



SIGMA

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Creating Change Together

**SELECTED JUDGEMENTS OF THE COURT OF JUSTICE
OF THE EUROPEAN UNION ON PUBLIC PROCUREMENT
(2006-2014)**

June 2014

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Analysis of the judgements of the Court of Justice of the European Union

Introductory note

This SIGMA public procurement publication looks at the key decisions of the Court of Justice of the European Union (CJEU) on nine procurement issues.

The publication covers the period from January 2006 to April 2014. Most, but not all, of the relevant CJEU cases on the nine procurement issues are mentioned. Decisions of the General Court (GC) are not discussed.

Chapter 1 is an introduction covering: the role and composition of the CJEU, the way in which legal actions are brought and conducted before the CJEU, the content and publication of CJEU judgments, and the consequences of non-compliance with those judgments.

Chapters 2 through 10 cover the nine procurement issues:

- Chapter 2 Material scope
- Chapter 3 Scope – Meaning of a “body governed by public law”
- Chapter 4 “In-house” procurement
- Chapter 5 Selecting economic operators – Grounds for exclusion
- Chapter 6 Selecting economic operators – Qualification
- Chapter 7 Contract award
- Chapter 8 Technical specifications
- Chapter 9 Changes to contracts
- Chapter 10 Remedies

Each chapter starts by placing the issue in context, with reference to relevant provisions in the directives and, where appropriate, comments on the approach of the CJ based on case law. An overview of case law is provided in each chapter, followed by a more detailed analysis.

Where a CJ case is of particular importance, a comprehensive case analysis and a copy of the full CJ judgment are provided.

Terminology

The following acronyms are used:

CJEU	Court of Justice of the European Union
CJ	Court of Justice
GC	General Court
<i>OJEU</i>	<i>Official Journal of the European Union</i>

References to Directives:

2004/18/EC	Directive
2004/17/EC	Utilities Directive
2009/81/EC	Defence and Security Directive
89/665/EC	Remedies Directive *
2007/66/EC	Amending Remedies Directive *

* Where both remedies directives apply, we refer to "remedies directives".

92/50/EEC	Services Directive
93/36/EEC	Supplies Directive
93/37/EEC	Works Directive
2014/24/EU	2014 Public Sector Directive
2014/25/EU	2014 Utilities Directive
2014/23/EU	Concessions Directive

Chapter 1 Introduction

1. Role and composition of the Court of Justice of the European Union

The European Union (EU) is a unique economic and political partnership between 28 European countries, referred to as EU Member States. The EU is based on two treaties of equal value:

- Treaty on the European Union (TEU);
- Treaty on the Functioning of the European Union (TFEU).

The EU is served by a number of institutions, one of which is the Court of Justice of the European Union (CJEU). The CJEU is located in Luxembourg. Its website is <http://curia.europa.eu>.

Role of the CJEU: The term “European Union law” (EU law) encompasses the body of law relating to the EU. EU law includes the law of the former European Community (Community law)¹, which has been fully integrated into the EU. EU law takes precedence over the domestic law of EU Member States². According to the CJEU, if the effect of EU law varied between Member States, it would jeopardise the attainment of the purposes set by the Treaties.

The CJEU is responsible for:

- securing the enforcement of EU law in cases where it has been breached;
- developing and interpreting the provisions of EU law.

Structure of the CJEU: The CJEU consists of several sub-courts:

- Court of Justice (CJ);
- General Court (GC)³;
- Other specialised courts (currently only one specialised court, the Civil Service Tribunal).

The CJEU Registrar provides administrative functions and support. Each sub-court has its own Registrar.

Rules of Procedure of the Court of Justice (CJ): The structure and organisation of the CJ and its detailed rules of procedure are set out in the “Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012”, as amended.⁴

Composition of the CJ: The CJ is comprised of judges and advocates general. The Treaty on the Functioning of the European Union (TFEU) requires both judges and advocates general to be “chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence” (Article 253 TFEU). All CJ judges and advocates general are appointed by common accord of the governments of the Member States. CJ judges and advocates general have equal standing.

¹ Community law refers to the former European Community, established as the European Economic Community in 1957.

² For example, see judgments of the CJEU in cases 26/62 *Van Gend en Loos v Administratie der Belastingen* and 6/64 *Costa v E.N.E.L.*

³ The Court of First Instance (CFI) was established in 1989 to assist in dealing with an increasing number of cases. In 2009 the CFI was renamed the General Court (GC).

⁴ Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013)

CJ judges: Each Member State has one judge on the Court of Justice. CJ judges are appointed for a six-year term and their term of office may be renewed. The CJ judges elect one of their number as President of the Court of Justice, for a renewable term of three years.

Advocates general: Nine advocates general assist the CJ judges in their tasks. Advocates general are responsible for presenting legal opinions on the cases assigned to them. Since 2003 they have been required to give an opinion on a particular case only if the CJ considers that the case raises a new point of law.

The opinions of the advocates general are advisory and do not bind the CJ. Their opinions are nonetheless very influential and are followed in the majority of cases. These opinions can also be very useful to practitioners, increasing their understanding of the CJ's judgments. They often contain more facts about the cases and discuss legal arguments in more detail than the judgments.

How the CJ sits: The CJ may sit as a full court, in a Grand Chamber composed of 13 judges, or in chambers composed of either three or five judges. The CJ sits in a Grand Chamber when a Member State or EU institution that is party to the proceedings makes such a request and in particularly complex or important cases. Other cases, including most public procurement cases, are heard by chambers of three or five judges.

Composition of the General Court (GC): Each EU Member State has one judge on the General Court. GC judges are appointed for a six-year term and their term of office may be renewed. They are appointed by joint agreement between Member States. GC judges are appointed from among persons whose independence is beyond doubt. They must possess the ability required for appointment to a high judicial office (Article 254 TFEU).

Unlike the CJ, no advocate general sits on the GC. A GC judge may nevertheless be called upon to perform the tasks of an advocate general.

2. Types of actions before the Court of Justice and the General Court

Actions before the Court of Justice: The following types of actions may be brought before the CJ:

- actions for failure to fulfil obligations;
- references for a preliminary ruling;
- actions for annulment of a secondary EU measure;
- actions related to failure to act by an EU institution;
- appeals against judgments and orders of the General Court.

Actions relating to public procurement: Two types of actions are mostly commonly used in relation to public procurement:

- actions for failure to fulfil obligations under article 258 TFEU;
- references for preliminary rulings under article 267 TFEU.

These two types of actions are explained further in Section 3 below.

Actions before the General Court: The GC has jurisdiction to review, in summary:

- Direct actions brought by natural or legal persons (claimants) against acts, or failures to act, by institutions, bodies, offices or agencies of the EU (where the relevant acts are addressed to the claimants or of direct and individual concern to them);
- Actions brought by Member States against the European Commission;
- Actions seeking compensation for damages caused by EU institutions or their staff;
- Actions related to Community trademarks;
- Appeals against decisions of the Civil Service Tribunal;
- Actions based on contracts entered into by the EU that expressly give jurisdiction to the GC.

Judgments of the GC in the first instance can be appealed to the CJ. The appeal must be filed within two months of the GC judgment.

3. Actions related to public procurement

This section provides details on the conduct of the two most commonly used procedures related to public procurement. The two procedures are i) actions for failure to fulfil obligations and ii) references for preliminary rulings.

3.1 Actions for failure to fulfil obligations under article 258 TFEU (“infringement procedures”)

Article 258 TFEU

“If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the CJ of the European Union.”

The European Commission (hereafter referred to as the “Commission”) may take actions for failure to fulfil obligations under article 258 TFEU (“infringement procedures”). These actions may concern:

- infringement of the Treaties, secondary EU legislation or general law principles;
- lack of action – failure to adopt required provisions;
- courses of action that do not comply with the Treaties, secondary EU legislation or general law principles.

Infringement procedures under article 258 TFEU are brought by the Commission against an EU Member State and not against an individual authority within the Member State.

An infringement procedure is usually prompted by an individual complaint to the Commission. For example, a company participating in a procurement procedure or a local resident may submit a complaint concerning a particular procedure to the Commission. The Commission may also commence an action under article 258 TFEU on its own initiative, after having discovered facts or provisions that are allegedly inconsistent with EU law.

A breach of EU law concerning public procurement may occur, for example, when the directives on public procurement have not been implemented on time or have been implemented incorrectly. A breach may also occur when a contracting authority fails to comply with the EU procurement rules. In that event the Member State is responsible for the actions of that authority.

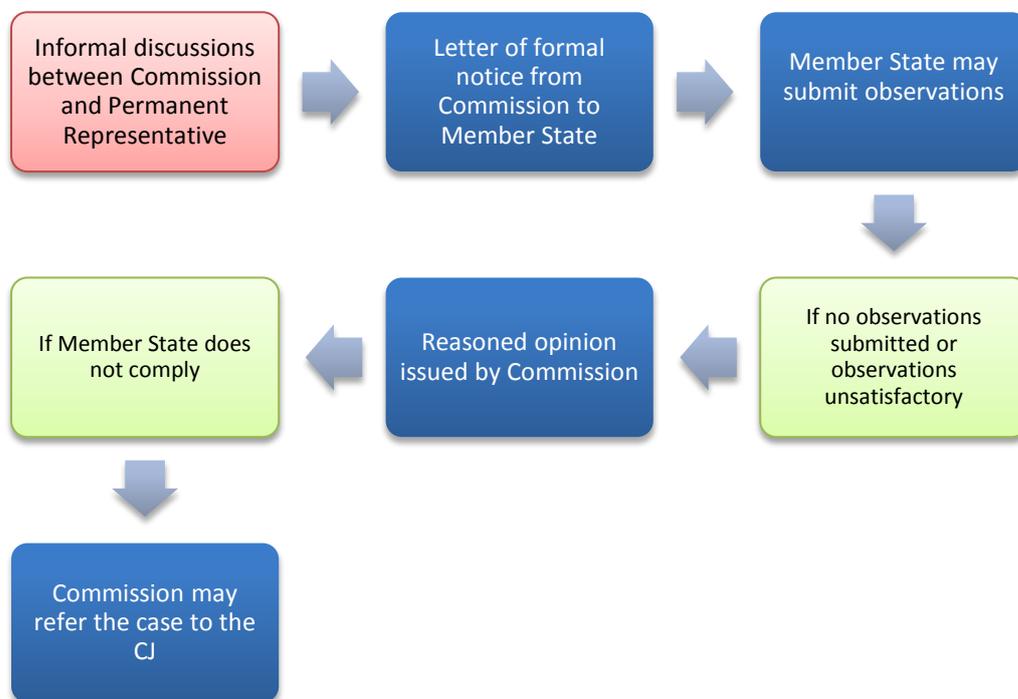
Case C-368/10 *Commission v Netherlands* (discussed in Chapter 7 – “Contract award” below) is an example of an infringement action brought by the Commission against a Member State. In that case, the Commission brought infringement proceedings against the Netherlands, alleging that in the Province of North Holland a contracting authority was in breach of EU procurement rules. The procurement process related to a contract for the supply, installation and operation of beverage machines. The alleged breach related primarily to the requirement set by the purchaser that the products supplied had to have particular labels indicating that they were organic and fair trade products. The Commission alleged that the use of these labels was in breach of the procurement directive on a number of grounds.

Preliminary procedure

Before starting a formal infringement action before the CJ, the Commission initially conducts less formal processes.

The Commission is required to conduct an administrative phase referred to as the “preliminary procedure”. It may also have an informal discussion with the Permanent Representative of the Member State concerned.

Summary of the preliminary procedure in an infringement action



When an informal dialogue does not resolve the problem, the Commission raises its concerns in a letter of formal notice sent to the Member State, indicating the alleged breach of EU law. The Member State then has the opportunity to express its view with regard to the alleged breach.

In the event that no reply to a letter of formal notice is received or that the observations made by the Member State are, in the opinion of the Commission, unsatisfactory, the Commission sends a reasoned opinion to the Member State. The reasoned opinion should include a coherent and detailed statement of the complaints. It should also set a time period for the Member State to respond. The minimum time period is two months.

If no reply to the reasoned opinion is received or if the reply is unsatisfactory, the Commission has the discretion to refer the case to the CJ. It is not obliged to do so.

Note: The Commission is not bound by any time periods with regard to initiating and concluding the infringement procedure.

Case C-17/09 Commission v Germany⁵ concerned an infringement procedure launched by the Commission 10 years after the alleged breach of EU law took place. The alleged breach was the award of a contract by the city of Bonn without publication of contract notice. Germany argued that the Commission’s claim was inadmissible because of the very long period of time between the Commission’s awareness of the alleged breach and the date on which proceedings were commenced (paragraph 13 of the ruling). The CJ held that the Commission, as a guardian of the Treaty, was to decide whether it was appropriate to commence proceedings (paragraph 20).

⁵ Judgment of 21 January 2010

Actions by Member States: A Member State may also bring a CJ case against another Member State under article 259 TFEU. Article 259 proceedings have occurred only a few times in the history of the CJ and have not concerned public procurement⁶. Before a Member State commences such an action, it must bring the matter before the Commission. A specific process must be followed.

3.2 Reference for a preliminary ruling under article 267 TFEU

The CJEU is the supreme guardian of EU law, but it is not the only judicial body entitled or required to apply EU law. This task is also vested in the national courts of Member States. The procedure that enables co-operation between the CJ and national courts is provided in article 267 TFEU. It is referred to as the “preliminary ruling” procedure.

Reference for a preliminary ruling: National courts may, and sometimes must, refer to the CJ and ask for clarification and interpretation of EU law. This measure aims to ensure the effective and uniform application of EU law and prevent divergent interpretations. If the issue of interpretation of EU law arises in a case before the national court, the court suspends the procedure, formulates the question(s), refers it to the CJ and waits for an answer from the CJ.

Jurisdiction and admissibility: Under Article 267 TFEU, the CJ has jurisdiction to give preliminary rulings concerning:

- interpretation of the Treaties;
- validity and interpretation of acts of EU institutions, bodies, offices or agencies.

Under the preliminary ruling procedure, it is not the parties in the national case that refer the question(s) to the CJ, but the national court. The parties may nevertheless appear before the CJ. The national court, in the light of the special features of each case, determines:

- the need for a preliminary ruling;
- the relevance of the question(s) that it submits to the CJ.

Questions asked by the national court must concern the interpretation of EU law. If EU law is not at issue the question is inadmissible. Questions about the conformity of national law with EU law may not be asked. However, in cases where this type of question arises, the CJ may be willing to “reformulate” the question so that it is admissible and can be considered.

In principle, the CJ is obliged to give a ruling on questions raised by a national court. The CJ may, however, refuse to rule on a question in the following circumstances:

- It is obvious that the request for interpretation of EU law bears no relation to the actual facts of the main action or its purpose;
- The problem is hypothetical
- The CJ does not have the factual or legal material necessary to give an appropriate answer to the question.

For example, in the case C-568/08 *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* (discussed below in Chapter 10 – “Remedies”), the CJ found one of the questions of the referring court to be inadmissible. In its view, the interpretation of EU law requested by the national court bore no relation to the subject matter of the dispute in the main proceedings.

⁶ The most recent proceeding under article 259 was the case C-364/10 *Hungary v Slovakia*.

Right to refer a question limited to a court or tribunal: Only a court or tribunal of a Member State may refer questions to the CJ.

The term “court or tribunal” is an EU law concept. According to that concept, the determination of whether a body is a court/tribunal depends on the nature of the particular body. To make this determination, the CJ takes into account a number of factors, all of which must be satisfied. The factors to be considered are whether:

- the body is established by law;
- it is permanent;
- its jurisdiction is compulsory;
- its procedure is *inter partes*⁷;
- it applies the rule of law;
- it is independent⁸.

The EU law concept of a “court or tribunal” may cover bodies that are not considered as courts according to the law of a Member State.

The CJ has recognised the following bodies as courts or tribunals according to the EU law concept:

- judges combining the functions of public prosecutor and magistrate in criminal cases (*pretori*) in Italy (Case 14/86 *Pretore di Salò v X*);
- a university appeals board (C-408/98 *Abbey National*);
- a court that determines an appeal against an arbitration award (C-393/92 *Gemeente Almelo and Others v Energiebedrijf IJsselmij*);
- arbitral tribunals if the parties are under an obligation to refer their disputes to arbitration (C-125/04 *Denuit and Cordenier*).

The CJ has held that the following bodies are not courts or tribunals according to the EU law concept:

- ordinary arbitral tribunal (Case 102/81 *Nordsee v Reederei Mond*)
- national competition authority (C-53/03 *Syfait and Others*)
- national commission for protection against discrimination (C-394/11 *Belov*)

Effects of the CJ ruling: The CJ’s ruling takes the form of a judgment or reasoned order. The ruling is not merely an opinion. The national court that had made the reference is bound by the interpretation of the CJ when deciding the case. Other courts may treat the ruling as authoritative.

