude the possibility that the municipality had a genuine option. Consequently, the national court concludes, such a case falls within the scope of Article 5(5) of Directive 93/36, in accordance with which, where a proposed procurement specifies option clauses, the basis for calculating the estimated value must be the highest possible total of the purchase permissible, inclusive of the option clauses.

22 — There is no reason, in theory, why the national court should not refer a question for a preliminary ruling on this if it encounters difficulties of interpretation.

23 — Interpreted in the light of Article 33 of Directive 93/36.

products also covered by the contract. This provision is designed to prevent mixed contracts (covering both services and supplies) from being subject to two different sets of rules and therefore means that the contract as a whole is awarded in accordance with only one of them. That is to say, it makes financial value the determining factor as regards which legislation is applicable. Thus, the award of a mixed contract falls within the scope of Directive 92/50 if the value of the services exceeds that of the goods supplied. [24] If, on the other hand, the value of the goods exceeds that of the services involved, Directive 93/36 must be applied to the award of the entire contract. [25]

44. In other words, it is clear from the above analysis that it is important to settle the question as to what constitutes the object of the contract. If the contract concerned is a mixed contract, that is to say one relating both to products and to services, it is important to establish whether the value of the goods supplied is greater than that of the services, in accordance with the criterion of financial value laid down for determining which legislation is applicable.

45. In the case in point, it is apparent from the order for reference that, by a single measure, AGAC was entrusted both with the provision of certain services and with the supply of certain products. [26] It is also apparent that the value of the products to be supplied is manifestly greater than that of the services. I am therefore of the view that the Community provisions whose interpretation would assist the national court are those of Directive 93/36, not Article 6 of Directive 92/50 as mentioned in the order for reference. Consequently, an answer to the question as drafted would not, in my opinion, be helpful in disposing of the case pending before the national court.

46. Bearing in mind the subject-matter of the dispute and the analysis contained in the order for reference, the national court is asking essentially, whether, in directly entrusting the heating service and the supply of fuel to AGAC, the Municipality of Viano is subject to an obligation to observe the procedure provided for under Directive 93/36. In other words, the question to be answered is whether Directive 93/36 precludes a local authority from entrusting the supply of products directly to a consortium of which it is a member, in circumstances such as those of the main proceedings, without having observed the

24 — See also M. Mensi, 'L'ouverture à la concurrence des marchés publics de services', No 3/1993 *Revue du Marché Unique Européen*, pp. 59-86, paragraph 8.

25 — In its judgment in Case C-331/92 *Gestión Hotelera Internacional* [1994] ECR I-1329 the Court, basing its reasoning on the 16th recital in the preamble to Directive 92/50, according to which 'it follows from Directive 71/305 that, for a contract to be a public works contract, its object must be the achievement of a work', held (paragraph 29) that 'a mixed contract relating both to the performance of works and to the assignment of property does not fall within the scope of Directive 71/305 if the performance of the works is merely incidental to the assignment of property'. Council Directive 71/305/EEC of 26 July 1971 concerned the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682). Furthermore, the 16th recital in the preamble to Directive 92/50, which refers expressly to the object of the contract, states that 'in so far as these works are incidental rather than the object of the contract, they do not justify treating the contract as a public works contract'. Lastly, in *Gestión Hotelera Internacional* the Court pointed out (paragraph 28 of its judgment): 'It is for the national court to determine whether the works are incidental to the main object of the award'.

26 — This is clear from Article 1 of the Decision of the Municipal Council of Viano, which the referring court quotes in full.

tendering procedure provided for under that directive.

47. The national court may, nevertheless, possibly consider that an interpretation of Treaty provisions is also necessary, in order to establish whether they preclude the exclusive right to provide heating services which, it asserts, is conferred on AGAC by Article 3 of the Statutes, viewed in the light of Articles 22 and 25 of Italian Law No 142/90. However, it is not clear from the order for reference whether the relevant national provisions, principally Articles 22 and 25 of Law No 142/90 and Article 3 of the Statutes, permit the acts which constitute the subject-matter of the Viano Municipal Council's decision to be entrusted directly to AGAC.[27] It is for the national court to decide that issue and, if it considers it necessary, to make a reference for a preliminary ruling on the subject.

C — *Substance*

48. Directive 93/36 is essentially intended to ensure development of effective competition in the field of public supply contracts.[28] That is to say, in selecting the person with which it is to conclude in writing a contract for pecuniary interest involving the supply, in whatever form, of a certain product, a contracting authority is required to apply the procedure guaranteeing effective/free competition which is established by Directive 93/36.

