OPINION OF ADVOCATE GENERAL ALBER

delivered on 7 November 2002 [1]

I — Introduction

1. The present action for infringement of the Treaties relates to the definition of the personal scope of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [2] ('Directive 93/37'). Spain takes the view that commercial undertakings whose capital involves public funding, but which are organised under private law, are not covered by the term 'body governed by public law' within the meaning of the directive.

II — Legal framework

2. According to Article 1(b) of Directive 93/37, '"contracting authorities" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

A "body governed by public law" means any body:

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

— having legal personality, and

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

1 — Original language: German.
2 — OJ 1993 L 199, p. 54.

members are appointed by the State, regional or local authorities or by other bodies governed by public law.'

3. That provision was transposed into Spanish law by Ley 13/1995 de Contratos de las Administraciones Públicas [3] ('Law 13/1995'). Article 1(3) of that Law reads:

'This law shall also apply to the award of contracts by independent bodies in all cases and by other bodies governed by public law and possessing legal personality, connected to or controlled by a public authority, if they meet the following criteria:

(a) that they were established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character,

(b) that they carry on activity which is financed, for the most part, by public authorities or other bodies governed by public law, or that their management is subject to supervision by those bodies, or that more than half the members of their administrative, managerial or supervisory board are appointed by the public authorities or by other bodies governed by public law.'

4. The sixth provision supplementing Law 13/1995, entitled 'Rules applicable to the award of contracts in the public sector', reads:

'When awarding public procurement contracts, commercial companies in the capital of which public authorities or their independent bodies, or bodies governed by public law, have a majority holding, whether direct or indirect, shall comply with the rules on advertising and competition, unless the nature of the transaction to be effected is incompatible with those rules.'

III — Facts and pre-litigation procedure

5. Sociedad Estatal de Infraestructuras y Equipamientos Penitenciarios SA ('SIEPSA') was established by the Kingdom of Spain and started business on 7 April 1992. It was originally set up for a maximum period of eight years from start of

3 — BOE No 119 of 19 May 1995, p. 14601. The Law was published on 16 June 2000 in a newly codified version (Texto Refundido de la Ley de Contratos de las Administraciones Públicas, BOE No 148 of 21 June 2000, p. 21775). The content of the provisions referred to was not amended.

business (Article 4 of its statutes). However, in 1998/99 the statutes were amended to the effect that the company now exists for an unlimited period.

6. According to Article 2 of its statutes, SIEPSA's remit is to implement programmes and measures provided for in the Plan de Amortización y Creación de Centros Penitenciarios (Plan for the amortisation and establishment of penitentiary institutions) approved by the Council of Ministers. They involve on the one hand selecting and purchasing appropriate sites for the construction of new prisons either by SIEPSA itself or by third parties, including issuing invitations to tender for, implementing and financing the planning and construction work required to bring the institutions into operation, and on the other hand selling institutions which are surplus to requirements. The Spanish State is SIEPSA's sole shareholder. It is managed by an administrative board whose members are chosen by the Spanish Government. SIEPSA is subject only to Spanish private law, apart from public rules governing its budget, accounting and financial control.

7. In connection with the construction of the Centro Educativo Penitenciario Experimental de Segovia, SIEPSA issued an invitation to tender in which the public notice (Article 11),[4] the time-limit for receipt of tenders (Article 12), suitability criteria (Articles 24, 27 and 29(3)), award criteria (Articles 18 and 30) and treatment of abnormally low tenders (Article 30(4)) satisfied the requirements of Spain's Ley 13/1995, but it is not disputed that they did not satisfy the requirements of Directive 93/37.

8. Having carried out the pre-litigation procedure by sending a letter of formal notice on 6 November 1998 and a reasoned opinion on 25 August 1999, but without success, the Commission brought the present action.