Rulings by the CJ in response to questions asked by the national court have a retrospective effect (*ex tunc*), which means that the interpretation of the CJ is considered to have always been the correct interpretation.

Member States that have provisions affected by a CJ ruling are obliged to change any provisions that are not in line with the CJ’s interpretation. For example, in C-406/08 *Uniplex* (discussed below in Chapter 10 – “Remedies”), the CJ considered the UK law relating to time periods for bringing legal proceedings in procurement cases. The CJ concluded that the wording of the UK law gave rise to uncertainty. The UK then amended its primary legislation so as to remedy the uncertainty identified by the CJ.

⁷ *Inter partes* refers to the situation in which all interested parties have been served with adequate notice of a hearing and are given a reasonable opportunity to express their opinions and views.

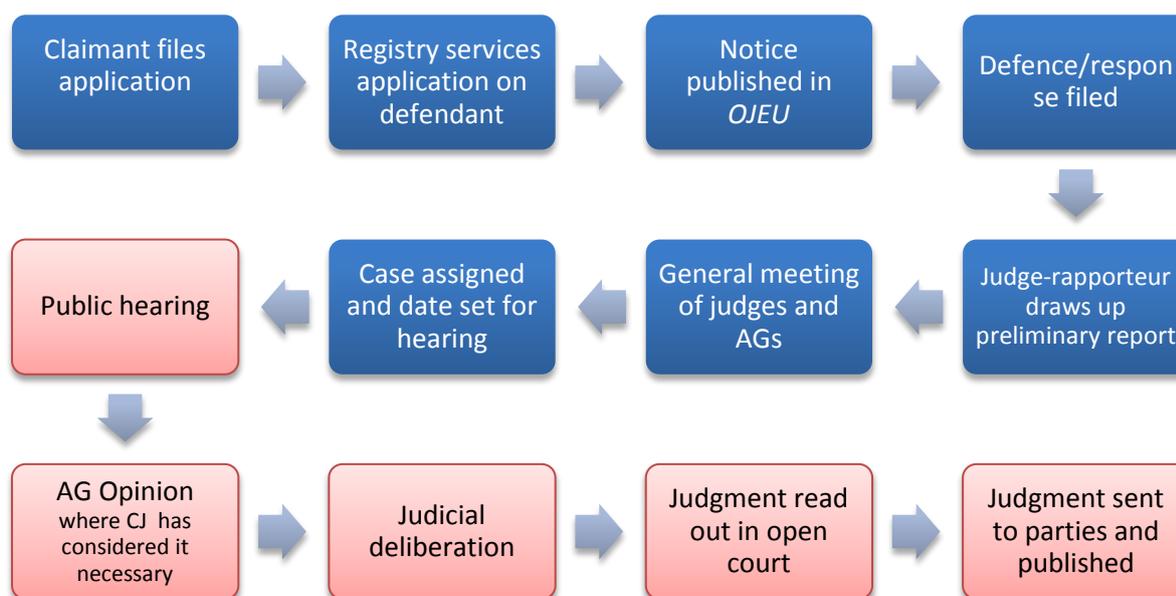
⁸ See, for example, case C-54/96 *Dorsch Consult Ingenieurgesellschaft v Bundesbaugesellschaft Berlin*, paragraph 23.

4. CJ proceedings – commencement of proceedings to judgment

All cases, no matter the type, as a general rule have a written stage as well as an oral stage, which is public. There are some differences, however, in the conduct of infringement actions and references for preliminary rulings.

4.1 Infringement actions

Key stages in an infringement action



In infringement actions, the judicial phase is preceded by the preliminary procedure, as discussed in section 3.1 above. The judicial phase starts with a written procedure before moving on to a public hearing in the CJ.

Written procedure: The main stages in the written procedure are as follows:

- The applicant submits a written application to the Registrar of the CJ;
- The Registrar of the CJ publishes a notice of the action and the applicant's claims in the *Official Journal of the European Union (OJEU)*;
- A judge-rapporteur (reporting judge) and an advocate general are appointed. The role of the judge-rapporteur is to manage the conduct of the case through the CJ process;
- The application is served on the other party, which has one month to lodge a defence;
- The applicant may submit a reply and the defendant a rejoinder. The time allowed in each case is one month.

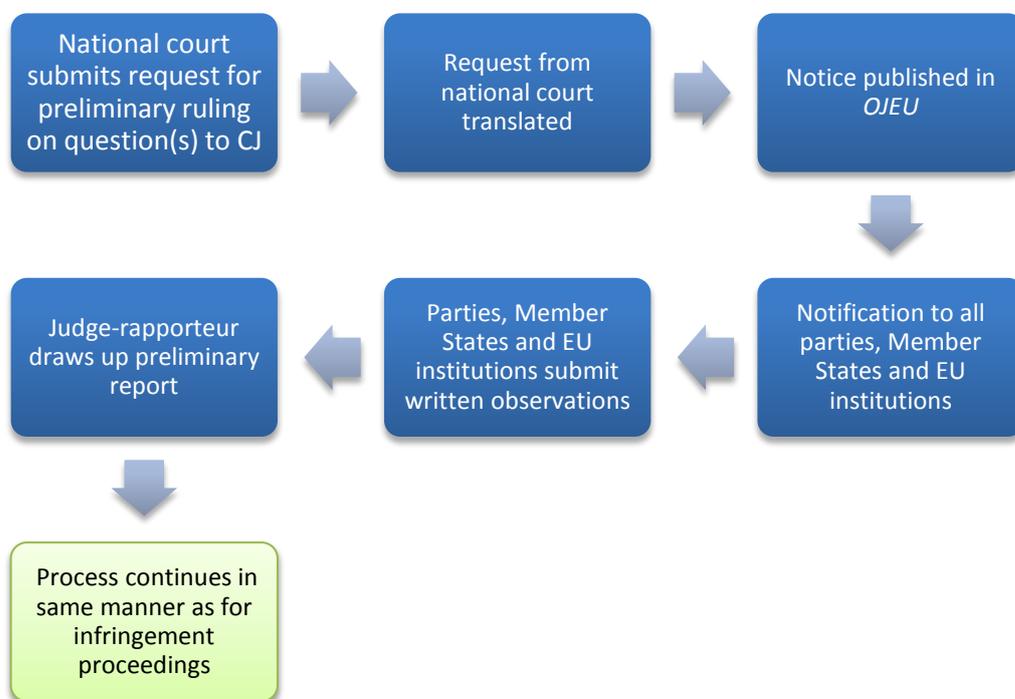
Oral procedure: The main stages in the oral procedure are as follows:

- Once the written procedure has been completed, the parties are asked to state, within one month, whether they wish to have a hearing arranged;
- The CJ decides, on reading the preliminary report of the judge-rapporteur and hearing the view of the advocate general, whether
 - any preparatory enquiry is necessary;
 - to what type of bench the case should be assigned.
- The President of the CJ then sets the date for a public hearing;

- The judge-rapporteur prepares a report on the hearing, which summarises the facts alleged and the arguments of the parties and interveners, if any;
- The case is argued in a public hearing before the CJ judges and the advocate general;
- Where the CJ has decided that an opinion of the advocate general is required, such an opinion is delivered before the CJ in open court. In the opinion, the advocate general analyses in detail the legal aspects of the case and independently proposes a solution to the problem;
- The judge-rapporteur prepares a first draft of the CJ judgment. All CJ judges hearing the case discuss the draft judgment. Judicial deliberations are held in secret. Judgments of the CJ are decided by a majority of CJ judges. No dissenting opinions are published. All CJ judges hearing the case sign the judgment;
- The judgment is read in open court and sent to the national court, the Member States and the institutions concerned.

4.2 Reference for a preliminary ruling

Key stages in the procedure for a preliminary ruling request



The national court submits a question(s) to the CJ. This question generally takes the form of a judicial decision, in accordance with national procedural rules.

The request of the national court is translated into all official languages of the EU. It is then served to parties in the main proceedings and notified to EU Member States and EU institutions. The notice indicating the names of the parties involved and the question(s) is published in the *OJEU*.

The parties, the Member States and the EU institutions have two months to submit their written observations to the CJ.

The remainder of the procedure is identical to the infringement procedure. All of the parties entitled to submit written observations may also present their arguments orally at the hearing, if a hearing is held.

5. Content and publication of CJ judgments

Case references: Cases submitted to the CJEU before 1989 were designated by the number of the case and the year of registration (for example, 101/81 or 232/87).

Following the establishment of the Court of First Instance (now the GC), a different way of designating the cases was introduced. This designation differentiates between cases heard by the CJ and those heard by the GC.

CJ cases are designated as follows:

- the letter “C” for “Court”;
- a sequential number;
- the year in which the case was registered.

(for example, C-406/08)

GC cases are designated as follows:

- the letter “T” for “Tribunal”;
- a sequential number;
- the year in which the case was registered.

(for example, T-21/2011)

Presentation and content of the judgments

Judgments are set out using a standard format and numbered paragraphs. Article 87 of the Rules of Procedure⁹ imposes the obligatory content of a judgment.

Article 87 of the Rules of Procedure

Article 87 Content of a judgment

“A judgment shall contain:

- (a) a statement that it is the judgment of the Court,
- (b) an indication as to the formation of the Court,
- (c) the date of delivery,
- (d) the names of the President and of the Judges who took part in the deliberations, with an indication as to the name of the Judge-Rapporteur,
- (e) the name of the Advocate General,
- (f) the name of the Registrar,
- (g) a description of the parties or of the interested persons referred to in Article 23 of the Statute who participated in the proceedings,
- (h) the names of their representatives,
- (i) in the case of direct actions and appeals, a statement of the forms of order sought by the parties,
- (j) where applicable, the date of the hearing,

⁹ See page 1, footnote 2.

- (k) a statement that the Advocate General has been heard and, where applicable, the date of his Opinion,
- (l) a summary of the facts,
- (m) the grounds for the decision,
- (n) the operative part of the judgment, including, where appropriate, the decision as to costs.”

Some judgments also contain a short summary, prepared by the CJ service, in which the main conclusions of the judgment are presented.

Publication of judgments

Curia: The texts of judgments issued by the CJ and the GC as well as opinions of advocates general are published by the CJEU in each of the official languages of the European Union. The texts of all judgments are available on the *Curia* website of the CJEU: <http://www.curia.europa.eu>.

European Court Reports: The official texts of judgments are also published in the *European Court Reports (ECR)*. Volume I contains judgments and opinions of the CJ as well as opinions of advocates general. Volume II contains the judgments of the GC.

OJEU: The operative part of the judgments and a note on the main issues covered in the judgments are also published in the *Official Journal of the European Union (OJEU)*, “C” series.

6. Consequences of non-compliance with CJ judgments

EU Member States are bound by the judgments of the CJ, which they must implement. If a Member State does not comply with the judgment of the CJ, article 260 TFEU then applies.

Article 260 TFEU

“1. If the CJ of the European Union finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the CJ finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.”

Article 260 TFEU permits the Commission to bring a case against the Member State concerned to obtain a lump sum or penalty payment. The Commission indicates in its claim the type and amount of the payment. The CJ is not bound by the Commission’s proposal, which nevertheless serves as a useful point of reference¹⁰.

Calculation of penalty payment: The Commission has adopted a method for calculating the penalty payment that it will ask the CJ to impose. The amount of penalty proposed is calculated in the following way:

¹⁰ See, for example, paragraph 103 of the judgment issued in *C-304/02 Commission v France*.

- First, a uniform flat daily rate is applied for each day of delay in implementation of the judgment of the CJ. The current flat rate is EUR 650 per day (as at June 2014). This flat rate is revised in line with the rate of inflation.
- Second, the uniform flat rate is multiplied by two coefficients:
 - Coefficient 1 is determined according to the seriousness of the infringement.
 - Coefficient 2 is determined according to the duration of the infringement.
- Third, the result is then multiplied by a “special factor”, which is determined according to the ability, to pay of the Member State concerned (based on its GDP) and on the number of votes it has in the Council of the European Union. For example, the special factor currently amounts to 21.29 for Germany, 18.65 for France, 7.75 for Poland and 0.35 for Malta¹¹.

Calculation of lump sum payment: In the case of a lump sum payment, the standard flat rate is currently fixed at EUR 220 per day (as at June 2014). This flat rate is revised in line with the rate of inflation.

Penalty payment and public procurement

In 2004 in *C-275/03 Commission v Portugal*, the CJ declared that Portugal had violated the Remedies Directive. The violation concerned Portuguese legislation that made the award of damages for breaches of public procurement legislation conditional on proof of fault or fraud of the contracting authority.

On 10 January 2008 in *C-70/06 Commission v Portugal*, the CJ ordered Portugal to pay a penalty for failure to comply with an earlier ruling (*C-275/03 Commission v Portugal*). The CJ imposed a penalty of EUR 19 932 per day. The penalty applied by the CJ was much lower than the penalty sought by the Commission.

The penalty applied as from 10 January 2008, which was the date of the penalty ruling, and up until the day on which the CJ’s judgment in *C-275/03* was complied with. In fact, Portugal had repealed the contested legislation and adopted new provisions on damages just a few days before 10 January 2008. Portugal therefore had the opinion that it did not need to pay any penalty.

The story, however, did not end there. The Commission argued that the new legislation adopted by Portugal still did not conform to EU rules. The Commission refused to halt the daily penalty. To avoid prolonging the dispute, Portugal again revised and adopted new public procurement rules, which entered into force in July 2008.

Portugal then issued proceedings against the Commission in the General Court challenging the penalty imposed by the Commission. By this stage, according to the Commission’s calculations, the penalty amounted to EUR 3.6 million. The GC annulled the Commission’s decision (T33/09).

The Commission appealed to the CJ against the GC ruling. It argued that the new public procurement rules did not comply with the original CJ decision in *C-275/03 Commission v Portugal*.

The dispute ended with the CJ judgment on 15 January 2014. The CJ dismissed the Commission’s claims (*C-292/11P*). Both the GC and the CJ took the view that the assessment of new legislation adopted by a Member State fell within the exclusive competence of the CJ. In the event of a disagreement between the Commission and that Member State as to the compliance of the new law with the ruling, this disagreement should be the subject of a new procedure based on article 260 TFEU.

¹¹ Communication of the Commission updating data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings [C(2013) 8101 final]

Chapter 2 Material scope

Scope and coverage of EU directives on public procurement

Definition of public contracts and concessions

Types of contract covered: The EU public procurement directives cover three main types of contract: works, supplies and services. Some general characteristics are common to all types of contract covered by the directives.

To be covered by the directives, the contract must satisfy three criteria:

- 1) The contract must be of pecuniary interest, i.e. consideration, money or money's worth.
- 2) The contract must be in writing.
- 3) The contract must be established between two parties – the economic operator and the contracting authority.

Financial thresholds: The directives cover contracts of a value equal to or higher than specific values (EU financial thresholds). The EU financial thresholds are fixed for a period of two years and amended every two years, with effect from 1 January. The amendments are made by means of a Commission Regulation.

The current thresholds of the Directive¹², applicable during the period 2014-2015, are as follows:

- EUR 134 000 for supplies and services awarded by central contracting authorities;
- EUR 207 000 for supplies and services awarded by other contracting authorities;
- EUR 5 186 000 for public works.

Financial thresholds under the Utilities Directive¹³: for works contracts, the financial thresholds are the same as those under the Directive; for supplies and services contracts, the financial thresholds (EUR 414 000) are higher than the Directive's thresholds.

Service contracts: The Directive makes a distinction between two categories of services, listed in two annexes to the Directive (Annexes IIA and IIB). Annex IIA services, also referred to as "priority" services, are subject to all provisions of the Directive. Annex IIB services, also known as "non-priority" services, are subject to a very limited number of the Directive's provisions.

Sub-threshold contracts: The Directive does not cover contracts that are valued below the thresholds, but these contracts may be subject to Treaty principles, provided that they are or may be of interest for undertakings of other Member States (cross-border interest).

Exclusions and exemptions: Even if contracts fall within the general definition of a public contract, some of them are excluded from the scope of the directives for a number of reasons. Some are excluded because they are not, by nature, amenable to competition. Some exclusions apply only to contracts of a specific nature, such as contracts concerning certain types of services.

The Treaty (article 346) also provides an exemption in the context of security matters.

¹² The Public Sector Directive 2004/18/EC is hereafter referred to as "the Directive".

¹³ Directive 2004/17/EC

Article 346 TFEU

“The provisions of the Treaties shall not preclude the application of the following rules:

(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material.”