49. Also, it should be made clear from the outset that Directive 93/36 does not contain a provision analogous to Article 6 of Directive 92/50, that is to say it makes no provision for an exemption from the obligation to apply the tendering procedure where a public supply contract is awarded to an entity which is itself a contracting authority, on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision compatible with the Treaty. Since no such exemption is provided for,[29] it makes no difference for the purpose of applying the directive whether or not it is a private person who, as a supplier, enters into a contract with a contracting authority. That conclusion is, in my view, to be inferred from the system laid down by the directive.[30]

27 — Teckal denies that these provisions can be interpreted to that effect and points out that, during the five years preceding the grant of the contract to AGAC, it had itself been a contractual partner of the Municipality of Viano.

28 — See the 14th recital in the preamble to Directive 93/36.

29 — This difference reflects a special feature of the field regulated by Directive 92/50, in the sense that due account has to be taken of the fact that services may be provided in the context of stable legal relations and ties between separate bodies (*collectivités*) in accordance with a system of cooperation where one body is subordinate to the other. Furthermore, Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), in addition to containing a provision (Article 11) analogous to Article 6 of Directive 92/50, includes another similar provision on this question which takes account of the particular case of entities which are undertakings classed as contracting authorities only in connection with service contracts in specific sectors. The provision in question is Article 13, concerning service contracts awarded by a contracting authority to an 'affiliated undertaking', which is defined by reference to a relationship of control and to dominant influence between a contracting entity and the undertaking or (in certain circumstances) between undertakings (Article 1(3)); in other words, this relates to legal entities which belong to the same economic unit (see also M. Mensi, op. cit., paragraph 18, p. 81 et seq.).

30 — It may be noted that the Court found that a Member State failed to fulfil its obligations under the directives coordinating procedures for the award of both public works contracts (Directive 71/305) and public supply contracts (Directive 77/62) when it excluded from the scope of national rules on public procurement transactions effected by the administrative authorities with private persons in cases where those directives did not authorise such exemption. See the judgment in Case C-71/92 *Commission* v *Spain* [1993] ECR I-5923, paragraphs 10, 11 and 22. In particular, the Court stated (paragraph 10) that 'the only permitted exceptions to the application of Directive 77/62 are those which are exhaustively and expressly mentioned therein'.

50. Under Article 1(a), for the purpose of Directive 93/36 '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 conditions which must be met in order for Directive 93/36 to apply follow from this provision.

51. First, the contractual relationship must concern the supply of products. The element of the supply of certain products is a basic condition for application of the directive.

52. Second, a contract must be drawn up [31] and, in particular, must be concluded in writing. The contract is synallagmatic and for pecuniary interest. This means that the directive is applicable where, first, there is a concordance of wills between two different persons, the contracting authority and the supplier, and, second, the commercial relationship that is created consists in the supply of a product for pecuniary remuneration. [32] In other words, there are mutual acts of performance, the creation of rights and obligations for the parties to the contract and interdependence of their respective acts of performance. [33]

53. Third — an element directly linked to the preceding one — the party entering into the contract with the contracting authority, namely the supplier, must have real third-party status vis-à-vis that authority, that is to say the supplier must be a separate person from the contracting authority. This element, likewise, is an essential characteristic for the conclusion of supply contracts falling within the scope of Directive 93/36.

54. It follows from the above that the directive does not apply where the contracting authority has recourse to its own resources for the supply of the products it wants. [34] Community law does not require

31 — It is significant that the eighth recital in the preamble to Directive 92/50 states that the 'provision of services is covered by this Directive only in so far as it is based on contracts; ... the provision of services on other bases, such as law or regulations, or employment contracts, is not covered'. In other words, Directive 92/50 applies only if the legal relationship between the contracting parties is a service contract for the purposes of Article 1(a) of the directive and does not apply where the provision of services is not based on a contract; see also point 26 of the Opinion of Advocate General La Pergola in Case C-360/96 *Arnhem and Reden* v *BFI Holding* [1998] ECR I-6821 and point 49 of the Opinion of Advocate General Alber in Case C-108/98 *R.I.SAN.* v *Comune di Ischia and Others* [1999] ECR I-5219.

32 — This element of fixing the remuneration in abstract terms in the case of the award of a public supply contract is highlighted in the judgment in Case C-272/91 *Commission* v *Italy* [1994] ECR I-1409, at paragraph 25; the case concerned the concession for the computerisation system for the Italian lottery, that is to say the supply of an integrated computerisation system for the lottery which involved, in particular, the supply of certain goods to the State. The same element involving payment of a specified consideration to remunerate the service provider is also highlighted in paragraph 25 of the judgment in *BFI Holding*, cited above.