IV — Claims of the parties

9. The Commission claims that the Court of Justice should:

(1) declare that, by not complying with the provisions of Directive 93/37/EEC as a whole and more specifically with the provisions on public notices contained in Article 11(2), (6), (7) and (11) and those of Articles 12(1), 29(3), 18, 27 and 30(4), in connection with the tendering procedure for the execution of works for the Centro Educativo Penitenciario Experimental in Segovia issued by Sociedad Estatal de Infrae-

4 — Articles without any further reference are those of Directive 93/37.

structuras y Equipamientos Penitenciarios SA, a company falling within the definition of contracting authority contained in Article 1(b) of Directive 93/37/EEC, for which the amount exceeds by a considerable margin the threshold for application of the directive, the Kingdom of Spain has failed to fulfil its obligations under Community law;

(2) order the Kingdom of Spain to pay the costs.

10. The Kingdom of Spain contends that the Court should:

(1) dismiss the action;

(2) order the Commission to pay the costs.

V — Submissions of the parties

11. The Kingdom of Spain did not address the alleged infringements of the provisions of Directive 93/37 in detail in its pleadings, but specifically admitted in its letter of 16 July 2002 that the invitation to tender in question did not satisfy the requirements of Directive 93/37 to which the Commission referred. The dispute therefore concerns only the question of whether SIEPSA is to be regarded as a contracting authority within the meaning of the directive. The parties' submissions are therefore repeated below only in so far as they relate to this question.

12. The parties both agree that SIEPSA both has its own legal personality and is also publicly controlled. The only question in dispute is to what extent SIEPSA meets needs not having an industrial or commercial character.

A — *Commission*

13. The Commission takes the view that SIEPSA meets needs of a non-commercial nature in the general interest. Its analysis is principally based on the purpose for which SIEPSA was set up, rather than on the activities which it actually carries out.

14. The Commission bases its opinion first of all on Article 2 of SIEPSA's statutes, according to which SIEPSA was set up to

carry out projects approved by the Council of Ministers as part of the 'Plan de Amortización y Creación de Centros Penitenciarios'. It deals with the construction and equipment of prisons and with the sale of institutions that are no longer needed, and thereby helps to implement State policy on prisons. The Commission underlines, referring to the judgment in *Mannesmann*,[5] that meeting this need in the general interest is closely linked to the maintenance of public order and that the State has a monopoly on criminal prosecution and imprisonment.

15. Furthermore, in operational terms SIEPSA is dependent on ministerial administration. When carrying out its activities it follows the recommendations of the general management of the prison administration, and this too is evidence that SIEPSA belongs to the public sector.

16. In addition, however, the Commission takes the view that SIEPSA's activities are also of a non-commercial nature. The construction of prisons and the sale of those which are no longer needed is not an activity for which there is a general market. The only demand for the construction of prisons is from the State, as part of the implementation of its prison policy.

17. However, even if SIEPSA's activities were to be classified as commercial, that does not preclude the application of Directive 93/37, since any economic activity carried out is merely a means of meeting a general interest (of a non-commercial nature) in the form of the implementation of policy on prisons.

18. The Commission also refers to the judgment in *BFI Holding*,[6] which states that the fact that private undertakings may also meet the same needs as the undertaking whose definition is at issue does not mean that that body may not be regarded as a contracting authority, nor is the absence of corresponding competition a condition for assuming a body to be public.

19. Even the fact that the aim of SIEPSA's operations may be to make a profit does not preclude its classification as a contracting authority. First, the wording of Directive 93/37 does not justify the assumption that bodies which make a profit are not meeting needs of a non-commercial nature in the general interest. Therefore the fact that a profit is made is not a feature which determines whether or not a body is commercial. Second, it is entirely doubtful whether a State enterprise such as SIEPSA actually pursues the aim of making a profit. SIEPSA's funding is derived solely from the

5 — Case C-44/96 *Mannesmann Anlagenbau Austria* [1998] ECR I-73, paragraph 24.

6 — Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraph 47.

general State budget. It was set up for the purpose of implementing a plan relating to the prison system, an area in which Member States do not usually regard profit-making as a priority. The Commission points out that SIEPSA made considerable losses in 1997 and 1998.

20. The Commission considers that the Spanish Government's reference to SIEPSA's classification under Spanish law is inappropriate. First, the term 'body governed by public law' is to be interpreted according to Community law, and domestic law is thus irrelevant. If Ley 13/1995 excludes SIEPSA from the scope of the rules of Community law on public contracts, then Directive 93/37 has not been correctly transposed.