Note: In 2009 the Defence and Security Directive was adopted. The practical consequence of its adoption was that reliance on the article 346 exemption became more difficult. The reason for this difficulty is that the Defence and Security Directive provides specifically adapted rules for the award of contracts in those sectors. A contracting authority has to prove that even the specific rules of that directive do not guarantee the protection of its essential security interests.

Concession contracts: The Directive covers public contracts and works concessions of a value above the EU financial threshold for works. Works concessions are defined in the same way as works contracts, except in relation to remuneration. Under a works concession contract, the remuneration of the economic operator takes the form of either i) a right to exploit the works, or ii) a right to exploit the works as well as payment. The transfer of risk is also a key factor. Works concessions are subject to a limited number of the provisions of the Directive. Services concessions are defined in the same terms as works concessions, but they are totally exempt from the provisions of that directive.

Works concessions of a lower value than the value stipulated in the Directive and service concessions are subject to Treaty principles whenever they are of cross-border interest.

New Concessions Directive

The Concessions Directive 2014/23/EU regulates the award of works concessions and services concessions above the EU financial threshold of EUR 5 186 000.

For further information, see:

Sigma Public Procurement Brief 4, “Which Contracts are Covered by the Procurement Directives” (January 2011) –

http://www.sigmaweb.org/publications/Contracts_Public_Procurement_Directives_2011.pdf

Sigma Public Procurement Brief 5, “Understanding the EU Financial Thresholds” (January 2011) –

http://www.sigmaweb.org/publications/EU_Financial_Thresholds_Public_Procurement_2011.pdf

Sigma Public Procurement Training Manual, Module D3, “Contracts covered” –

<http://www.sigmaweb.org/publications/46179267.pdf>

Sigma Public Procurement Training Manual, Module D4, “Exemptions” –

<http://www.sigmaweb.org/publications/46179267.pdf>

Key learning points

1. The EU procurement directives apply to works, supplies and services contracts and to works concessions of a value above the EU financial thresholds.
2. Both public contracts and concessions are given a specific meaning by the EU procurement directives. These definitions, interpreted by the CJ, are explored further below. The new Concessions Directive defines both works and services, drawing on the CJ’s case law.
3. It is important for national legislation to transpose the exact definitions of public contracts, including concessions, as set out in the directives.
4. Contracting authorities must interpret the definitions in accordance with the meaning provided by the CJ to ensure that all public contracts fall within the scope of public procurement rules.

5. Contracts of smaller value and service concessions are subject to TFEU principles if they are of cross-border interest. The meaning of the term “cross-border interest” is explained in the CJ case law discussed below.
6. The obligations of the contracting authority (advertising and other positive obligations) applying to the award of sub-threshold contracts are explained in the case law discussed below.
7. The only permitted exceptions to the application of the public procurement directives are those that are exhaustively and expressly mentioned in EU law.

Summary of CJEU approach and decisions

Advertising and other positive obligations under the Treaty: The free movement provisions of the Treaty on freedom of establishment and freedom to provide services entail a transparency obligation. This transparency obligation “consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procurement process to be reviewed”.

Application of principles of the Treaty to sub-threshold contracts and contracts only partly covered: The procurement directives do not cover contracts valued below the EU financial thresholds, but these contracts may nevertheless be subject to the principles of the Treaty, provided that they present certain cross-border interest for companies located in other Member States (see, for example, C- 507/03 *Commission v Ireland*). In certain circumstances, even low-value contracts may be of cross-border interest. For example, when national borders straddle conurbations (see C-147/06 and C-148/06 *SECAP and Santorso*).

The same principle relating to cross-border interest applies to service concessions and to non-priority services that, under the current EU rules, do not require publication of a contract notice in the *OJEU* (C-226/09 *Commission v Ireland*). The CJ has held that in some cases the fact of advertising at an EU-wide level can demonstrate sufficient cross-border interest (C-91/08 *Wall*).

In the case C-388/12 *Comune di Ancona*, the CJ considered cross-border interest in the context of an award of a concession. The CJ concluded that an arrangement is not precluded from having cross-border interest merely because it is incapable of generating sufficient profit.

Definition of public contracts: In the cases C-220/05 *Auroux and Others* and C-451/08 *Helmut Müller*, the CJ defines the conditions that must be met in order to classify arrangements relating to the development of land as public works contracts. The CJ also considered this issue in the joint cases C-197/11 and C-203 *Libert and Others* in the context of legislative requirements for the development and sale of social housing.

Definition of concessions: The difference between public contracts and concession contracts is determined by the way in which a contractor is remunerated for the works or services performed. In the case of a public contract, the contracting authority itself is responsible for the remuneration. In the case of a concession, the remuneration consists of the right to exploit works or services. A contractor can charge parties for the use of these works or services. Thus some or all of the remuneration derives from a source other than the contracting authority. The CJ has held that a services concession is considered to exist when the agreed method of remuneration consists of the right of the service provider to exploit his own service for payment (C-382/05 *Commission v Italy*).

The CJ has introduced another key element in deciding whether a contract is a concession contract. An essential characteristic of a concession is that the concessionaire bears the main or at least a substantial part of the operating risk (C-274/09 *Privater Rettungsdienst and Krankentransport Stadler*, C-348/10 *Norma-A and Dekom*, and C-206/08 *Eurawasser*). The risk must be understood as the risk of exposure to the vagaries of the market, which may include the following:

- competition from other operators;

- insufficient supply of services to meet demand;
- inability of those liable to pay for the services provided;
- insufficient revenue to meet the cost of operating the services;
- liability for harm or damage resulting from inadequate services.

Risks linked to bad management or errors of judgment by economic operators are not decisive for purposes of classification as a services concession. Those risks are inherent in every contract, whether it is a public service contract or a services concession. The national court assesses whether the transaction is to be regarded as a services concession or a public service contract by taking account of all of the transaction's characteristics. See the note below on the new Concessions Directive.

Exemptions: The directives provide for a number of derogations (exemptions) from the obligation to apply transparent, competitive procedures. In accordance with a settled case law, any derogation from the rules must be strictly interpreted. The burden of proving the existence of exceptional circumstances that would justify a derogation lies with the contracting authority seeking the derogation. The CJ has considered a number of cases in relation to exemptions under article 346 TFEU on the grounds of essential security interests, and it has confirmed the strict interpretation of the exemption (C-337/05 *Commission v Italy*). In cases where equipment has been purchased for mixed civilian and military use, the exemption may not be available (C-157/06 *Commission v Italy*). Even where article 346 TFEU does apply, the contracting authority still needs to demonstrate that the use of the exemption is necessary (C-615/10 *Insinööritoimisto InsTiimi*.)

Concessions Directive 2014/23/EU

The Concessions Directive includes the transfer of operating risk to the economic operator as one of the elements in the definition of a concession:

Article 5

“The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.”

Case law

Meaning of cross-border interest

C-507/03 *Commission v Ireland*

Commission of the European Communities v Ireland

Judgment dated 13 November 2007, Opinion of the Advocate General dated 12 January 2006

Action brought by the Commission

This action brought by the European Commission concerned an arrangement for the provision of services relating to the payment of a welfare benefit. These services were considered as non-priority services under the Services Directive. The Irish Government had given this work to *An Post*, the Irish

postal service, without any advertising. The Commission contended that this arrangement violated the obligation to procure services in a transparent manner, as stipulated by articles 43 and 49 of the Treaty (now articles 49 and 56 of the TFEU).

The CJ noted the explicit rules in the Services Directive on the publication of contract notices and the fact that there is no obligation to publish a contract notice for non-priority services. It ruled that this exemption did not preclude the application of articles 43 and 49 of the Treaty. The CJ held that a transparency obligation, which is derived from the principle of equal treatment, does apply to non-priority services contracts where there is a cross-border interest. In this case, no violation of the transparency obligation occurred because the Commission did not prove that there was a cross-border interest in the contract. The CJ considered that the statement that a complaint had been made to the Commission about the failure to advertise was not sufficient to demonstrate cross-border interest.

C-226/09 *Commission v Ireland*

European Commission v Ireland

Judgment dated 18 November 2010, Opinion of the Advocate General dated 29 June 2010

Action brought by the Commission

This case concerned a contract tendered by the Department for Justice, Equality and Law Reform in Ireland. The object of the contract was the provision of interpretation and translation services to institutions dealing with asylum matters. The services in question were non-priority services. The award of the contract was therefore subject only to limited rules of the Directive related to technical specifications and publication of award notices. The CJ concluded that the contract was of cross-border interest based on the fact that: i) it was publicised at EU level in the *OJEU*, and ii) some responding tenderers were from outside Ireland.

Public Sector Directive 2014/24/EU

The 2014 Public Sector Directive abolishes the distinction between priority and non-priority services and introduces a new, lighter regime for social, health and other specified services.

All other services, with the exception of services exempted from the 2014 Public Sector Directive, remain subject to the full regime.

C-91/08 *Wall*

Wall AG v Stadt Frankfurt am Main, Frankfurter Entsorgungs und Service (FES) GmbH

Judgment dated 15 May 2008, Opinion of the Advocate General dated 27 October 2009

Reference for a preliminary ruling

In this case, the CJ concluded that the contract was of cross-border interest from the simple fact that it had been announced as a tender at “EU-wide” level. The notice advertising the contract was published in the official gazette of the City of Frankfurt.

C-147/06 and C-148/06 *SECAP and Santorso*

SECAP SpA and Sortorso Soc. Coop. arl v Comune di Torino

Judgment dated 13 April 2010, Opinion of the Advocate General dated 27 November 2007

Reference for a preliminary ruling

In these joint cases, the CJ indicated how to identify a cross-border interest in a contract. The CJ stated that legislation at national or local level may set objective criteria to determine whether such an interest exists. Such criteria “could be” the fact that the contract entails a significant value coupled with the place in which the work is to be carried out. The CJ also commented that when national borders straddled conurbations, even low-value contracts could be of cross-border interest.

C-388/12 *Comune di Ancona*

Comune di Ancona v Regione Marche

Judgment dated 14 November 2013, Opinion of the Advocate General dated 5 September 2012

Reference for a preliminary ruling

One of the issues considered by the CJ in this case was the application of the TFEU free movement rules. The context was the award of a concession contract. The question was whether the fact that a concession was incapable of generating either substantial revenue or an undue advantage for the concessionaire or contracting authority meant that the concession was not of cross-border interest. The CJ considered that an arrangement is not precluded from having cross-border interest merely because it is incapable of generating “sufficient profit” (paragraph 51 of the judgment). The CJ noted that the award of such a concession contract could enable a firm to establish itself in the Member State where the concession is awarded, thereby providing a basis for future activity.

Definition of a public contract

C-220/05 *Auroux and Others*

Jean Auroux and Others v Commune de Roanne

Judgment dated 18 January 2007, Opinion of the Advocate General dated 15 June 2006

Reference for a preliminary ruling

This case arose in the context of the award of a contract for the construction of a leisure centre in Roanne, France. *Mr. Auroux* and eight other applicants brought an action to annul the resolution of the municipality of Roanne that had authorised the mayor to sign an agreement with the *Société d'équipement du département de la Loire (SEDL)*. The agreement provided for the development of a leisure centre in successive phases. The first phase consisted of the construction of a multiplex cinema and commercial premises. The agreement provided that the cinema and commercial premises were to be transferred to third parties once the construction work had been completed. The car park, access roads and public spaces were to be transferred to the municipality of Roanne. The later phases, which required the signature of an addendum to the agreement, principally concerned the construction of other commercial or service premises and a hotel.

Under the agreement, *SEDL* was entrusted with a range of activities, including: acquiring land, organising an architecture and/or engineering competition, arranging for studies to be carried out, undertaking construction work, drawing up and keeping up-to-date certain accounting and management documents, procuring funding, putting in place effective measures for the sale of the works, ensuring the overall management and co-ordination of the project, and keeping the municipality of Roanne informed about the development of the leisure centre.

The question referred by the national court aimed to establish whether such an agreement constituted a public works contract. The CJ observed that under the agreement *SEDL*'s commitment was not limited to the administration and organisation of works, but also extended to the execution of specific works.

The CJ reiterated that it was not necessary for a contractor under a public works contract to be capable of direct performance of the works using its own resources. To ascertain whether the main purpose of the agreement was the execution of works, it is irrelevant whether *SEDL* itself executes the works or if it uses sub-contractors. The construction of the leisure centre must be regarded as corresponding to the requirements specified by the municipality of Roanne in the agreement. The CJ observed that the work referred to in the agreement was the leisure centre as a whole, which included the construction of a multiplex cinema, service premises for leisure activities, a car park and possibly a hotel. It was clear from the agreement that, through the construction of the leisure centre as a whole, the municipality of Roanne sought to reposition and regenerate the area around the railway station.

It was clear that the agreement had been concluded for pecuniary interest. Under the terms of the agreement, *SEDL* was to receive a sum from the municipality of Roanne as consideration for the transfer of the car park. The municipality also undertook to contribute to the costs of all of the works that were to be executed. Finally, under the agreement, *SEDL* was entitled to obtain income from third parties as remuneration for the sale of the works executed. Consequently, the CJ held that an agreement by means of which a contracting authority entrusted another body with the execution of works constituted a public works contract, regardless of whether the contracting authority was or would become the owner of all or part of those works.

C-451/08 *Helmut Müller*

Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben

Judgment dated 25 March 2010, Opinion of the Advocate General dated 17 November 2009

Reference for a preliminary ruling

A full transcript of this ruling and a more detailed analysis are included in this publication.

The proceedings in Germany related to a sale of land that was the site of a former army barracks. The sales process was undertaken by the *Bundesanstalt*, which is the German federal agency responsible for administering public property. The land was sold to *GSSI*, a property development company.

The CJ held that only a contract concluded for pecuniary interest constituted a public contract within the scope of the Directive. The “pecuniary nature of the contract” means that the contracting authority that has concluded a public works contract receives a service pursuant to that contract in return for remuneration. That service consists in the realisation of works from which the contracting authority intends to benefit. Economic benefit is clearly established where it is shown that the public authority is to become the owner of the works that are the subject of the contract. Economic benefit may also be considered to exist where the contracting authority is to hold a legal right over the use of the works so that they can be made available to the public. Economic benefit may also exist through the economic advantages that the contracting authority may derive from the future use or transfer of the works, the financial contribution of the authority to the realisation of the works or its assumption of the risk that the works may turn out to be an economic failure.

Joint cases C-197/11 and C-203/11 *Libert and Others*

Eric Libert, Christian Van Eycken, Max Bleeckx, Syndicat national des propriétaires et copropriétaires ASBL, Olivier de Clippele v Gouvernement flamand

Judgment dated 8 May 2013, Opinion of the Advocate General dated 4 October 2012

Reference for a preliminary ruling

Belgian law on land and real estate imposes an obligation on developers to provide social housing in specific, designated areas (communes). This obligation arose by law whenever the developer was given permission for the development or the sub-division of land. The developer could fulfil the obligation by choosing one of the following four options:

1. providing on its own the social housing or lots for social housing. In that case, an obligation automatically arises under the law for the developer to enter into an administration agreement with a social housing organisation. Under the administration agreement, the social housing organisation markets the sale of the social housing, with a price cap on the amount to be paid;
2. selling the land for use as social housing to a social housing organisation;
3. leasing the land to a social rental agency;
4. combining the above measures 1 to 3.

Contract concluded in writing: The CJ considered whether an administration agreement was a works contract under the Directive. The CJ confirmed that in order to determine whether some kind of contractual relationship exists, there must be “a development agreement concluded between the housing authorities and the economic operator in question for the purpose of determining the work to be undertaken by the economic operator and the terms and conditions related to it” (paragraph 112).

The CJ commented that, where such an agreement has been concluded, the existence of a contractual relationship is not precluded by the fact that i) the development of social housing units is a requirement imposed directly by national legislation, and ii) the party contracting with the authorities is necessarily the owner of the land in question (paragraph 113).

In this particular case, however, the administration agreement did not regulate the relationship between the contracting authority and the economic operator concerned. In addition, the administration agreement did not appear to concern the development of social housing units. It appeared to relate only to the next stage in the process, which was the marketing of the properties for sale (paragraph 114).

Concessions

C-274/09 *Privater Rettungsdienst und Krankentransport Stadler*

Privater Rettungsdienst und Krankentransport Stadler v Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau

Judgment dated 10 March 2011, Opinion of the Advocate General dated 9 September 2010

Reference for a preliminary ruling

A full transcript of this ruling and a more detailed analysis are included in this publication.

The proceedings of this case in Germany arose from a decision by the Passau municipal association (*Passau*) to terminate a contract with *Stadler*. Under the contract, *Stadler* provided rescue services to the public in Passau. *Stadler* challenged the decision made by *Passau*.