33 — On this important element of the concept of a contract, see A. de Laubadère, F. Moderne and P. Delvolvé, *Traité des contrats administratifs*, volume 1 (1983, 2nd ed., 808 pp.), paragraph 14 et seq., p. 29 et seq.

34 — A form of supply referred to as 'in-house'. On this question in connection with Directive 92/50, see P. Flamme and M.-A. Flamme, 'Les marchés publics de services et la coordination de leurs procédures de passation (Directive 92/50/ECC du 18 juin 1992)', *Revue du Marché commun et de l'Union européenne* (1993) No 365, pp. 150-170, paragraphs 15 and 16. See also M. Mensi, op. cit., paragraph 5.

contracting authorities to observe the procedure ensuring effective competition between interested parties where those authorities wish to take on themselves the supply of the products they need. [35]

55. AGAC maintains that the Municipality of Viano did not entrust the service of managing heating installations to a third party but merely decided to organise the direct management of that service in a different manner, by having recourse to the structure and staff of a special entity established for that purpose rather than its own structure and staff.

56. First, it is in my view beyond doubt, according to the information supplied by the national court, that the case in point (also) involves the supply of certain products.

57. Second, in order for it to be possible for the directive to apply there must be a written contract which lays down the rights and obligations of the parties and, more particularly, regulates the matter of remuneration. In other words, the national court must establish whether a *contract* was concluded, in writing, regulating the relationship between the contracting authority and the supplier and specifying the rights and obligations of the parties, in addition to the decision of the Viano Municipal Council entrusting the task concerned to AGAC. [36]

58. Also, if a written contract was concluded it is for the national court to establish whether the possibility of renewing the contract afforded to the Municipality of Viano was the result of negotiations between the latter and AGAC. It is likewise for the national court to establish whether the remuneration fixed for the supply of goods and the provision of services to the municipality was determined on the basis of prevailing commercial practice. [37] Whether or not there actually

35 — A similar question has already been raised before the Court in connection with the interpretation of Directive 92/50. In the *BFI Holding* case (cited in footnote 31 above), concerning a dispute between two Dutch municipalities and a private undertaking (BFI) which was claiming that the award of a contract involving refuse collection to a public limited company (ARA) established for that purpose by the municipalities in question was subject to the procedure laid down by the directive, the national court took the view that ARA fell within the exception provided for in Article 6 of Directive 92/50 in so far as it was to be regarded as a body governed by public law within the meaning of Article 1(b) of that directive.
In point 38 of his Opinion in *BFI Holding*, Advocate General La Pergola reached the conclusion that 'there is no "third party" element, that is to say no essential distinction between ARA and the two municipalities, in the present case. What is involved here is a form of inter-departmental delegation that remains within the administrative ambit of the municipalities. In assigning the activities in question to ARA, the municipalities had absolutely no intention of *privatising* the functions they themselves had previously performed in this sector'. Furthermore, this issue of whether public services are provided by a part of the public administration, in which case there is no public contract within the meaning of Directive 92/50, was also highlighted by Advocate General Alber in his Opinion in *RI.SAN.*, cited in footnote 31 above; see point 49 of that Opinion.
Advocate General La Pergola concluded that 'in short, ... the relationship between the municipalities and ARA cannot be regarded as a contract within the meaning of the Directive' (the directive in question being Directive 92/50). However, Advocate General La Pergola was of the opinion that an entity of this type (such as ARA) constitutes a body governed by public law within the meaning of Directive 92/50. The Court examined the issue of when a body can be classed as having the status of a body governed by public law within the meaning of the second subparagraph of Article 1(b) of Directive 92/50 and supplied the national court with the ruling that it needed on the interpretation of that provision.

36 — It is apparent from the order for reference that AGAC is required to manage the heating service mainly on the basis of the instructions contained in the Decision, which were issued unilaterally by the Municipality of Viano.

37 — I do not consider that there can be any question of the award of a contract and procurement for the purposes of the directive if, first, the remuneration mentioned in the Decision was not freely fixed on the basis of an offer tendered by AGAC within the context of its operational autonomy and, second, that offer lacks any profit-making character, as indeed the Commission maintains.

is a contract governed by Community legislation depends on the answers given by the national court to the foregoing questions.

59. In addition, as is made clear by the national court, the situation is one which involves two formally separate persons operating in the market. This element is important because a situation where a municipality, in the interests of improved internal organisation of its services, entrusted supply to one of its units would constitute a form of internal delegation that remained within its own administrative ambit. [38] In those circumstances, the relationship between the Municipality of Viano and AGAC could not be regarded as a public contract within the meaning of Directive 93/36.