21. Second, the fact that under Spanish law SIEPSA, in accordance with its legal form, is a private body governed by private law is irrelevant. Classification as a public law body does not depend on whether the rules governing the body's establishment and activity are those of public or private law, but on the purpose for which it is established.

22. Moreover, the wording of Directive 93/37 contradicts Spain's argument. Article 1 of the directive covers 'any' body fulfilling the criteria listed, and so it cannot therefore matter whether a national regulation excludes certain bodies from the personal scope of the directive.

23. The reference to the distinction drawn in Directive 93/38/EEC [7] between bodies governed by public law on the one hand and public undertakings on the other also does not justify the assumption that public undertakings are excluded from the scope of Directive 93/37. The Commission takes the view, referring to Article 2 of Directive 93/38, that the purpose of specifically mentioning public undertakings is to include within the scope of Directive 93/38 undertakings with exclusive rights performing substantial activities in the sectors covered by that directive. That does not alter the meaning of the term 'body governed by public law', which is the same in all four directives on public procurement. In the opinion of the Commission, 'public undertakings' are different from 'bodies governed by public law' in so far as they are set up for commercial purposes.

7 — 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.

B — *Spanish Government*

24. The Spanish Government, on the other hand, takes the view that Directive 93/37 does not apply to SIEPSA. SIEPSA is, according to both the purpose for which it was set up and the tasks it performs, purely commercial in nature. It was set up to carry out all the activities required for the proper implementation of the programmes and measures contained in the plan for the amortisation and construction of prisons. The activities it performs are also of a purely commercial nature. Buying and selling property and planning and organising the execution of construction work are purely commercial activities, and the sums acquired thereby are used solely for the implementation of the plan. In that respect SIEPSA acts with the intention of making a profit, as is typical of a commercial approach.

25. The Spanish Government submits that the wording 'body governed by public law' in Directive 93/37 refers to a *public* law body. Spanish public institutions, however, have traditionally made use of certain *private* law bodies in performing their duties. These are the 'State business undertakings' ('Sociedades Mercantiles Estatales'). Their capital is held, at least for the most part, by the State or other public bodies. However, regardless of their legal form they are subject in their activity solely to private law, unless provisions of budget law or rules on accounting, financial control and public procurement provide otherwise. They do not exercise any public powers. SIEPSA is one such undertaking.

26. The Spanish legislation enacted to transpose Directive 93/37 excludes State business undertakings from the personal scope of the rules on public procurement. Where those undertakings award contracts, they are required only to make some advertisement of their invitations to tender and to comply with the competition rules. The SIEPSA invitation to tender at issue fulfilled both those requirements.

27. The Spanish Government also bases its argument on the fact that, unlike the other public procurement directives, only Directive 93/38 distinguishes between bodies governed by public law and public undertakings and declares that the rules on procurement also apply to public undertakings. This is not the case with Directive 93/37, however, which was adopted on the same day and is relevant in the present case, and that is why public undertakings like SIEPSA do not fall within its scope. If public undertakings are to be subsumed under the term 'body governed by public law', it then becomes difficult to understand why Directive 93/38 specifically distinguishes between those two categories.

28. The Spanish Government further considers that the Commission's interpretation does not take sufficient account of the independent significance of the requirement that the need should 'not have an industrial or commercial character'. If it were sufficient that the body meets a need in the general interest, such as contributing to the prison system, then the requirement set out in the directive that that need must not have an industrial or commercial character would be redundant. However, the Court found in the judgment in *BFI Holding* [8] that this requirement has its own separate significance.

VI — Assessment

29. Spain does not dispute that the invitation to tender issued by SIEPSA does not satisfy the requirements of Directive 93/37, but it considers that the directive does not apply to SIEPSA. The following discussion will therefore consider solely whether Directive 93/37 is applicable to SIEPSA.

30. The answer to that question depends on whether the company is to be regarded as a body governed by public law within the meaning of the directive. The parties both agree that SIEPSA has its own legal personality, is controlled by the State and was established for the specific purpose of meeting needs in the general interest. However, they dispute whether those needs have a commercial or non-commercial character.