The German review body referred several questions to the CJ concerning the interpretation of the concept of a services concession. This question aimed to establish whether the arrangements for rescue services were services concessions excluded from the scope of the Directive.

The CJ first confirmed, as stated in *C-382/05 Commission v Italy*¹⁴, that one characteristic of a concession is that the service provider is not remunerated directly by the contracting authority but by exploiting the services. The CJ indicated that this condition is satisfied when the remuneration comes from another government body and not from the users of the services.

The CJ further confirmed that in order to qualify as a concession, all or part of the risk faced by the contracting authority must be transferred to the service provider. The CJ stated that the risk transferred might be quite limited when the risk involved in the activity itself was limited.

The CJ ruled, based on the facts of the case, that the transfer of risk was sufficient. It identified various factors that indicated a transfer of risk, including the following: the fees for the service might not cover costs; there was no guarantee that costs would be covered by other sources, the supply of the services could exceed demand, and some users might default in the payment of fees.

The CJ held that service concession contracts were not governed by any of the directives¹⁵. Public authorities concluding such contracts are nevertheless bound to comply with the fundamental rules of the TFEU. These rules include articles 49 and 56 TFEU and entail the consequent obligation of transparency whenever the contract concerned has a transnational (cross-border) dimension.

C-206/08 Eurawasser

Wasser und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha) v Eurawasser Aufbereitungs und Entsorgungsgesellschaft mbH

Judgment of 18 July 2007, no opinion of the Advocate General

Reference for a preliminary ruling

The proceedings of this case in Germany arose in connection with a contract award procedure conducted by *WAZV Gotha*, an association of municipalities responsible for water distribution and sewage disposal in the Gotha region. The award procedure was for a 20-year contract for the distribution of drinking water and disposal of sewage. The contract was advertised in the *OJEU*. *WAZV Gotha* considered that the Utilities Directive did not apply, as the arrangement was a services concession and thus outside the Utilities Directive. This view was challenged by one of the potential bidders. The German review body referred questions to the CJ concerning the interpretation of the concept of a services concession in the Utilities Directive.

The CJ noted that previous jurisprudence had indicated that a service provider must bear the risk of the activity undertaken in order for the arrangement to be considered as a concession. An arrangement is not precluded from being a concession by the fact that the risk undertaken is “very limited” because the service provision is regulated by rules of public law. To qualify the arrangement as a concession, it is merely necessary for the procuring entity to transfer to the service provider “at least a significant share” of the existing risk.

Exemptions from the Directive under Article 346 TFEU – essential security interests

C-337/05 Commission v Italy

¹⁵ With the adoption of the new Concessions Directive 2014/23/EU this is no longer the case.

Commission of the European Communities v Italian Republic

Judgment dated 8 April 2008, Opinion of the Advocate General dated 10 July 2007

Action brought by the Commission

In this case, the Commission brought an action against Italy relating to the award of 37 contracts for the purchase of helicopters to meet the requirements of several military and civilian corps. The contracts were awarded directly without a competition. Italy contended that the directives did not cover the contracts, as they fell under the derogations for the procurement of military equipment.

The relevant derogation is provided in article 10 of the Supplies Directive. According to this article, the Supplies Directive applies to contracts awarded by contracting authorities in the field of defence “subject to Article 296 of the Treaty” (now article 346 TFEU).

Article 296 (now article 346 TFEU)

A Member State “may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material...”.

The Italian Government sought to rely on article 296 on the grounds that the helicopters purchased were dual-use items for both military and non-military purposes.

The CJ pointed out that article 296 also provided that a Member State could apply such measures, provided that they “[did] not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes”. For the purchase of equipment where the military use is uncertain, it is necessary to comply with the rules governing the award of public contracts. This obligation applies to the supply of helicopters to military corps for civilian use. Compliance with these rules is required even when an obligation of confidentiality exists.

The CJ commented on the use of the negotiated procedure without prior publication of a notice. It confirmed that the use of this procedure was to be exceptional in nature and applied only in cases set out in an exhaustive list. The Supplies Directive must be strictly interpreted to ensure that it is not deprived of its effectiveness. Member States cannot allow the use of the negotiated procedure without prior publication of a notice in cases that are not provided for by that directive. They cannot add new conditions to the cases expressly provided for in the directive simply for the purpose of making that procedure easier to use. The burden of proving the existence of exceptional circumstances that would justify a derogation from the procurement rules lies with the individual seeking to rely on those circumstances.

C-157/06 Commission v Italy

Commission of the European Communities v Italian Republic

Judgment dated 2 October 2008, no opinion of the Advocate General

Action brought by the Commission

In this case the CJ considered the Italian legislation that authorised a derogation from the EU procurement rules. The contract in question again related to the purchase of helicopters. The helicopters were to be used by the police force and the national fire service. The CJ pointed out that

the requirement of confidentiality in no way prevented the use of a competitive tendering procedure for the award of a contract. It also referred to the requirement that, in order to rely on the derogation under the Treaty, the products in question had to be intended for specifically military purposes. For the purchase of equipment where the military use is uncertain, it is necessary to comply with the rules governing the award of public contracts.

C-615/10 *Insinööritoimisto InsTiimi*

Insinööritoimisto InsTiimi Oy

Judgment dated 7 June 2012, Opinion of the Advocate General dated 19 January 2012

Reference for a preliminary ruling

This case arose from proceedings before a national review body in Finland. The proceedings related to a change in the award of a contract by the Finnish Defence Forces Technical Research Centre. The contract was for the supply of tiltable turntable equipment designed to support objects subject to electro-magnetic measurements. The equipment allowed the simulation and study of combat situations. For example, vehicles could be placed on the turntable and tilted to test their sensors against overhead threats. The contract was awarded using a competitive procedure, to which four firms were invited. No contract notice was published.

The CJ first stated that, as with other exceptions to the Treaty provisions on free movement, the exception in article 346 TFEU had to be strictly interpreted.

The CJ also stated the important principle that it is not merely sufficient for a Member State to rely on a general statement related to its security interests. Reliance on security is subject to scrutiny, the purpose of which is to assess whether those security interests can be properly relied on. This scrutiny should aim to determine i) whether the product in question is covered by article 346 TFEU, ii) whether measures are needed to protect essential security interests; and iii) whether other measures that are less intrusive or less restrictive on trade could be taken.

The CJ considered the requirement that measures taken could not adversely affect the conditions of competition in the market. The key question in this respect was whether the products could be regarded as having specifically military purposes. The CJ stated that if a product had technical applications for civilian use that were practically identical to its use in a military context, it would then be considered as “intended for specifically military purposes” only if: i) the contracting authority intended the product to be solely for military use, and ii) the product had the intrinsic characteristic of being specially designed, developed or modified significantly for those military purposes. The CJ relied on recital 10 of the Defence and Security Directive to conclude that modified products were among those “intended for specifically military purposes”.

Finally, the CJ stated that if the product concerned fell under article 346, the national court would also be required to determine whether the Member State could show that it was “necessary” to have recourse to the derogation. If so, it would require the consideration of both: i) whether it was necessary to take measures to protect essential security interests, and ii) whether the need to protect those essential interests could not have been addressed through a competitive tendering procedure, such as the procedure specified by the Directive.

This preliminary ruling seems to indicate that article 346 would require application of the “proportionality” test. It is probably necessary for a Member State seeking to rely on article 346 to assess whether it can protect its interests through measures that are less restrictive of trade than those proposed. Such measures could include, for example, the application of a procedure advertised through a public notice but involving modified rules on participation.

Comment

The acquisition by contracting authorities of military or sensitive equipment exceeding certain value thresholds is now subject to the provisions of the Defence and Security Directive. A contracting authority may still be exempted from the obligation to apply procurement procedures to an acquisition in defence and security sectors. Such an exemption would be possible in a specific case if the conditions specified in article 346 TFEU were met or if the acquisition fell under an explicit exemption provided in the Defence and Security Directive. In practical terms, this Directive should bring more defence procurement under a regulated regime. The Defence and Security Directive provides solutions that are specifically adapted to the needs of defence and security procurement. Although the scope of the exemption under the Treaty remains unchanged, reliance on that exemption is now more difficult, as it requires the contracting authority to prove that even the specifically adapted rules of the Defence and Security Directive may not be used because of the need to protect the Member State's essential security interests.

C-274/09 Privater Rettungsdienst und Krankentransport Stadler

Privater Rettungsdienst und Krankentransport Stadler v Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau

Judgment dated 10 March 2011, Opinion of Advocate General dated 9 September 2010

Reference for a preliminary ruling

This case is of particular relevance to the following topic:

Material Scope – definition of a concession

Key sections of the judgment for the purposes of this topic are:

Legal context – European Union law	paragraph 3
Legal context – Bavarian law (Germany)	paragraph 4
Facts	paragraphs 5-19
Questions referred to CJEU	paragraph 20
Analysis and judgment	paragraphs 21-49

References to paragraphs below (in parentheses) are to paragraphs of the judgment.

Summary of facts (paragraphs 5-19)

In Passau (Bavaria, Germany), contracts for the provision of rescue services to the public are concluded according to a “concession model”. The concession model is agreed between the Passau municipal authority (a contracting authority) and a service provider.

The usage fees paid to the service provider for the rescue services are agreed between the social security institution and the selected services provider. The fees are received for emergency rescue, transport of patients accompanied by a doctor and transport of ill persons.

Under Bavarian law, the usage fees must be calculated on the basis of the costs that can be estimated in accordance with economic principles applicable to undertakings. The usage fees must be consistent with the proper provision of services, economical and cost-efficient management, and efficient organisation. Where the social security institution and the service provider disagree on the amount of the fees, the matter may be brought before an arbitration board. The decisions of the arbitration board can be contested before the administrative courts.

The service provider receives its fees from a central settlement office set up by the Bavarian Minister for Internal Affairs. That office transfers payments on account, on a weekly or monthly basis, to that service provider. The payments on account are made on the basis of an overall annual amount of remuneration, calculated in advance independently of the number of rescues actually carried out. If there is a deficit at the end of the year, it will be the subject of negotiations. Persons who are either privately insured or uninsured (who, according to the referring court, represent 10% of debtors) are obliged to pay the same usage fee as persons insured under the compulsory statutory scheme.

The proceedings in Germany arose out of a decision by the Passau municipal association (Passau) to terminate its existing contract for the provision of rescue services to the public in Passau. The existing contract was with *Stadler*. Passau decided to entrust another undertaking with the provision of rescue services. It did so initially on the basis of temporary contracts. It awarded the final contract

using a selection procedure provided for under article 13(3) of the Bavarian law. It did not go out to tender for the award of the contracts.

Stadler filed a complaint with the procurement review body on the basis that the award contravened EU procurement law. The review body referred two questions to the CJ in order to determine i) whether the provision of the disputed services was to be classified as a “service concession” or a “service contract”, and ii) what were the legal consequences of that classification. The classification depends on the interpretation of the term “service concession” in the Directive.

EU law: Article 1 of Directive 2004/18: definition of public contract, public service contract and service concession

Bavarian law (Germany) – provisions on rescue services

Judgment (paragraphs 21-49)

Definition of a concession

Requirement for payment by a party other than the contracting authority: The CJ first confirmed that one characteristic of a concession is that the service provider is not remunerated directly by the contracting authority. The service provider is remunerated by obtaining the right to exploit the service. This provision includes the situation where payment is made by a third party rather than by the contracting authority (paragraph 25).

In this case, the service provider received most of its usage fees from a central settlement office of the Bavarian Government. This body paid fees for service users who were insured under a statutory scheme. It also agreed the level of fees to be set through negotiations with the relevant social security institution. The level of fees was based on costs that had been established in accordance with economic principles and assumed the efficient operation of the service. Approximately 10% of service users, who were either privately insured or uninsured, paid the fees themselves. These fees were the same as those charged for persons covered by the compulsory statutory scheme.

Payment by a third party other than a user of the services: The CJ indicated that the condition for a concession that the provider not be remunerated directly by the contracting authority was met in these circumstances (paragraph 27). This indication signifies that the definition of a concession does not include a requirement that fees be paid directly by the users (paragraph 28). As in this case, the fees may be paid by another government body.

The CJ added that the status of the arrangement was not affected by the fact that a public body other than the contracting authority negotiated the level of fees (paragraph 28).

Requirements concerning the transfer of risk to the provider: The CJ confirmed that the mere proof of payment by a third party was not sufficient for classification as a concession. It would also be necessary to transfer the risk connected with operating the service to the service provider (paragraph 26).

The CJ stated as a general principle that the question was whether a transfer was made of all or a significant share of the risk from the contracting authority to the contractor. It commented that the transfer of even a “very limited” operating risk might be sufficient (paragraphs 29 and 33), for example in cases where the risks involved in an activity were inherently limited (paragraph 34). The CJ added that exposure to the vagaries of the market was the type of risk required for an arrangement to be considered as a concession. This risk might consist of:

- competition from others;
- insufficient supply to meet demand;
- non-payment;
- insufficient revenue to meet costs;
- liability resulting from inadequate service (paragraph 37).

Risk linked to bad management or errors of judgment by the provider, which are common to all contracts, are not risks of a type that would lead to classification of a contract as a concession (paragraph 38).

The CJ emphasised that the national court was to decide on the classification of a contract as a concession. The CJ nevertheless stated that the various risks undertaken by the provider in this particular case signified that the arrangement was indeed a concession.

First, the CJ noted as relevant the fact that the fees payable had been negotiated with social security institutions. Those institutions had an incentive to fix the fees at as low a level as possible. The resulting risk was that the fees paid might not cover costs (paragraphs 39-40). The CJ also noted that the provider could not deal with the risk of low fees simply by ceasing activity because by doing so it might not recoup its investment and might have to face legal consequences in accordance with the contract. In addition, the specialised nature of rescue services meant that the scope for engaging in alternative activities was limited (paragraph 41). Also relevant was the fact that if the provider faced a deficit during the contract period, the social security institutions involved were not obliged to pay any additional amount. The issue of the deficit would have to be dealt with during the subsequent set of negotiations, and there was no guarantee that the losses would be fully recouped (paragraph 44).

Second, the CJ pointed out that the provider took the risk of the possibility of non-payment for use of its services by persons who were uninsured or insured privately (paragraph 46).

Third, the CJ noted that there was no legal monopoly on the provision of the service and that two providers of rescue services had been engaged in the area concerned (paragraphs 46-47).

Decision (paraphrased)

A contract under which the selected economic operator

- is fully remunerated by persons other than the contracting authority that awarded the contract for rescue services;
- runs an operating risk, albeit a very limited one, for reasons that include the fact that the amount of the usage fees depends on the result of annual negotiations with third parties; and
- where full coverage of the costs incurred in managing its activities is not assured, in compliance with the principles laid down by national law,

must be classified as a “service concession” within the meaning of article 1(4) of Directive 2004/18/EC.

C-451/08 Helmut Müller

Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben

Judgment dated 25 March 2010, Opinion of Advocate General dated 17 November 2009

Reference for a preliminary ruling

This case is of particular relevance to the following topic:

Material Scope – definition of a public works contract and definition of a concession

Key sections of the judgment for the purposes of this topic are:

Legal context – European Union law	paragraphs 3-5
Legal context – German law	paragraphs 6-7
Facts	paragraphs 8-32
Questions referred to CJEU	paragraph 33
Analysis and judgment	paragraphs 34-89

References to paragraphs below (in parentheses) are to paragraphs of the judgment.

Summary of facts (paragraphs 8-32)

In October 2006 the *Bundesanstalt* published notices in the press and on the Internet announcing its intention to sell some land. The land comprised approximately 24 hectares in the municipality of Wildeshausen. The land included former military barracks that had been decommissioned. The notice published by the *Bundesanstalt* stated that the proposed use of the land had to be agreed in advance with the municipality of Wildeshausen.

One company, *Helmut Müller GmbH* (hereafter referred to as *Müller*), made an offer in November 2006 to buy the land for EUR 4 million. The offer was made on condition that the building plans for the area were drawn up in accordance with *Müller's* designs. The proposal was not accepted.

In January 2007, the *Bundesanstalt* asked interested parties to make offers for the land without any definite building plan. *Müller* made an offer to buy the land for EUR 1 million. Another company, *GSSI*, made an offer to buy the land for EUR 2.5 million. In May 2007, a survey commissioned by the *Bundesanstalt* estimated the value of the land to be EUR 2.33 million.