60. More specifically, under the national legislation AGAC, which has legal personality and enjoys operational autonomy, is a consortium (consorzio) of municipalities which was set up on the basis of Article 25 of Italian Law No 142/90. That article makes express provision for the joint management of one or more services through the creation of consortia in accordance with the provisions governing special undertakings referred to in Article 23 of the same Law, as stated above in point 13. In addition, AGAC must perform the functions entrusted to it by the municipalities belonging to the consortium and is subject to control by them.

61. Under Article 10(3) of the Statutes, the Municipality of Viano's percentage participation in the general meeting of AGAC and hence, in reality, both in the administration and in the profits and losses of the consortium, stands at 0.9%. In my view it is therefore unlikely (and the same also appears to be the case from the facts as presented by the national court) that, in the case of AGAC, a consortium set up by 45 municipalities in the province of Reggio Emilia and having separate legal personality, it could be maintained that the Municipality of Viano exercises over that consortium the kind of control which an entity exercises over an internal body.

62. Furthermore, under Article 3(4) of the Statutes AGAC may provide certain services [39] to municipalities, private persons or public bodies (*enti*) which do not belong to the consortium.

63. Consequently, despite the possibility for the Municipality of Viano, under the Decision, to extend the contract at its request, I do not consider it proven that the municipality exercises hierarchical control over AGAC or that the relationship between it and AGAC does not entail the

38 — It should be noted that, as Teckal points out, the services in question were previously provided by it for five years under a contract with the Municipality of Viano.

39 — Including, it may be recalled, the production and distribution of methane gas and heating for civil and industrial purposes.

award of a contract on the ground that the two contracting parties do not in reality have third-party status with respect to each other. [40]

64. If, on the basis of the findings which it must make, the national court concludes that the relationship between the municipality and AGAC is the outcome of the concordance of two autonomous wills representing separate legal interests in a manner consistent with the customary form of relationship that characterises the contractual relationship of two separate persons, [41] a conclusion which can also be inferred from a study of the contractual conditions, [42] the entrusting of the supply which constitutes the subject-matter of this case falls within the scope of Directive 93/36.

65. To accept that is possible for contracting authorities to have recourse, for the supply of goods, to separate entities over which they maintain either absolute or relative control, in breach of the relevant Community legislation, would open the floodgates for forms of evasion contrary to the objective of ensuring free and undistorted competition which the Community legislature seeks to achieve through the coordination of procedures for the award of public supply contracts.

66. Subject to the abovementioned reservations concerning the points to be clarified by the national court, the procedure laid down in Directive 93/36 should, consequently, be observed. This means that in selecting its contractual partner the municipality should comply with the provisions aimed at safeguarding competition, with no exception permitted even if it regards AGAC as a body governed by public law within the meaning of Article 1(b) of Directive 93/36, because, as I stated earlier in this Opinion, that directive makes no provision, as regards the conclusion of public supply contracts with other contracting authorities, for a derogation comparable to that contained in Article 6 of Directive 92/50.

67. In my view, therefore, it follows from the foregoing considerations that Directive 93/36 permits no exception to the procedure it lays down where a public supply contract is concluded, irrespective of whether the contract is concluded between a contracting authority and an entity which is also a contracting authority. Accordingly, subject to the points which the national court must establish, the entrusting of the contested supply to the consortium is in breach of the directive in question if the relationship between the local authority and the consortium to which it belongs constitutes the outcome of a concordance of wills of two different, essentially autonomous, persons representing separate legal interests.

40 — The Commission considers (paragraph 34 of its written observations) that the case in point involves a special mode of organisation whereby the municipality, in order to obtain a particular supply of goods or provision of services, does not turn to the market but has recourse to a body that can be described as emanating from itself (it constitutes a *longa manus*) in the specific sector concerned.

41 — In other words, it must be established whether the contractual conditions laid down were the subject of prior negotiations.

42 — Such as the inclusion of penalty clauses operative in the event of defective performance by AGAC of its obligations, or an arbitration clause, and so forth.

VI — Conclusion

68. In the light of the foregoing analysis, I propose that the Court should give the following answer to the question referred to it by the Tribunale Amministrativo Regionale per l'Emilia-Romagna, Sezione di Parma:

Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts requires the procedure which it lays down to be observed where a contract for pecuniary interest is concluded in writing for the supply of products, irrespective of whether the contract is concluded between entities which are contracting authorities.