31. Spain focuses more on the activities actually carried out, which are the buying and selling of property, and it therefore contends that SIEPSA meets commercial needs. The Commission, on the other hand, focuses more on the purpose of SIEPSA's operations, which is to set up prisons. It infers from this that the need met is not of a commercial character.

32. None of the public procurement directives [9] defines the concept of non-commercial needs in the general interest. Up to now the Court has, as far as can be seen, considered the interpretation of this criterion only in *BFI Holding* [10] and *Agorà*. [11]

8 — *BFI Holding*, cited in footnote 6, paragraphs 32 to 36.

9 — Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ 1993 L 199, p. 1; Directive 93/37, cited in point 1; Directive 93/38, cited in footnote 7; 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.

10 — *BFI Holding*, cited in footnote 6.

11 — Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605.

33. In *BFI Holding* it held that the absence of a commercial character is a criterion intended to clarify the meaning of the term 'needs in the general interest' as used in the second subparagraph of Article 1(b) of Directive 92/50. [12] It based its findings primarily on the practical effect of the provision. [13]

34. In the judgment in *Agorà*, referring to the bodies listed in Annex I to Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts [14] in the version of Directive 93/37, it held that '... the needs in question are generally, first, those which are met otherwise than by the availability of goods or services in the market place and, secondly, those which, for reasons associated with the general interest, the State itself chooses to provide or over which it wishes to retain a decisive influence'. [15]

35. It also held in both judgments that the term needs in the general interest does not exclude needs which are or can be satisfied by private undertakings as well, but that the existence of significant competition, and in particular the fact that the entity concerned is faced with competition in the marketplace, may be indicative of the absence of a need in the general interest, not having an industrial or commercial character. [16]

36. In my Opinions in *Agorà*, [17] *Universale Bau*, [18] *Truley* [19] and *Korhonen* [20] I also suggested that the nature of the need should be ascertained by examining whether the entity in question has to bear any losses itself, in other words whether it bears the economic responsibility for its decisions in awarding contracts. If so, it must be assumed that it is guided by economic considerations in reaching its decisions, and its activity must then be assumed to be commercial. If, on the other hand, a publicly funded body stands behind the entity to offset any losses it incurs, there is a risk that the entity could also be influenced by considerations other than purely economic ones when awarding a contract. In such a case there is a threat to the free movement of goods and services, which is why the meaning and purpose of the directives on public procurement demand that

12 — *BFI Holding*, cited in footnote 6, paragraph 32.

13 — *BFI Holding*, cited in footnote 6, paragraph 35.

14 — OJ, English Special Edition 1971 (II), p. 682.

15 — *Agorà*, cited in footnote 11, paragraph 37, referring to *BFI Holding*, cited in footnote 6, paragraphs 50 and 51.

16 — *Agorà*, cited in footnote 11, paragraph 38; *BFI Holding*, cited in footnote 6, paragraph 49.

17 — Opinion in Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605, point 67.

18 — Opinion in Case C-470/99 *Universale Bau* [2002] ECR I-11617, point 27.

19 — Opinion in Case C-373/00 *Truley* [2003] ECR I-1931, point 95.

20 — Opinion in Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, point 77.

they should apply to the entity. The Court confirmed this approach in its judgment in *Agorà*. [21]

37. Against the background of this case-law we may conclude the following with regard to SIEPSA. We have to agree with the Spanish Government that the requirement for the needs to be of a non-commercial nature has its own independent significance. For the directive to apply to SIEPSA it is not sufficient that it meets a need in the general interest in constructing prisons.

38. On the other hand, the purpose for which SIEPSA was set up is entirely relevant in deciding whether it meets needs of a non-commercial nature. The wording of Directive 93/37 requires the body to have been established for the specific purpose of meeting needs of a non-commercial nature. It follows that the body is outside the scope of the directive if it was established in order to meet needs of a commercial nature. It is not sufficient that it meets needs of a commercial nature as well. Rather, it must be a body offering goods and services on the open market and thus competing with other private and public economic operators. On the other hand, the directive does apply to bodies which carry out commercial activities, but which were actually established in order to meet other needs in the general interest. [22]

39. There is no open market for the goods and services offered by SIEPSA in planning and constructing prisons. Because of the State's penal monopoly there is only one single taker for those services, the Spanish State, which is alone in needing prisons. This argues against the assumption that SIEPSA meets needs of a commercial nature.