The municipality of Wildeshausen subsequently asked prospective buyers to submit their own plans for the use of the land. Those plans were then discussed with the municipal authorities in the presence of the *Bundesanstalt*. On 24 May 2007, the Wildeshausen town council expressed its preference for the plan submitted by *GSSI* and indicated that it was prepared to embark on the formal procedure of drawing up the building plans for the area on the basis of the *GSSI* plan. The town council stated explicitly that its preference was not to be regarded as binding with respect to local planning powers. The town council reserved the right to exercise planning powers at its discretion.

On 6 June 2007, the *Bundesanstalt* sold the land to *GSSI*. The contract of sale did not mention the future use of the land. *Müller* brought proceedings before the national court, contesting the sale of the land. It claimed that the sale should have been conducted in accordance with EU procurement rules. *Müller* also claimed that the land had been sold in view of specific types of works of public interest, as determined by the municipality that were being carried out on the land. It argued that the sale of the land constituted a procurement of works by that municipality, with the contractor having been selected through the land-sale arrangement.

The German review body hearing an appeal in the case referred nine questions to the CJ. The review body aimed to establish whether the land sale was covered by the Directive and, in particular, by the concept of a public works contract or public works concession.

EU law (paragraphs 3-5): Directive 2004/18/EC – recital 2: principles of awarding public contracts, article 1 (2) and (3): definition of public works contract and public works concession, article 16 (a): exemption related to acquisition or rental of land, existing buildings, etc.

German law (paragraphs 6-7): Paragraph 10(1) of the Building Code (*Baugesetzbuch*) of 23 September 2004 (BGBl. 2004 I, p. 2414; ‘the BauGB’)

German law

“The municipality shall adopt the development plan by means of a by-law.

(...)

1. The municipality may decide, by means of a building plan for the works, on the admissibility of a project where, on the basis of a plan drawn up in agreement with the municipality for the execution of the works and for the supply of utilities (works and utilities plan), the contractor is ready and able to execute the works and, before the decision under Paragraph 10(1), undertakes to execute them within a prescribed period and to bear the planning costs and the costs relating to the supply of utilities in full or in part (contract to execute works).

3. (a) Where, by determining a zone for construction of the works or by other means, a building plan for the works lays down (...) a building use (...), it must (...) be provided, with regard to the specified uses, that the only projects which are authorised are those which the contractor undertook to execute in the contract for execution of the works ...”

Judgment (paragraphs 34-89)

Definition of a public works contract

Most of the questions submitted by the referring court concerned the definition of a “public works contract” under article 1 (2) (b) of the Directive. That provision defines a public works contract as a contract concluded in writing between a contracting authority and an economic operator for a pecuniary interest, “having as their object either the execution, or both the design and execution, of works ... or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the authority”. In its responses to the questions asked, the CJ dealt with the matters described below.

Requirement of an immediate economic benefit on the part of the procuring entity

The CJ indicated that only a contract concluded for pecuniary interest constituted a public contract within the scope of the Directive. The pecuniary nature of the contract means that the contracting authority receives a service in return for consideration. Such a service consists in the realisation of works from which the contracting authority intends to benefit (paragraphs 47-48). The service must be “of direct economic benefit for the contracting authority” (paragraph 49). This immediate economic benefit can clearly be established when the authority is to become the owner of the works (paragraph 50).

However, the CJ confirmed that an economic benefit may also exist in any of the following cases, when the contracting authority

- is to hold a legal right over the use of the works so that they can be made available to the public (paragraph 51);
- may derive economic benefits from the future use or transfer of the work (paragraph 52);
- contributes financially to the realisation of the works (paragraph 52); or
- assumes the risk that the works might be an economic failure (paragraph 52).

Taking into account the facts of the case, the CJ concluded that the test of a direct economic benefit was not satisfied merely by the authority's exercise of its planning powers to approve the works as being in the public interest (paragraph 57).

The requirement of a direct economic benefit applies to all three types of public works contract under the Directive:

- execution of works;
- design as well as execution of works;
- realisation, by whatever means, of works corresponding to the requirements specified by the contracting authority.

Requirement of a legal obligation to carry out the works

The CJ also indicated that the concept of a public works contract under the Directive requires the assumption by the contractor of a direct or indirect obligation to carry out the works. The obligation must be legally enforceable (paragraphs 59-63). The CJ held the view that the requirement of a legal obligation to carry out the works applied to all three types of public works contract under the Directive.

Meaning of “requirements specified by the contracting authority”

Another issue discussed in the case concerned the interpretation of the concept of “a work corresponding to the requirements specified by the contracting authority”. This interpretation is relevant for the third type of public works contract, where there is “the realisation, by whatever means, of a work corresponding to the requirements specified by the authority”.

The CJ indicated that the contracting authority “must have taken measures to define the type of work or, at the very least, have had a decisive influence on its design” (paragraph 67 of the judgment).

The CJ underlined that the mere fact that the contracting authority, in the exercise of its urban-planning powers, examined building plans that were presented to it or took a decision that required the application of such powers, was not sufficient (paragraph 68).

Does a land sale, combined with the intention to award a future contract, constitute a public works contract?

The German court also asked whether the Directive applied to a land sale in other circumstances. Those circumstances include the situation where another public authority intends to award a contract for works on that land but has not yet formally decided to do so.

The CJ considered that in principle the Directive could apply in such circumstances. The Directive could apply if the sale of land that will subsequently be the subject of a works contract and the contract for the works could be considered as a single transaction – a “unity” (paragraph 82 of the judgment).

However, the CJ considered that this was not the situation in the case before it (paragraph 83). The CJ considered it relevant that the parties did not assume any binding contractual obligations regarding the works and that there was no evidence in the deeds of the sale that the award of a public works contract was “imminent” (paragraphs 86-87). Thus the transaction lacked the element of legal obligations that are required for a public works contract to exist (paragraph 88). The CJ also stated that in this case there was no public works contract, even if another public authority “intended” to award such a contract but had not yet formally decided to do so (paragraph 88).

Definition of a concession

Another question concerned the meaning of a public works concession under article 1(3) of the Directive. The CJ indicated that where the sole economic operator to which the concession can be granted already owns the land, a public works concession is not possible. The CJ considered that in order to be able to transfer the right to exploit a work, the contracting authority itself must be in a position to exploit that work. This is not the case when the economic operator owns the land and enjoys the right to exploit it (paragraph 74).

Contracts of indefinite duration

The CJ also commented on the issue of the duration of contracts. These comments were in response to the question of whether an arrangement of indefinite duration could be considered as a concession. The CJ stated that there were serious grounds, including the need to guarantee competition, for considering that it contravened EU law to grant concessions of unlimited duration (paragraph 79).

Decision (paraphrased)

- The concept of a “public works contract” does not require the works that are the subject of the contract to be materially or physically carried out for the contracting authority. They do need to be carried out for that authority’s immediate economic benefit. The latter condition is not satisfied by the exercise of regulatory urban-planning powers by the contracting authority.
- The concept of a “public works contract” requires the contractor to assume a direct or indirect obligation to carry out the works that are the subject of the contract. That obligation must be legally enforceable, in accordance with the procedural rules laid down by national law.
- The “requirements specified by the contracting authority” cannot consist in the mere fact that a public authority examines building plans submitted to it or takes a decision in the exercise of its regulatory urban-planning powers.
- The provisions of the Directive do not apply to a situation in which one public authority sells land to an undertaking, even though another public authority intends to award a works contract in respect of that land but has not yet formally decided to award the contract.

Chapter 3 Scope – Meaning of a “body governed by public law”

Context

The Directive is applicable only if a contracting authority awards a public contract. The definition of a contracting authority is set out in article 1(9) of the Directive. There are two main categories of contracting authority – public authorities, such as state, regional or local authorities, and bodies governed by public law.

The term “body governed by public law” refers to any body that cumulatively meets three conditions set out in article 1(9) of the Directive, relating to the purpose and nature of the body, its legal status, and the way in which it is financed, managed or supervised.

Article 1(9) of the Directive

“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 is subject to management supervision by those bodies; or has 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.”

For a body to be classified as a body governed by public law, it should fulfil criteria (a) and (b) and at least one of the conditions listed in criterion (c).

For further information, see:

Sigma Public Procurement Brief 3, “What is a Contracting Authority” (January 2011) – http://www.sigmaweb.org/publications/Public_Procurement_Contracting_Authority_2011.pdf

Sigma Public Procurement Training Manual, Module D1, “Contracting authorities” – <http://www.sigmaweb.org/publications/46179267.pdf>

Key learning points

1. The EU procurement directives apply to contracting authorities. One category of contracting authority is a “body governed by public law”.
2. A “body governed by public law” is a strictly EU law concept that has a specific meaning prescribed by the Directive.
3. It is important for national legislation to:
 - transpose the exact definition as prescribed in the Directive;
 - interpret the concept in practice in line with the meaning provided by the CJ.
4. Incorrect transposition into national law or misinterpretation of the definition and concept of a “body governed by public law” may lead to situations where:
 - bodies that should be covered by public procurement rules are not covered by national rules;or

- bodies that do not fall within the EU definition are covered by national public procurement rules.

Summary of CJ approach and decisions

The CJ takes a functional approach to the definition of a contracting authority in the directives.

The CJ has confirmed that the definition of a “body governed by public law” is an exclusively EU law concept and must be interpreted in the light of EU provisions (C-84/03 *Commission v Spain*). Three conditions must be fulfilled cumulatively:

- existence of a legal entity;
- discharge by that entity of non-commercial tasks in the general interest;
- dependency of that entity for the most part on the public authority.

(see C-44/96 *Mannesmann*, C-353/96 *Commission v Ireland* and C-328/96 *Commission v Austria*).

Each of these criteria must be interpreted in functional terms, which means that each criterion is given an interpretation that is independent of the formal rules for its use. This requirement should be understood as a means of creating a dependency of the body on the public authority concerned (C-526/11 *IVD*).

To determine whether a private body is to be considered as a “body governed by public law”, it is necessary to simply establish whether the body satisfies the three cumulative conditions mentioned above. An entity’s private law status does not prevent it from being classified as a contracting authority according to the meaning of the Directive (C-84/03 *Commission v Spain*).

Existence of a legal entity: As the first condition (legal personality) rarely creates problems in practice, the jurisprudence of the CJ has focused on the other criteria.

Non-commercial tasks in the public interest: “Needs in the general interest, not having industrial or commercial character” are generally i) satisfied otherwise than by the availability of goods and services in the market place, and ii) provided by the state or subject to decisive influence by the state for reasons in the general interest. These two factors are not always decisive, however (see C-393/06 *Ing. Ainger*).

The CJ has held that the Directive makes a distinction between:

- needs in the general interest that do not have an industrial or commercial character;
- needs in the general interest that have an industrial or commercial character.

A body will only be classified as a body governed by public law when it has been established to meet needs in the general interest without an industrial or commercial character.

Activities recognised as meeting needs in the general interest: The CJ has recognised the following types of activities as meeting needs in the general interest:

- running a university (C -380/98 *University of Cambridge*);
- organising exhibitions and fairs (joint cases C- 223/99 and C-260/99 *Agorà and Excelsior*);
- carrying out the activities of funeral undertakers (C-373/00 *Adolf Truley*);
- building and acquiring property to be made available to commercial firms for the purpose of stimulating economic growth in the municipality (C-18/01 *Korhonen and Others*);
- printing official documents (C-44/96 *Mannesmann*);
- collecting and disposing of waste (C-360/96 *Gemeente Arnhem and Gemeente Rheden v BFI Holding*);
- managing national forests and woodland industries (C-353/96 *Commission v Ireland* and C-306/97 *Connemara Machine Turf*);

- providing low-rent housing (C-237/99 *Commission v France*);
- establishing and repaying the costs of prisons (C-283/00 *Commission v Spain*);
- carrying out radio and television broadcasting activities (C-337/06 *Bayerischer Rundfunk and Others*);
- supplying heating for an urban area through an environmentally-friendly process (C-393/06 *Ing. Aigner*).

Dependency on the public authority – finance: The CJ noted in C-380/98 *University of Cambridge*, with regard to the way in which a body is financed, the following:

The term “for the most part” in the Directive is quantitative and refers to more than half (more than 50%) of the relevant funding.

- Not all payments by another contracting authority are taken into account when determining the portion financed by that authority but only those that “have the effect of creating or reinforcing a relationship of dependency”. The payment of awards or grants for the support of research work and the payment by local education authorities of university fees for designated students may create a relationship of dependency.
- The total income to be taken into account when determining the proportion of that income coming from a contracting authority should be calculated by including all income, including income from a commercial activity.
- The time period for the calculation is the entity’s own budgetary year. Whether the entity is covered for a particular year should be determined at the beginning of the budgetary year, by referring to the figures available at the start of the year. That time period applies even if the figures are only provisional.
- For the purpose of the Directive, a body is considered to constitute a contracting authority when the procurement procedure commences. The Directive continues to apply to the procurement process until such time as the relevant procedure has been completed.

In C-337/06 *Bayerischer Rundfunk and Others* concerning German public broadcasting bodies, the CJ held that the concept of financing by a public authority must be interpreted in functional terms. The CJ considered that direct financing by the state was not required in order to classify a body as a body governed by public law. The case C-300/07 *Hans and Christophorus Oymanns* concerned German statutory sickness insurance funds. The CJ confirmed that the financing referred to in the Directive might still occur when a body has itself fixed the level of contribution of its members. That is the case when a number of circumstances apply, including: membership of the body and payment of contributions are required by law; contributions are made without specific consideration; levels of contribution are fixed by law; and the body is prohibited from operating on a profit-making basis.

In contrast, in C-526/11 *IVD* the CJ held that a professional association governed by public law did not satisfy the financing criterion. The professional body concerned was financed for the most part by the contributions of its members. However, the law requiring contributions to be paid and fixing the level of contribution did not determine the scope of, and procedures for, the actions undertaken by that body in the performance of its statutory tasks.

Dependency on the public authority – supervision: The CJ held in C-373/00 *Adolf Truley* that the criterion of supervision was met when another contracting authority supervised the annual accounts of the body and its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency. In addition, the authority is allowed to inspect the body’s business facilities and/or premises and report the results to the owner.

Case law

C-300/07 *Hans and Christophorus Oymanns*

Hans and Christophorus Oymanns GbR v AOK Rheinland/Hamburg

Judgment dated 11 June 2009, Opinion of the Advocate General dated 16 December 2008

Reference for a preliminary ruling

A full transcript of this ruling and a more detailed analysis are included in this publication.

The German proceedings arose from an award procedure conducted by *AOK Rheinland/Hamburg (AOK)* for the supply and advisory services related to orthopaedic footwear. *AOK* was a statutory sickness insurance fund. Its supply and advisory services were provided to insured persons.

The CJ considered whether *AOK* was a contracting authority according to the definition of the Directive. The CJ concluded that *AOK* was a body governed by public law, as it was financed for the most part by contracting authorities and it met the other criteria as well. In the opinion of the CJ, it was clear that a sickness fund was a body with legal personality established for the specific purpose of meeting needs in the general interest and without an industrial or commercial character. This conclusion was based on the fact that it was a legal body under public law established to meet needs relating to public health. The needs in question did not have an industrial or commercial character since the benefits were provided on a non-profit basis.

C-393/06 *Ing. Aigner*

Ing. Aigner, Wasser-Wärme-Umwelt, GmbH v Fernwärme Wien GmbH

Judgment dated 10 April 2008, Opinion of the Advocate General dated 22 November 2007

Reference for a preliminary ruling

A full transcript of this ruling and a more detailed analysis are included in this publication.

This case arose out of proceedings before an Austrian review body. The case concerned a procedure for the award of a contract by *Fernwärme Wien (FW)*, a company wholly owned by the city of Vienna. *FW* had responsibility for providing heating to homes, the Austrian Government and the private sector, using energy produced by the disposal of waste. The Utilities Directive covered this activity. However, the award procedure concerned the installation of refrigeration plants in an office complex, i.e. related to an activity not listed in the Utilities Directive.

The questions referred to the CJ arose from the need to establish which directive, if any, was applicable to the award procedure in question.

The CJ first ruled that the activity of providing heating for an urban area by means of an environmentally friendly process was an aim in the general interest. *FW* had therefore been established for the purpose of meeting needs in the general interest. The CJ confirmed that needs might be considered to be in the general interest even though the activities were also undertaken by private companies.

The CJ then considered whether the needs had an industrial or commercial character. It considered, in line with previous case law, whether those needs were carried out in a situation of competition. The CJ stated (confirming previous case law) that the existence of “significant competition” was an indication that the needs had an industrial or commercial character.

The CJ first noted that although *FW* might make profits, profit making was not its principal aim. The CJ then concluded that the entity did not operate under conditions of significant competition since it was the only entity capable of meeting the needs in question. In this respect it was relevant that the two other undertakings operating in the sector were of negligible size and could not constitute true competitors. Another relevant factor was the difficulty in replacing the system with another form of energy, as large-scale conversion work would be required. The City of Vienna attached considerable importance to the system, for environmental reasons among others. This situation meant that public opinion would make it difficult to withdraw, even if the system operated at a loss.

The CJ also confirmed its earlier judgments indicating that it was irrelevant to the definition of a body governed by public law that the entity also carried out some commercial activities. The proportion of “commercial” compared to “non-commercial” activities was also irrelevant to the definition of a body governed by public law.

The CJ also considered the situation where an entity that was a body governed by public law carried out activities that were subject to one of the procurement directives, while some of its activities were carried out under conditions of competition. In previous cases the CJ had established that in general the directives covered all of the entity’s activities. If this were not the case, there would be a possibility of using non-commercial activities to subsidise commercial activities, which could be dangerous if it resulted in non-commercial and thus discriminatory purchasing.

C-337/06 Bayerischer Rundfunk and Others

Bayerischer Rundfunk and Others v GEWA – Gesellschaft für Gebäudereinigung und Wartung mbH

Judgment dated 13 December 2007, Opinion of the Advocate General dated 6 September 2007

Reference for a preliminary ruling

The proceedings before the German court concerned the award of a contract for cleaning services by *GEZ*. The contract was awarded without using the competitive procedures of the Services Directive.

GEZ was a central agency that collected fees for German public broadcasting bodies. Mainly citizens with television receivers paid the fees. *GEZ* had no legal personality. It had been set up by administrative agreement between the broadcasting authorities to collect fees on their behalf. It was argued that the contract in the present case should have been awarded under the Directive.

Questions referred by the German review body were concerned with establishing whether the German public broadcasting authorities were “contracting authorities” for the purpose of the directives.

Indirect financing: A first question referred by the German review body concerned the term “financed... by the State”. Did this term include indirect financing of broadcasters through the payment of fees by persons who possessed television receivers? It was not disputed that these fees accounted for more than half of the income, with other revenue coming from sources such as advertising.

The CJ concluded that there was financing, for the most part, by the state when the activities of public broadcasting bodies were financed by fees payable by persons possessing a receiver. In that circumstance the fee was “imposed, calculated and levied according to rules such as those in the main proceedings”. The CJ referred to the purpose of the rules, which was to cover bodies that were dependent on the state. State influence could thus incite them to favour national tenderers. The CJ considered that direct financing by the state was not required, since the Directive did not lay down this rule and it was not a relevant condition in light of the purpose of the rules.

In this respect, the CJ considered the following elements:

- The fees in question were imposed under a state measure rather than through contractual arrangements with customers, and the amount was set by the state. The CJ considered that state finance was involved, even though the fees were primarily set in accordance with a recommendation of an independent commission based on broadcasters' needs. State finance was involved, even though the state had limited power to modify the recommended fees.
- Liability to pay depended on merely possessing a receiver of television services and was not based on actual use of the services. The CJ considered that such fees could be distinguished from fees charged by professionals such as doctors, lawyers and architects, which were also fixed by the German State. This distinction was made because the customers of those professional services entered into a contractual relationship of their own free will and received an actual service. In addition, the financing of those professions was not ensured or guaranteed by the state.

The CJ also emphasised that it was irrelevant that the funds did not pass through the state budget.

Direct state interference: A second question referred to the CJ was whether direct state interference in the award of contracts was necessary for the definition to apply. The CJ concluded that such interference was not required. Dependence on financing in a broad sense was sufficient to incur the risk of national preference.

C-526/11 IVD

IVD GmbH & Co. KG v Ärztekammer Westfalen-Lippe

Judgment dated 12 September 2013, Opinion of the Advocate General dated 30 January 2013

Reference for a preliminary ruling

More recently, in the case C-526/11 *IVD*, the CJ concluded that a professional association governed by public law was not a body governed by public law. The case concerned contracts for printing and distribution of advertising materials concluded by *Ärztekammer Westfalen-Lippe*, which is the association of doctors in Westphalia-Lippe (hereafter referred to as "the doctors' association").

The CJ based its conclusions on the fact that the doctors' association did not satisfy the criterion of financing for the most part by the public authority. The doctors' association is financed for the most part by the contributions of its members, and it is authorised by law to fix and collect the amount of those contributions. In addition, the criterion relating to management supervision by the public authority was not satisfied.

The CJ, referring to the case C-373/00 *Adolf Truley*, stated that the mere fact that decisions adopted by the body concerned could be reviewed did not satisfy the criterion of supervision. The reason for this is that such a review does not enable the public authority to influence the decisions of the body in question in relation to public contracts. That is the case, in principle, of a general review of legality conducted after a supervisory authority has made a decision. It is also the case when the supervisory authority approves the body's decision fixing the amount of contributions that constitute the greater part of its financing. The supervisory authority's approval is confined to ascertaining that the body's budget is balanced.

<p>Public Sector Directive 2014/24/EU</p>
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<p>In the preamble, the 2014 Public Sector Directive refers to the rich case law of the CJ.</p>

Recital 10 stipulates:

“The notion of ‘contracting authorities’ and in particular that of ‘bodies governed by public law’ have been examined repeatedly in the case-law of the CJ. To clarify that the scope of this Directive *ratione personae* should remain unaltered, it is appropriate to maintain the definitions on which the CJ based itself and to incorporate a certain number of clarifications given by that case-law as a key to the understanding of the definitions themselves, without the intention of altering the understanding of the concepts as elaborated by the case-law. For that purpose, it should be clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a ‘body governed by public law’ since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character.

Similarly, the condition relating to the origin of the funding of the body considered, has also been examined in the case-law, which has clarified *inter alia* that being financed for ‘the most part’ means for more than half, and that such financing may include payments from users which are imposed, calculated and collected in accordance with rules of public law.”

C-300/07 Hans and Christophorus Oymanns

Hans and Christophorus Oymanns GbR v AOK Rheinland/Hamburg

Judgment dated 11 June 2009, Opinion of the Advocate General dated 22 November 2007

Reference for a preliminary ruling

This case is of particular relevance to the following topics:

Scope – Meaning of a “body governed by public law”

Material scope – classification of a contract and service concessions

Key sections of the judgment for the purposes of this topic are:

Legal context – European Union law	paragraphs 3-11
Legal context – German law	paragraphs 12-25
Facts	paragraphs 26-38
Questions referred to CJEU	paragraph 39
Analysis and judgment	paragraphs 40-76

References to paragraphs below (in parentheses) are to paragraphs of the judgment.

Summary of facts (paragraphs 26-38)

AOK Rheinland/Hamburg (AOK) is a statutory sickness insurance fund. *AOK* advertised in a specialist publication inviting tenders for the manufacture and supply of orthopaedic footwear as part of an integrated service. This integrated service was to cover the manufacture and supply of individually tailored orthopaedic footwear as well as direct advice to the patient before and after delivery of the footwear. Patients suffering from diabetic foot syndrome who held a sickness insurance card and an appropriate medical prescription were to contact the supplier directly. The quantity of shoes to be supplied was not specified in the call for tender. Payment for the integrated service was to come from contributions of patients and *AOK*.

Hans and Christophorus Oymanns (Oymanns), an orthopaedic footwear company, submitted a tender. It subsequently lodged complaints with *AOK* relating to infringements of the EU law and the national procurement law by *AOK*. Those complaints were rejected by *AOK* on the grounds that the rules of procurement law were not applicable. *Oymanns* appealed to the procurement review body.

The German review body referred a number of questions to the CJ in order to establish whether the sickness insurance fund was a “body governed by public law”.

The German review body also referred questions regarding the classification of the contract. Statutory sickness insurance funds in Germany operate the sickness insurance scheme, which covers about 90% of the German population. The scheme is operated on a non-profit basis. Individuals insured under the scheme may choose between various public sickness insurance funds.

EU law (paragraphs 3-11): Directive 2004/18/EC, article 1(2) – definitions of “public contracts”, “public supply contracts”, “public service contracts”, “service concession”, “framework agreement”; article 1(9) – definition of “contracting authority” and “body governed by public law”; article 21 – services listed in Annex IIB to the Directive, article 32 “framework agreements”

German law (paragraphs 12–25): German “Social Law”

Judgment (paragraphs 40-76)

Definition of a “body governed by public law”: the meaning of “established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character”

One of the categories of a body covered by the Directive under the definition of a "contracting authority" is a "body governed by public law". The concept of a "body governed by public law" is defined in article 1(9) of the Directive.

Article 1(9) Directive 2004/18/EC

“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 is subject to management supervision by those bodies; or has an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.”

The CJ first stated that it was clear that a sickness fund was a body that i) had legal personality; and ii) had been established for the specific purpose of meeting needs in the general interest as it did not have an industrial or commercial character. This was the case because the fund was a legal body under public law established to meet needs relating to public health. The needs in question did not have an industrial or commercial character since the benefits were provided on a non-profit basis (paragraph 49).

The meaning of “financed for the most part” in relation to the concept of bodies governed by public law

The CJ then considered whether bodies such as sickness funds could be considered to meet the criterion of being mainly financed by the state. The CJ concluded that they could not meet that criterion. The fund in this case was financed by contributions from both insured persons and employers. The contributions were required by law and, to a limited extent, provided directly by federal funds. In this respect, the CJ considered it relevant that:

- The contributions for financing were compulsory (paragraph 52).
- The contributions were paid without specific consideration being given to individuals. They were not linked to benefits received but to the ability to contribute and other factors, such as age and state of health (paragraph 53).
- The public body supervising the fund had to approve the contribution rate (paragraph 55).
- The insured person's contribution to the fund was compulsorily withheld from his/her salary. It was paid by the employer, along with the employer's contribution. The total contribution to the fund was, in effect, collected in accordance with public law methods (paragraph 56).

The CJ noted that, unlike the case *C-337/06 Bayerischer Rundfunk*, the contribution rate was fixed, not by the public authority but by the sickness fund itself. However, the CJ considered that this did not affect its view. The CJ also noted that the sickness fund had very limited discretion. The fund's objective is to provide the benefits specified in the social security legislation. These benefits and related expenditures are imposed by national law. The fund performs its functions on a non-profit basis. The contribution rate must be set in such a way that the revenue accrued is equal to expenditure (paragraph 54).

In these circumstances, the CJ concluded that the financing was brought into being by the state and guaranteed by the state and that its collection was secured by public law methods. It should thus be considered as financing by the state (paragraph 57).

The meaning of “subject to management supervision”

The German review body also asked whether the sickness fund was subject to management supervision by the state. The CJ concluded that the fund was financed by the state, and it therefore did not consider it necessary to examine whether this criterion was met.

The significance of Annex III in determining whether a body is a contracting authority

Annex III of the Directive lists various authorities in each Member State that are considered to be contracting authorities. This list includes the German sickness insurance funds. It was argued that inclusion in this annex confirmed an irrefutable presumption that the listed body was a contracting authority. The CJ rejected this argument, ruling that a listed body was a contracting authority only if it met the substantive definition of such a body, as provided in the Directive (paragraph 45).

Classification of contracts involving both products and services

The CJ also considered issues relating to the classification of contracts involving both the supply of products and services. The Directive states that a contract for both products and services is considered to be a supply contract if the value of the consideration dedicated to supplies is greater than that dedicated to services. Otherwise it is to be considered as a services contract [article 1(2)(d)].

A different rule applies to contracts involving both works and services. Article 1(2)(d), third paragraph states that:

“A public contract having as its object services within the meaning of Annex II and including activities within the meaning of Annex I that are only incidental to the principal object of the contract shall be considered to be a public service contract”.

The CJ confirmed that the rule for mixed supplies/services contracts involved a purely quantitative test relating to the value of the consideration. The rule applicable to mixed works/services contracts with regard to the principal object of the contract is not to be taken into account when determining the classification of a mixed supplies/services contract (paragraphs 61-63).

In this case, the orthopaedic shoes were to be manufactured for each customer according to the customer's specific needs and requirements. The CJ considered whether the fact that a product was manufactured in an individual manner, in accordance with the needs and preferences of the customer, rendered the manufacture of that product a service. If so, it would have to be taken into account when determining the value of consideration dedicated to services. The CJ concluded that the manufacture did not in this case constitute a service but had to be classified as a “supply” part of the contract (paragraph 67). The CJ supported this view by referring to the definition of contracts of sale in article 1(4) of Directive 1999/44 on the sale of consumer goods.

The distinction between a framework agreement and a services concession

The CJ also considered the question of whether the footwear contract constituted a service concession. The CJ established that one of the conditions for classifying a contract as a concession was the assumption of the economic risk of the activity under the contract by the provider. The CJ concluded in this case that the provider did not undertake sufficient risk for the arrangement to be characterised as a concession (paragraph 75).

In this respect, the CJ referred to the following factors:

- The footwear provider undertook the obligation to serve the insured persons at their request.
- The contract fixed the price.
- The provider bore only the limited risk that insured persons might not avail themselves of its products and services.
- The statutory sickness insurance fund met the entire cost of the remuneration to the provider, with the result that the latter was spared the risk connected with a possible recovery of payment.
- The provider did not have to incur considerable advance expenditure before concluding contracts with insured persons.
- The number of persons suffering from diabetic foot syndrome, for which the particular shoes were needed, was known. The provider was therefore able to make a reasonable forecast of the number of likely customers (paragraph 74).

The CJ considered the nature of the agreements. It noted that the contract set out the payments, services to be delivered and duration of the contract. The services were to be delivered at the request of individuals. The CJ concluded that the nature of the arrangements in this case meant that the contract was a framework agreement (paragraph 76).

Decision (paraphrased)

Financing is considered to be provided “for the most part” by the state whenever the activities of statutory sickness insurance funds are chiefly financed by contributions payable by members. These contributions are imposed, calculated and collected according to rules of public law, such as those in the main proceedings. Such sickness insurance funds are to be regarded as bodies governed by public law. They are therefore contracting authorities for the purpose of application of the rules in the Directive.

When a mixed public contract concerns both products and services, the criterion used to determine whether the contract is a supply contract or a service contract is the respective value of the products and services covered by the contract. Where the products supplied are individually manufactured and tailored to the needs of each customer and where each customer receives individual advice on the use of the products, the manufacture of those products must be classified as a “supply” for the purpose of calculating the value of each part of the contract.

The characteristics of the agreement, such as the one at issue concluded between a statutory sickness insurance fund and a trader, mean that it must be regarded as a framework agreement.

C-393/06 *Ing. Aigner*

Ing. Aigner, Wasser-Wärme-Umwelt, GmbH v Fernwärme Wien GmbH

Judgment dated 10 April 2008, Opinion of the Advocate General dated 22 November 2007

Reference for a preliminary ruling

This case is of particular relevance to the following topic:

Scope – meaning of a “body governed by public law”

Key sections of the judgment for the purposes of this topic:

Legal context – European Union law	paragraphs 3-13
Legal context – Austrian law	paragraph 14
Facts	paragraphs 15-21
Questions referred to CJEU	paragraph 22
Analysis and judgment	paragraphs 23-59

References to paragraphs below (in parentheses) are to paragraphs of the judgment.

Summary of facts (paragraphs 15-21)

This case arose out of proceedings before an Austrian court. The case concerned a procedure for the award of a contract by *Fernwärme Wien GmbH* (hereafter referred to as *FW*), a company wholly owned by the city of Vienna. It had been established for the purpose of supplying heating to homes, public institutions, offices and private undertakings, using energy produced by the disposal of waste. In parallel, *FW* was also engaged in the general planning of refrigeration plants for large estate projects. In carrying out that activity, it was in competition with other undertakings.

FW launched a tendering procedure for the installation of refrigeration plants in a planned office complex in Vienna. *FW* was of the opinion that the Austrian legislation on public procurement was not applicable to the contract. The enterprise *Ing. Aigner* participated in the procedure by submitting a tender. *FW* informed *Ing. Aigner* that its offer would not be taken into account due to negative references. *Ing. Aigner* challenged that decision. The court decided to suspend the review proceedings and referred to the CJ three questions concerning the interpretation of EU law on public procurement.

The questions concerned the identification of the directive, if any, that was applicable to the award procedure in question. The referring court was of the view that:

- activities concerning the operation of fixed district heating were covered by the Utilities Directive, whereas
- activities concerning refrigeration plants were not covered by the Utilities Directive.

The referring court asked whether the Utilities Directive 2004/17/EC did cover activities related to refrigeration plants since they were performed by an entity that performed other activities covered by that Directive.