40. SIEPSA also meets a need in connection with which the Spanish State ensures that it has considerable influence over the way in which SIEPSA meets that need. It implements the Plan de Amortización y Creación de Centros Penitenciarios approved by the government and in doing so works under the instruction of the State administration. On the basis of the case-law referred to earlier, this circumstance too argues in favour of the assumption that it meets needs of a non-commercial nature.

21 — *Agorà*, cited in footnote 11, paragraph 40.

22 — See the description given in the Commission's guide to the Community rules on the awarding of public works contracts, p. 10, published on the Commission's website at *www.europa/internal_market* under the heading 'public procurement'.

41. The fact that SIEPSA has to buy property as part of its activities does not alter this conclusion. The acquisition of new property and the sale of redundant property is merely a means by which SIEPSA carries out its business of setting up prisons for the Spanish State. It is not its purpose to trade in real property.

42. From the parties' submissions it is not entirely clear whether SIEPSA has to bear any losses incurred itself, or whether they are offset from the national budget. The Spanish Government submits that it is SIEPSA's aim to make a profit from its activities. The Commission disputes this and provides evidence that SIEPSA made substantial losses in 1997 and 1998. However, its submissions do not indicate who was required to bear the losses incurred.

43. Whether or not SIEPSA operates with the intention of making a profit does not ultimately appear, on the basis of previous case-law, to be conclusive for its classification. In the view of the Court of Justice the aim of making a profit may at best be an indication of commercial activity. In *Agorà* it regarded Ente Fiera as a body meeting needs of a commercial nature, even though it was non-profit-making. [23]

44. On the question of who is economically responsible for SIEPSA's decisions, too, account should be taken of the fact that it was established in order to implement the Spanish Government's decisions concerning the institutions required for its prison system. This concerns the practical requirements for implementing State prison policy, a need which the State has to meet somehow. The Spanish State established SIEPSA for this purpose and entrusted it with carrying out the tasks associated with it. In this respect it is to be assumed that the Spanish State also has an interest in SIEPSA's continued existence, since if it becomes insolvent, the State itself must once again directly meet the needs which SIEPSA was fulfilling. The State's interest in SIEPSA's continuation is evident from the extension of the period for which the undertaking was established. The company, originally set up for only eight years from the start of its activities, has since been converted into a company of unlimited duration (see point 5 above). That interest in SIEPSA's continuation provides grounds for assuming that the Spanish State as the sole shareholder will do everything to prevent SIEPSA from becoming insolvent. [24] So even if there is no official mechanism for offsetting any losses, SIEPSA will probably ultimately not have to bear sole responsibility for the economic consequences of its actions. There could therefore be a risk that, when awarding

23 — *Agorà*, cited in footnote 11, paragraphs 40 and 43.

24 — See, on similar facts, my Opinion in *Korhonen*, cited in footnote 20, points 80 and 81.

contracts, it might be influenced by considerations other than purely economic ones, which is sufficient for Directive 93/37 to be applied in order to ensure the free movement of goods and services.

45. As a preliminary finding, therefore, it must be concluded that, according to the criteria developed in earlier case-law, the needs met by SIEPSA are of a non-commercial nature.

46. The Spanish Government further bases its position on the fact that, under Spanish law, SIEPSA is subject only to private law. The legislation enacted to transpose the public procurement directives excludes all State business undertakings from the application of those directives.

47. It should be pointed out here that drawing a distinction according to the field of law to which the entity in question is subject is consistent with the wording of Article 1(b) of Directive 93/37. That provision talks about bodies *governed by public law*, which suggests that bodies governed by private law are in principle excluded from the scope of the directive.