EU law (paragraphs 3-13): Directive 2004/17/EC, article 2(1)(a) – definition of “contracting authority” and “body governed by public law”; article 2(1)(b) – definition of “public undertaking”; article 2(2) – personal scope of the directive; articles 3-7 – “covered activities”; article 9 – mixed contracts; article 20 – exemptions from the directive

Austrian law (paragraph 14): Federal law on the award of public procurement contracts (*Bundesvergabegesetz*), 2006 (Austria)

Judgment (paragraphs 23-59)

Application of the Utilities Directive to activities not listed in that directive

The CJ first noted the differences between scope and coverage of the Directive and the Utilities Directive. While the Directive applies to contracting authorities, the Utilities Directive applies to contracting entities. The term “contracting entity” covers “contracting authority” (defined in the same way as in the Directive). It also covers public undertakings and undertakings operating on the basis of special or exclusive rights granted by a competent authority of a Member State. The Utilities Directive does not cover all spheres of economic activity, however, but only specifically defined sectors (“utilities sectors”). The Directive includes almost all sectors of economic activity, and for that reason it is referred to as a “general directive” (paragraph 26).

The CJ concluded that the general scope of the Directive and the restricted scope of the Utilities Directive required a narrow interpretation of the provisions of the Utilities Directive (paragraph 27). The CJ stated that since the scope of the Utilities Directive was strictly defined, its procedures could not be extended beyond the sectors covered by that directive. The Utilities Directive covered only contracts that were awarded i) by an entity classified as a contracting entity under that directive, and ii) in connection with and for the exercise of activities in the sectors referred to in articles 3 to 7 of that directive.

Activities concerning the operation of heating fall within the fields of application of the Utilities Directive. The contracting entity is obliged to apply the procedures defined in that directive to award contracts related to those activities. This is not the case for activities concerning refrigeration plants (paragraph 33).

Definition of a “body governed by public law”

The second question was whether an entity such as *FW* was a “body governed by public law” within the meaning of the Directive or the Utilities Directive. The CJ noted that the concept of a “body governed by public law” was defined in identical terms in both directives.

In this case, the criteria concerning i) legal personality; and ii) ownership and supervision by a body governed by public law were fulfilled, as *FW* was wholly owned by the City of Vienna. It was therefore only necessary to verify whether the third criterion, concerning the purpose for which the entity had been established, was satisfied.

Concept of needs in the general interest

The CJ first ruled that the activity of providing heating for an urban area by means of an environmentally friendly process was an aim in the general interest. *FW* had thus been established for the purpose of meeting needs in the general interest (paragraph 39). The CJ confirmed that an entity might meet needs in the general interest even though the activities in question were also undertaken by some purely private undertakings. It was important for them to be needs that “...for

reasons in the general interest, the State or a regional authority [chose] to meet itself or over which it [wished] to retain a decisive influence..." (paragraph 40).

Needs of an industrial or commercial character

The CJ then considered whether the needs had an industrial or commercial character. It considered, in line with previous case law, whether those needs were carried out in a situation of competition. The CJ stated that the existence of "significant competition" was an indication that the needs had an industrial or commercial character (paragraph 46). The CJ first noted that although *FW* might make profits, profit making was not its principal aim (paragraph 42). The CJ then concluded that the entity did not operate under conditions of significant competition since it was the only entity capable of meeting the needs in question (paragraph 45). It was relevant that the two other undertakings operating in the sector were of negligible size and could not constitute true competitors. The fact that it would be difficult to replace the system by another form of energy was also relevant, as it would require large-scale conversion work. In addition, the City of Vienna attached considerable importance to the system, for environmental reasons among others, which meant that public opinion would make it difficult to withdraw even if the system operated at a loss (paragraph 44).

Relevance of non-commercial activities

The CJ also confirmed its earlier judgments that it was irrelevant to the definition of a body governed by public law that the entity also carried out some commercial activities. The proportion of "commercial" compared to non-commercial activities was also irrelevant for the purpose of defining the term "body governed by public law" (paragraph 47).

The CJ concluded that an entity such as *FW* was a body governed by public law under both the Directive and the Utilities Directive. The practical consequence of that conclusion is that a contracting entity that happens to be a contracting authority under the Directive is obliged to apply the procedures defined in that directive when awarding contracts related to activities that are not covered by the Utilities Directive (as in the case of *FW* concerning refrigeration plants).

Application of the directives to the commercial activities of a body governed by public law

The third question addressed to the CJ concerned the situation in which it was possible to clearly separate:

- activities performed a body governed by public law that are subject to one of the procurement directives,
- activities that are carried out in conditions of competition.

In previous cases the CJ had established that, in general, the directives covered all activities of a body governed by public law. If this were not the case, it would be possible to use non-commercial activities to subsidise commercial activities. There is a danger that this possibility would lead to non-commercial (and thus discriminatory) purchasing.

However, in the present case the CJ had to consider whether an exception could be made to this general principle. Such an exception would be applied in situations where "commercial" activities were clearly separated from non-commercial activities, so that the possibility of cross-financing between the two would be excluded.

The CJ confirmed the Advocate General's view that in reality there had to be serious doubts that it would be possible to separate the various activities of one entity. The CJ drew attention to the practical obstacles of identifying a total separation between the different spheres of activity. It noted that the entity was a single legal person with a single system of assets and property as well as a unitary method for the adoption of administrative and management decisions (paragraph 53). The CJ concluded that for reasons of "legal certainty, transparency and predictability" (paragraph 54), all

contracts, of whatever nature, entered into by a contracting authority were subject to the directives (paragraph 50).

Decision (paraphrased)

1. A contracting entity, within the meaning of Utilities Directive 2004/17/EC, is required to apply the procedures laid down in that directive only for the award of contracts relating to activities carried out by that entity in one or more of the sectors listed in articles 3 to 7 of the directive.
2. It is immaterial whether, in addition to its duty to meet needs in the general interest, an entity that has been classified as a “body governed by public law” is free to carry out other profit-making activities. This possibility is nevertheless subject to the proviso that the body continues to attend to the needs that it is specifically required to meet.
3. All contracts awarded by a body governed by public law relating to activities carried out by that entity in one or more of the sectors listed in articles 3 to 7 of the Utilities Directive must be subject to the procedures laid down in that directive. However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in the Public Sector Directive 2004/18/EC.
4. Each of these two directives applies without distinction to i) activities carried out by that entity to accomplish its task of meeting needs in the general interest; and ii) activities that it carries out under competitive conditions. This is the case even for an entity that has set up an accounting system intended to make a clear internal separation between those activities in order to avoid cross-financing.

Chapter 4 “In-house” procurement

Context

There are basically three ways in which public authorities (public administration) may perform various tasks in the public interest. They may choose to perform those tasks by:

- using their own resources;
- working in co-operation with other authorities;
- conferring them on economic operators.

The EU procurement directives do not oblige Member States to contract out the provision of services that they wish to provide themselves. There is no public procurement in cases where the contracting authorities decide to perform certain tasks by using their own resources.

Public procurement rules become relevant when the contracting authority decides to entrust a third party with the provision of goods, services or works that it cannot or does not want to perform itself. The general rule is that when a contracting authority awards a contract to a separate legal person, the procurement directives then apply to that award.

In practice a contracting authority may for good reasons establish, own and control a company or other type of separate legal body that provides such goods, services or works. For example, a municipal authority may set up a company to deal with waste collection and disposal for the municipality. Legally, such a body is separate from the contracting authority that is its founder and owner. The body has a legal personality of its own. In such a case the contracting authority needs to consider whether i) it is permitted to award a contract directly to the body that it owns, or ii) it is necessary to conduct a procurement procedure in which any economic operators interested are invited to bid.

The Directive is silent on the question of whether a contracting authority may award a contract directly to a company or other separate legal body that it owns or controls, without using a competitive tender process. The Directive is also silent about the extent to which contracting authorities are permitted to work together and award contracts to each other without using a competitive tender process.

The CJ has established two exceptions to the general rule that when a contracting authority awards a contract to a separate legal person the procurement directives then apply. These exceptions are subject to certain conditions being met. Where the conditions are met, the award of the contract will then be classified as “in-house” procurement and will not be subject to the Directive.

The two exceptions to the principle requiring a competitive tender process are often referred to as the “*Teckal*” exemption and the “*Hamburg Waste*” exemption. These titles refer to the CJ cases in which the principles were first established. The *Teckal* exemption is relevant where a contracting authority sets up or participates in a separate legal entity. The *Hamburg Waste* exemption is relevant where there is co-operation between contracting authorities but no separate legal entity is established.

The 2014 Public Sector Directive and the 2014 Utilities Directive include provisions covering the *Teckal* exemption and the *Hamburg Waste* exemption

For further information, see:

Sigma Public Procurement Training Manual, Module D3, “Contracts covered” – <http://www.sigmaxweb.org/publications/46179267.pdf>

Key learning points

1. A contracting authority always has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical or other resource. In that case there is no need to apply public procurement rules. The contracting authority is not obliged to call on outside entities to perform those tasks.
2. Public procurement rules apply, in general, when the contracting authority entrusts an entity that is legally distinct from it with the provision of services, works or supply of goods.
3. Where the party performing the services or providing the supplies (the economic operator) is an entity that is legally distinct from the contracting authority, a call for tenders may not be mandatory if specific conditions are met. Those conditions were defined in the case law discussed below, and they relate to two different types of circumstances: in-house award and co-operation between public institutions.
4. The 2014 Public Sector Directive and the 2014 Utilities Directive contain provisions covering in-house award and co-operation between public institutions.

Summary of CJ approach and decisions

Teckal in-house award

The concept of in-house award dates back to the CJ's ruling in 1999 in the case *C-107/98 Teckal*. In that judgment the CJ confirmed that, in general, where a contract was concluded between a contracting authority and a legally distinct entity, that contract would then be subject to the procurement directives. The CJ held, however, that a contract would be classified as "in-house" and therefore exempt from the application of the procurement rules where both of the two conditions were satisfied. Those two conditions are:

- **The control condition:** where the contracting authority exercises over the separate entity a control that is similar to the control exercised over its own departments;
- **The activity condition:** where the separate entity carries out the essential part of its activities with the controlling public authority.

The CJ has based subsequent rulings on these conditions and has expanded and refined the concept of in-house award.

Strict interpretation of "Teckal" conditions: The two *Teckal* conditions must be strictly interpreted. The burden of proving the circumstances justifying the derogation lies with the person seeking to rely on the derogation (*C-410/04 ANAV*).

Control and private participation: Where a private undertaking participates in the capital of a company in which the contracting authority also participates, the *Teckal* exemption is not available. This is the case even when the private participation is only minority in nature. Private capital participation in the capital of the company excludes the possibility of the contracting authority exercising over that company a control that is "similar to that which it exercises over its own departments". This provision has been established because any private capital investment has considerations in the private, rather than the public, interest and pursues objectives of a different kind (*C-26/03 Stadt Halle and RPL Lochau*).

A contracting authority must comply with the procurement rules when it wishes to award a contract covered by the Directive to a legally distinct company in which it has a capital holding together with one or more private companies (*C-29/04 Commission v Austria*).

The possibility of future private investment does not rule out the classification of the contract as an in-house contract under the *Teckal* principles. This is the case unless there is a real prospect of such investment occurring in the short term (C-573/07 *Sea*).

Control: Control exercised jointly by municipalities through shareholder committees, which limits the autonomy of directors, is sufficient to satisfy the control condition of *Teckal*. The mere possibility of providing services to the private sector does not preclude the existence of such control (C-573/07 *Sea*).

The directives do not permit the direct award of a public supplies and services contract to a joint stock company that has i) a board of directors with ample managerial powers that may be exercised independently, and ii) a share capital held entirely by another joint stock company, which has as its majority stakeholder the contracting authority.

In order to assess whether the control condition is satisfied, it is necessary to take account of all legislative provisions and circumstances. Of particular importance are the circumstances indicating whether a successful tenderer is subject to a control enabling the contracting authority to influence the company's decisions (C-340/04 *Carbotermo*).

The *Teckal* control condition is only satisfied when there is a possibility for the awarding entity to contribute effectively to that control. Control must not be based solely on the controlling power of the entity that has a majority shareholding in that company (C-182/11 and C183/11 *Econord*).

Activity: In establishing whether the activity condition is satisfied, all of the activities that the body carries out on the basis of an award by the contracting authority must be taken into account. This requirement is valid regardless of whether those activities are paid for by the contracting authority itself or by the user of the services. The territory in which the activities are carried out is irrelevant.

(C-340/04 *Carbotermo*)

Co-operation

Public procurement procedures do not need to be applied to co-operation arrangements within the public sector, i.e. co-operation between two or more public authorities, provided that certain conditions are satisfied, as described in CJ case law (C-486/10 *Commission v Germany*, C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others*, and C-368/11 *Piepenbrock*).

Selection of a private partner and award of a contract to a public-private company:

The direct award of a public service to a semi-public company that has been formed specifically for the purposes of providing that service and that possesses a single corporate purpose is allowed under the Treaty if the private participant in the company is selected by means of a public and open procedure (C-196/08 *Acoset*).

2014 Public Sector Directive

The 2014 Public Sector Directive 2014/24/EU incorporates the case law of the CJ concerning in-house procurement in article 12, which is entitled "Public contracts between entities within the public sector".

Article 12 reflects the case law of the CJ on both in-house procurement and co-operation arrangements. Article 12 incorporates and expands on the CJ case law. In some respects it provides more clarity, such as specifying that the term "activity" signifies more than 80% of the body's activity and explaining the meaning of the term "control".

The same provisions are set out in article 28 of the 2014 Utilities Directive (2014/25/EU), entitled "Contracts between contracting authorities".

Case law

Application of *Teckal* conditions

C-410/04 ANAV

Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari and AMTAB Servizio SpA

Judgment dated 6 April 2006, Opinion of the Advocate General dated 12 January 2006

Reference for a preliminary ruling

The case before the Italian review body concerned challenging a decision by the municipality of Bari in relation to the provision of public transport services. The municipality had arranged for public transport services to be delivered by *AMTAB Servizio*, a company that was wholly owned and controlled by the municipality. This arrangement had been made under Italian legislation, which provided the possibility for local municipalities to award, without any competition, contracts to companies belonging entirely to the public sector. This provision had been made on condition that i) the public authority or authorities holding the share capital exercised control over the company that was comparable to the control exercised over their own departments, and ii) the company carried out the essential part of its activities with the controlling authority/authorities.

There was no dispute of the fact that this contract was to be classified as a services concession, which was excluded from regulation under the procurement directives. However, a question arose as to whether it was compatible with the Treaty to maintain legislation allowing the grant of such a concession without an advertisement and a competition.

The CJ ruled that the Treaty did not preclude such provisions in relation to public service concessions. The CJ stated that national legislation that reproduced the wording of the *Teckal* conditions theoretically complied with EU law, with the proviso that the interpretation of that legislation would also have to comply with the requirements of EU law (paragraphs 24 and 25).

The CJ confirmed that the two *Teckal* conditions had to be strictly interpreted. The CJ also confirmed that the burden of proving the circumstances justifying the derogation lay with the person seeking to rely on the derogation. The CJ noted some factual information in relation to the ownership of the company and the potential for private sector involvement in the company. The CJ stated that it was a matter for the referring court to decide, based on the facts, whether the municipality of Bari intended to open the capital in *AMTAB Servizio* to private shareholders. It nevertheless provided some guidance to the referring court.

The CJ reiterated the importance of ensuring that there was no participation by a private undertaking in the capital of a company in which the concession-granting public authority was also a participant. Even minority participation by a private undertaking in such a company excluded the possibility of satisfying the *Teckal* control condition. A problem would arise if, for the duration of the contract, the capital of *AMTAB Servizio* were open to private shareholders. The result would be the award of a public services concession to a semi-public company without any call for competition, which would “interfere with the objectives pursued by [EU] law” (paragraphs 30-32).

C-340/04 Carbotermo and Consorzio Alisei

Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA

Judgment dated 11 May 2006, Opinion of the Advocate General dated 12 January 2006

Reference for a preliminary ruling

The proceedings before the Italian review body arose out of the award of a supply contract by the *Comune di Busto Arsizio*. The contract concerned the supply of fuel and work on heating installations in municipal buildings. The contract was awarded directly to *AGESP*, an ordinary joint stock company. While *AGESP Holding* held 99.98% of the shares in *AGESP*, 99.98% of the shares in *AGESP Holding* were in turn owned by the *Comune di Busto Arsizio*. Other Italian municipalities owned the remaining shares.

The Italian review body, which was asked to decide whether this supply contract fell under the Supplies Directive, referred a number of questions to the CJ. These questions concerned the circumstances in which contracting authorities could award contracts to their own subsidiaries without following the Directive, on the grounds that the award was an “in-house” arrangement.