48. However, such an interpretation does not take sufficient account of the indents following those words, which list the criteria to be used for deciding whether a body is governed by public law. Those criteria, which must all be satisfied,[25] require that the body be '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'. It follows from this that it is a body which is controlled and directed by the public authorities. In spite of the wording body *governed by public law*, it does not depend on which branch of law the body is subject to, public or private.

49. In my Opinions in *Truley*[26] and *Korhonen*[27] I explained why I consider that it is not compatible with the spirit and purpose of the public procurement directives to interpret needs in the general interest according to how the Member State concerned itself defines its sphere of activity. The independent nature of Com-

25 — On this point, see *BFI Holding*, cited in footnote 6, paragraph 29.

26 — Cited in footnote 19, points 42 to 44.

27 — Cited in footnote 20, point 57.

munity law and the aim of its uniform application argue in favour of understanding and interpreting the term as an autonomous concept of Community law. This view is supported by the spirit and purpose of the public procurement directives, which is to contribute to the establishment and functioning of the single market.

50. The following example may illustrate this line of thought. If the branch of law to which the body was subject under national provisions were the deciding factor, the authorities of a Member State could easily evade the application of the public procurement directives. It would be sufficient to set up a company, a 'Procurement PLC', say, to which only private law was applicable, and to establish as the purpose of its business the procurement of office furniture, paper etc. for the State authorities. Although the State would be the sole shareholder and could influence all the decisions taken by the company, it would not be required to issue invitations to tender for contracts because 'Procurement PLC' was subject to private rather than public law. That is clearly not consistent with the spirit and purpose of the public procurement directives.

51. The determination of the personal scope of Directive 93/37 cannot therefore depend on whether the body is subject to public or private law under domestic law. It is therefore immaterial in the present proceedings that SIEPSA is subject only to private law in Spain.

52. Lastly, the Spanish Government compares the wording of the sectoral Directive 93/38 with the wording of the other public procurement directives, pointing out that the sectoral directive refers to 'public undertakings' as well as to 'public authorities'. The definition of 'public authorities' is identical to that of 'contracting authorities' in the other procurement directives. Since Directives 93/36, 93/37 and 93/38 were adopted on the same date, the terms 'public authorities' and 'contracting authorities' are, it argues, to be interpreted as meaning the same. The Spanish Government infers from this that 'public undertakings' cannot be 'contracting authorities' within the meaning of Directive 93/37. Because the term 'public undertakings' is not used in Directive 93/37, it does not apply to them.

53. It is true that the wording of Directive 93/37 does not specifically determine whether it is applicable to 'public undertakings'. However, such undertakings may be subsumed under the legal definition of 'contracting authorities'. As the example of SIEPSA shows, they too may have been established for the specific purpose of meeting needs in the general interest (of a

non-commercial nature), they too may have their own legal personality and — as follows from the legal definition given in Article 1(2) of Directive 93/38 — they too are characterised by the fact that 'the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of [them], their financial participation therein, or the rules which govern [them]'. The question therefore arises whether it may be inferred from the absence of specific rules on 'public undertakings' in Directive 93/37 that it does not apply to 'public undertakings'.

54. The provision on 'public undertakings' in Article 1 of Directive 93/38 indeed only makes sense if they do not come under 'public authorities' within the meaning of that article. And since the definition of 'public authorities' is identical to that of 'contracting authorities' in the other procurement directives, it must also be assumed that these provisions are to be interpreted in the same way. Then, however, bodies covered by the term 'public undertaking' could not be 'contracting authorities' within the meaning of Directive 93/37. The wording of the provisions therefore initially supports the Spanish Government's position.

55. However, in schematic terms it should be pointed out that Directive 93/38 is a special set of rules applicable only to certain economic sectors: the water, energy, transport and telecommunications sectors. Directives 92/50, 93/36 and 93/37, on the other hand, apply to all public activities. Directive 93/38 is an exception in that respect. However, exceptional rules are in principle not an appropriate basis for interpreting general rules. This argues against the Spanish Government's restrictive interpretation of the term 'contracting authorities' within the meaning of Directive 93/37 and in favour of the inclusion of 'public undertakings' within the scope of that directive.

56. The historical development of the provisions on public procurement also argues against the Spanish Government's interpretation.

57. It is true that Directives 93/36, 93/37 and 93/38 were all adopted on 14 June 1993. It is therefore to be assumed that the legislature intended the terms to be used in the same way. However, the question then arises — if we follow the Spanish Govern-

ment's approach — why it did not also use the term 'public authorities' in Directives 93/36 and 93/37 if the definition of that term was the same as that of 'contracting authorities' in the other two directives.

58. On the other hand, it should be pointed out that the terminology used in Directives 93/36 and 93/37 is consistent with that used in Directive 92/50 on public service contracts. That suggests that the terminology used in Directive 93/38 should be seen as a special set of rules compared with the other provisions on public procurement, and that no conclusions are to be drawn from it for the interpretation of the other directives.

59. The development of public procurement law as a whole also argues in favour of this approach. The field of public works contracts governed by Directive 93/37 was already covered by Directives 71/304/EEC[28] and 71/305/EEC and was adapted by Directive 89/440/EEC.[29] The public supply contracts regulated in Directive 93/36 were already covered by Directive 77/62/EEC,[30] as amended by Directives 80/767/EEC[31] and 88/295/EEC.[32] The field covered by Directive 93/38, on the other hand, was regulated for the first time considerably later, in Directive 90/531/EEC.[33] The chronology of these developments is another argument against referring to the rules contained in Directive 93/38 for the interpretation of Directive 93/37.

60. The legal definition given in Article 1(b) of Directive 93/37, including that of the term 'contracting authorities', goes back to an amendment proposed by the European Parliament during consultations on the Commission's proposed amendment of Directive 71/305. In its proposal the Commission had spoken only of 'legal per-

28 — Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches, OJ, English Special Edition 1971 (II), p. 678.

29 — Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts, OJ 1989 L 210, p. 1.

30 — Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, OJ 1977 L 13, p. 1.

31 — Council Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC coordinating procedures for the award of public supply contracts, OJ 1980 L 215, p. 1.

32 — Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC, OJ 1988 L 127, p. 1.

33 — Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1990 L 297, p. 1.

sons'. [34] In order to ensure that the directive on works contracts applied as extensively as possible, Parliament introduced the expression 'organ governed by public law', [35] later amended to 'body'. The inclusion of the legal definition was intended to replace the lists to be drawn up under Article 1(b) of Directive 71/305 which defined the class of contracting authorities. It was designed to ensure the comprehensive application of the directive. [36] The intention was to extend the scope of the directive to construction work carried out by third parties which was funded wholly or in part and directly or indirectly from the public purse. [37]

61. It can thus be established that the term 'contracting authorities' existed long before Directive 93/38 was adopted. If the legislature did not follow the terminology generally used in public procurement when it adopted the sectoral directive, no conclusions can be drawn from that special set of rules for the interpretation of terms used consistently in the other directives. In that respect the fact that the three 1993 directives were adopted at the same time does not prove that the legislature would have expressly referred to 'public undertakings' in Directives 93/36 and 93/37 too if it had intended to include them in the personal scope of those directives.

62. The spirit and purpose of Directive 93/37 also argue against the interpretation which the Spanish Government draws from a comparison with Directive 93/38. As explained earlier, the legislature's intention was to replace the lists of contracting authorities by a generally valid definition in order to make it clear that the provisions apply to all bodies meeting certain criteria, even if they are not on the list of contracting authorities. It is contrary to this intention to try to exclude an entire area of public activity such as that of 'public undertakings' solely because it is not specifically mentioned.

63. As explained earlier, the reason why Directive 93/37 is applicable is also valid for 'public undertakings' within the meaning of Directive 93/38. They too are undertakings which, although organised as private companies, are controlled and directed by the public authorities. That influence on

34 — Proposal for a Council Directive amending Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts, COM(86) 679 final of 23 December 1986, pp. 6 and 22.

35 — Proposed amendment No 4, report by the Committee on Economic and Monetary Affairs and Industrial Policy, European Parliament session documents 1988/89, Document A2-37/88, p. 6, and the statement of reasons, p. 31.

36 — See the abovementioned report, statement of reasons, p. 31.

37 — See the statement by the rapporteur, Mr Beumer, at the European Parliament session on 17 May 1988, European Parliament Verbatim Report of Proceedings, No 2-365, p. 83.

the part of the public authorities justifies their inclusion in the scope of the directive.

64. Unlike the other procurement directives, Directive 93/38 relates only to certain sectors. In 1990 — when those areas were first regulated — the bodies operating in the relevant market in those sectors were organised in many different ways. Water and electricity supplies and transport and telecommunications services were provided partly by public bodies and partly by private companies given exclusive rights by the Member States. The privatisation of broad areas of public services was only just beginning. In order to be able to cover the many different forms of organisation and structure in existence at that time, the legislature did not use the traditional term 'contracting authorities', but introduced the terms 'public authorities' and 'public undertakings'. This first of all made it clear that it did not depend on the form of organisation, and secondly it ensured that the sectoral directive applied to all bodies operating in those fields, provided that they fulfilled the criteria. This directive thus pursued exactly the same aim as with the definition of the term 'contracting authorities', including 'bodies governed by public law', in the other public procurement directives.

65. The fact that the fields regulated by Directive 93/38 are subject to considerable change is clear from two Commission communications. In 1998 it stated in its communication on 'Public procurement in the European Union': [38]

'Following the liberalisation of some of the sectors covered by Directive 93/38/EEC, it is necessary to examine the degree of openness to competition of the liberalised sectors with a view to deciding whether the constraints the directive imposes on contracting entities are still justified. *They were introduced because of the lack of competition resulting from the State's decision to grant a monopoly or a privileged position to an operator.* In return for this preferential treatment by the State, the operators concerned had to comply with certain advertising and procedural requirements when awarding contracts. If a sector is found to be effectively open to competition, the constraints imposed by the directive should be removed.

38 — COM(98) 143 final of 11 March 1998, point 2.1.2.1, p. 7.

The Commission was the prime mover in the process of liberalisation in the sectors covered by Directive 93/38/EEC... It must now take account of the changes that have occurred and the new factors that are emerging on the market, by excluding from the scope of the Directive entities operating under real competitive conditions in the same way as private entities which base their decisions on purely economic criteria.'

66. In 1999 the Commission declared that Directive 93/38 was largely inapplicable to the telecommunications sector. [39] These considerations confirm that Directive 93/38 contains special rules taking account of particular circumstances on the market in the relevant sectors at the time. It therefore does not give a generally applicable definition of the operators concerned, but regulates a special case.

67. It consequently cannot be inferred from the fact that Directive 93/37 does not expressly include 'public undertakings' in its scope that they do not come under the term 'contracting authorities'. This plea by the Spanish Government must therefore also be dismissed.

68. It must therefore be concluded that SIEPSA is a body governed by public law within the meaning of Article 1(b) of Directive 93/37. As the Spanish Government has admitted the individual infringements of the tendering rules complained of by the Commission, the decision given should be in accordance with the form of order sought by the Commission.

VII — Costs

69. In the light of the foregoing the application must be granted. Under Article 69 of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they are applied for by the successful party. As the Spanish Government has been unsuccessful in its application and the Commission has made such an application, Spain must be ordered to pay the costs of the proceedings.

39 — Communication from the Commission pursuant to Article 8 of Directive 93/38/EEC: List of services regarded as excluded from the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, pursuant to Article 8 thereof, OJ 1999 C 156, p. 3.

VIII — Conclusion

70. In the light of the foregoing I propose that the Court of Justice should give the following decision:

(1) The Kingdom of Spain has failed to fulfil its obligations under Community law by failing to comply with all the provisions of Directive 93/37/EEC, in particular the provisions on public notices contained in Article 11(2), (6), (7) and (11) and those of Articles 12(1), 29(3), 18, 27 and 30(4), in connection with the call for tenders for the execution of works for the Centro Educativo Penitenciario Experimental in Segovia issued by Sociedad Estatal de Infraestructuras y Equipamientos Penitenciarios SA.

(2) The Kingdom of Spain must pay the costs of the proceedings.