Teckal control condition: The CJ held that, when determining whether the control condition was satisfied, it was necessary to take account of all of the legislative provisions and relevant circumstances. It had to follow, from the examination of that information, that the body was subject to control, enabling the contracting authority to influence that body’s decisions. The control had to be a power of “decisive influence” over both strategic objectives and significant decisions of the body.

The CJ considered it important that the contracting authority held, alone or together with other public authorities, all of the share capital in the body. This fact tended to indicate that the contracting authority exercised sufficient control to satisfy the Teckal control condition. However, the Supplies Directive precludes the direct award of a public supplies and services contract to a joint stock company having i) a board of directors with ample managerial power that could be exercised independently, and ii) share capital that at present was held entirely by another joint stock company, with the contracting authority as the majority shareholder.

Teckal activity condition: The CJ held that, in establishing whether the activity condition was satisfied, all of the activities carried out by the body on the basis of an award by the contracting authority had to be taken into account. This requirement was valid regardless of whether those activities were paid for by the contracting authority itself or by the user of the services provided. The territory in which the activities were carried out was irrelevant.

C-295/05 *Asociación Nacional de Empresas Forestales*

Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado

Judgment dated 19 April 2007, Opinion of the Advocate General dated 28 September 2006

Reference for a preliminary ruling

A full transcript and a more detailed analysis of this ruling are included in this publication.

This case concerned Spanish rules relating to the entrustment of work by a contracting authority to a particular company. Under these national rules, some contracting authorities, including the Spanish State and Autonomous Communities, could entrust certain works to a public company, *Tragsa*. They could do so directly, without application of the EU procurement procedures set out in the directives.

The CJ first remarked that a public services, supplies or works contract assumed the existence of a contract for pecuniary interest, in writing, between an economic operator and a contracting authority (paragraph 48). The CJ held that *Tragsa* was a state company, and the Autonomous Communities could hold the share capital. It was an “an instrument and technical service” of the state

administration and the Autonomous Communities. *Tragsa* was obliged to carry out work entrusted to it by the state administration, the Autonomous Communities or the public bodies subject to them. It had no choice as to whether it accepted or rejected requests made by the relevant authorities. It was not free to set the tariff for its services. It was clear that *Tragsa's* relations with the relevant authorities were not contractual, but rather "internal, dependent and subordinate" (paragraph 51). In the opinion of the CJ, the requirement in the directives for the existence of a contract was not met.

The CJ then went on to refer to the *Teckal* conditions. The CJ concluded that *Tragsa* satisfied both conditions:

- **Teckal control condition:** It was clear from the case file that 99% of *Tragsa's* share capital was held by the Spanish State itself as well as through a holding company and a guarantee fund. Four Autonomous Communities, each with one share, held 1% of the capital. *Tragsa* was not free to fix the tariff for its actions, and its relationships with the relevant authorities were not contractual. *Tragsa* was not to be regarded as a third party in relation to the Autonomous Communities, which hold a part of its capital.
- **Teckal activity condition:** It was also clear from the case file that *Tragsa* carried out more than 55% of its activities with the Autonomous Communities and nearly 35% with the Spanish State. The *Teckal* activity condition was satisfied.

The CJ held that the national legal provisions governing *Tragsa* were not contrary to the EU public procurement directives. These legal provisions enabled *Tragsa*, a public undertaking acting as an instrument and technical service of several public authorities, to execute operations without being subject to the regime laid down by the directives.

C-324/07 Coditel Brabant

Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale

Judgment dated 13 November 2008, Opinion of the Advocate General dated 4 June 2008

Reference for a preliminary ruling

A full transcript and a more detailed analysis of this ruling are included in this publication.

This case related to arrangements for the installation and operation of a cable television network in the municipality of Uccle in Belgium. A services concession was awarded to an inter-municipal co-operative society in which the municipality of Uccle participated.

The CJ considered articles 43 and 49 of the Treaty, the principles of equal treatment and non-discrimination on grounds of nationality, and the obligation of transparency. In view of the circumstances of this case, the CJ held that those principles and that obligation did not preclude a public authority from awarding a public service concession without calling for competition. Those circumstances are where i) an award is made to an inter-municipal co-operative society of which all of the members are public authorities; ii) those public authorities exercise control over that co-operative society that is similar to the control exercised over their own departments; and iii) that society carries out the essential part of its activities with those public authorities.

The CJ confirmed that the public authorities had to have a power of decisive influence over both the strategic objectives and the significant decisions of the concessionaire. After considering the facts of the case, the CJ was of the view that the requisite control existed. This view was subject to verification of the facts by the referring court.

The CJ considered the situation where a public authority joined an inter-municipal co-operative in order to transfer the management of a public service to that body. A particular question was whether the *Teckal* control condition was satisfied in a situation where the control over the concessionaire was exercised jointly by a number of public authorities. The CJ confirmed that this control had to be similar to the control that the authority exercised over its own departments, but it did not need to be identical in every respect. The control exercised over the concessionaire had to be effective, but it was not essential for it to be exercised individually. The *Teckal* control condition could be satisfied where the control was exercised jointly by a number of public authorities.

C-196/08 Acoset

Acoset Conferenza Sindaci e Presidenza Prov. Reg. ATO Indrico Ragusa

Judgment dated 15 October 2009, Opinion of the Advocate General dated 2 June 2009

Reference for a preliminary ruling

A full transcript and a more detailed analysis of this ruling are included in this publication.

This case involved a request for a preliminary ruling submitted by an Italian review body. The proceedings in Italy concerned an arrangement for service provision made by *ATO*, which was a body established by various public authorities in the province of Ragusa to assume responsibility for the province's water service. *ATO* had published a notice in the official journal for the recruitment of a partner that would become a minority shareholder in a new company (mainly publicly owned) that was to be entrusted with management of the water service. The partner in the new company would also undertake related work. An Italian review body referred questions to the CJ concerning the procedure to be followed under EU law for such arrangements.

The CJ proceeded on the assumption that the arrangement involved was a services concession. The CJ ruled that a single award procedure compatible with the Treaty (including its rules on transparency, equal treatment and competition) could be used to select a private partner that would become a shareholder in the public-private company and also be entrusted with work related to the company's tasks.

Joint cases C-182/11 and C-183/11 Econord

Econord SpA v Comune di Cagno and Comune di Varese (C-182/11) and Comune di Solbiate and Comune di Varese (C-183/11)

Judgment dated 29 November 2012, Opinion of the Advocate General dated 19 July 2012

Reference for a preliminary ruling

A full transcript and a more detailed analysis of this ruling are included in this publication.

The proceedings related to an arrangement by two Italian municipalities, the *Comune di Cagno* and the *Comune di Solbiate* (hereafter referred to as "the two municipalities"). The two municipalities decided to use a publicly owned company, *Aspem*, to provide urban hygiene services, in particular waste disposal services. *Aspem* had been set up by another public authority, the Varese Municipal Council, which owned the vast majority of the shares in *Aspem*. On deciding to use *Aspem* to deliver waste disposal services, each of the two municipalities purchased a single share in *Aspem*. Under a shareholders' agreement, the two municipalities were given the right to be consulted and to appoint

a member of *Aspem's* supervisory council. They were also entitled to nominate, in agreement with the other participants in the shareholder agreement, a member of the management board.

The Italian Council of State (appeals body) sought a preliminary ruling from the CJ. The reference was to help determine whether the above arrangement was excluded from the EU procurement rules on the basis of the *Teckal* principles.

The CJ ruled that the *Teckal* control condition was only satisfied when there was a possibility for the awarding entity to contribute effectively to that control. The control was not to be based solely on the controlling power of the entity that had a majority shareholding in that company. It was up to the Italian courts to verify whether this was the case based on the facts.

The CJ indicated that there had to be an actual possibility of the awarding company participating in the control of the company. The absence of any such possibility would increase the potential for circumventing the procurement rules. As a result, contracting authorities would be able to award their contracts to other public bodies, without competition, simply through a “purely formal affiliation” to the company. The participants (in this case the two municipalities) had to be able to “contribute effectively” to the control.

This ruling seems to indicate that in an arrangement where one of the contracting authorities that jointly control the company has such extensive capital and/or powers that it can by itself effectively control that company, the “*Teckal*” control condition is not met. This does not mean that each individual authority must be able to make an effective contribution, but that it must be able to do so in conjunction with other authorities.

As noted above, the CJ considered that it was up to the Italian courts to verify whether this was the case, based on the facts.

Co-operation between two public authorities (public – public co-operation)

C-480/06 *Commission v Germany*

Commission of the European Communities v Federal Republic of Germany

Judgment dated 9 June 2009, Opinion of the Advocate General dated 19 February 2009

Action brought by the Commission

This action brought by the European Commission concerned a 20-year arrangement for waste disposal concluded between i) four administrative districts of Lower Saxony in Germany, and ii) the City of Hamburg Cleansing Department (hereafter referred to as “*Hamburg*”). The parties entered into the arrangement without any call for tenders.

The Commission contended that the arrangement should have been tendered under the Services Directive. The CJ rejected the Commission’s argument. The CJ concluded that the Services Directive did not apply to such an arrangement of co-operation between public authorities.

The CJ started by reiterating the general principle that the procurement directives applied in principle to contracts between one public entity and another legally separate entity. However, an essential factor in this case was that the objective of the co-operation extended beyond the simple acquisition of requirements by one party from another. The CJ noted that the arrangement had the effect of making the construction of a proposed treatment facility feasible, due to the “pooling” of waste disposal requirements by the authorities concerned. This pooling arrangement meant that significant amounts of waste could be sent to the proposed treatment facility. The treatment facility was to be operated by a third party. In this respect, the CJ considered it relevant that the arrangement itself entailed commitments from administrative districts to provide specific amounts for processing.

The CJ also observed that the arrangement provided for other commitments by the administrative districts that were directly related to this public service objective of waste disposal. For example, the administrative districts made available to *Hamburg* a landfill capacity that they did not use themselves, which helped to alleviate any shortfall that *Hamburg* might have. The arrangement also provided for the parties to assist each other in various other ways in meeting the public service objective of waste disposal. This assistance included the reduction by the administrative districts of the amount of waste sent to the proposed treatment facility, where capacity problems had existed at a particular time.

In addition, the CJ referred to the fact that the arrangement provided for payment by the administrative districts to the third party operating the facility. It did not involve financial transfers to *Hamburg* itself. Payments would only be made to Hamburg to reimburse it for the charges that it had paid to the operator for the use of the treatment facility by the districts.

The CJ made it clear that it would not be dealing with the position under the Services Directive of contracts awarded by *Hamburg* for the processing of waste (which presumably were under EU procurement rules). The CJ commented that in the present case the co-operation between the authorities did not give preference to any private undertaking over its competitors. This lack of prejudice was presumably the case because any person would be able to tender for the actual waste disposal function.

The view adopted by the CJ was subsequently developed in case law. It is known as the *Hamburg Waste Doctrine*.

C-159/11 Ordine degli Ingegneri della Provincia di Lecce and Others

Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others

Judgment dated 19 December 2012, Opinion of the Advocate General dated 23 May 2012

Reference for a preliminary ruling

A full transcript and a more detailed analysis of this ruling are available in this publication.

The proceedings in Italy concerned a consultancy arrangement between *Azienda Sanitaria Locale di Lecce*, a local health authority, and the *University of Salento* (“the University”). Under the consultancy arrangement, the *University* was to conduct a study to assess the vulnerability to earthquakes of hospital buildings in the health authority’s area. The payments made under this consultancy were intended to cover the *University*’s costs. The consultancy arrangement was entered into in accordance with national legislation permitting an award without competition.

The arrangement was challenged in the Italian courts as being in breach of EU procurement rules. The referring court asked the CJ whether the Directive precluded national legislation that permitted an arrangement of this type between two contracting authorities without competition under that Directive.

The CJ considered whether the EU procurement rules might not apply because of the limitations on their applicability to arrangements between two different public bodies arising from the *Teckal* and *Hamburg Waste* cases.

Teckal: The CJ found that the *Teckal* control condition was not satisfied and therefore the *Teckal* exemption did not apply.

Hamburg Waste: The CJ considered whether this type of arrangement might be excluded on the basis of the ruling in the *Hamburg Waste* case. It provided more precise information on the legal conditions for the *Hamburg Waste Doctrine*.

The CJ considered this doctrine to apply essentially to arrangements that “establish co-operation between public entities with the aim of ensuring that a public task that they all have to perform is carried out”.

In this case, the CJ indicated that the task in question was one “of which a significant or even major part” corresponded to activities usually carried out by architects or engineers. The task did not constitute academic research, although it was based on it. For this reason, the CJ did not consider that the task to be carried out under the arrangement was one that both parties to the arrangement had to perform.

The CJ developed the *Hamburg Waste Doctrine* by stating that three further conditions had to be met. These three conditions were cumulative, i.e. all three conditions had to be satisfied for the *Doctrine* to apply:

- 1) The contracts are concluded exclusively by public entities without the participation of a private party.
- 2) No private provider of services is placed in a position of advantage over its competitor.
- 3) Implementation of the co-operation is governed solely by considerations and requirements relating to the pursuit of public interest objectives.

C-386/11 *Piepenbrock*

Piepenbrock Dienstleistungen GmbH & Co. KG v Kreis Düren

Judgment dated 13 June 2013, no opinion of the Advocate General

Reference for a preliminary ruling

This case related to a proposed arrangement for the provision of cleaning services for offices, administrative buildings and schools. The proposed arrangement was between an association of local authorities and one of its member authorities. Under the arrangement, the association assigned responsibility for the cleaning services to the member authority for a two-year period by means of a pilot project. The arrangement allowed the member authority to engage the services of a third party to fulfil this task. The authority planned to use a company that it owned for that purpose. The arrangement provided for only the reimbursement of costs and not for a profit element. The association retained some supervisory power over the delegated services, since it could unilaterally terminate the contract in the event of improper implementation.

The CJ concluded that the Directive covered an arrangement of this kind. It considered that the conditions of the *Hamburg Waste Doctrine* concerning certain public-public arrangements were not satisfied in this case.

First, the CJ considered the purpose of the arrangement. The CJ was of the opinion that the arrangement did not appear to establish co-operation between the two contracting public entities for the purpose of carrying out a public task that both of them had to perform.

Second, the CJ considered the fact that under the arrangement the engagement of the services of a third party was authorised. In the view of the CJ, this possibility meant that the third party might be placed in a position of advantage. The second condition laid down in C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and others* was therefore not met.

The CJ concluded that a contract such as the one at issue in the present case fell within the scope of the Directive.

C-295/05 Asemfo

Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa), Administración del Estado

Judgment dated 19 April 2007, Opinion of the Advocate General dated 28 September 2006

Reference for a preliminary ruling

This case is of particular relevance to the following topic:

“In-house” procurement – analysis of the *Teckal* conditions

Key sections of the judgment for the purposes of this topic:

Legal context – European Union law	paragraphs 3-5
Legal context – Spanish law	paragraphs 6-15
Facts	paragraphs 16-23
Questions referred to CJEU	paragraph 24
Analysis and judgment	paragraphs 25-66

References to paragraphs below (in parentheses) are to paragraphs of the judgment.

Summary of facts (paragraphs 16-23)

Tragsa is a public company in which 99% of the shares are owned by the Spanish State, either directly or through a holding company and guarantee fund. The Autonomous Communities hold 1% of the shares. Under national rules, some contracting authorities, including the Spanish State and Autonomous Communities, could entrust certain works to *Tragsa* directly, without application of the EU procurement procedures laid down in the directives.

Tragsa, a public company, was entrusted with works related to forestry, rural development and the environment. In 1996 another undertaking, *Asemfo*, lodged a complaint against *Tragsa*. *Asemfo* accused *Tragsa* of abusing its dominant position in the Spanish forestry works, services and projects market and sought a ruling that this position constituted non-compliance with the award procedures for public contracts laid down in Spanish law. According to *Asemfo*, the special status of *Tragsa* enabled it to carry out a large number of works at the direct demand of the Spanish administration. It argued that this special status was in breach of the principles relating to public procurement and free competition and resulted in eliminating any competition on the Spanish market. It further argued that *Tragsa*, as a public undertaking for the purposes of EU law, could not be entitled, under the pretext of being a technical service of the administration, to privileged treatment with regard to the rules governing public procurement.

The Spanish court rejected *Asemfo*'s complaint on the grounds that *Tragsa* was a service of the administration. It was a service without any independent decision-making powers, and it was required to carry out the work demanded of it. *Tragsa* operated outside the market and therefore the rules with regard to competition did not govern its activities.

The Spanish court, in reviewing the appeal submitted by *Asemfo*, decided to stay the appeal procedure and to refer to the CJ three questions concerning the interpretation of EU law. The review

body asked whether the EU procurement directives and the Treaty provisions on competition allowed the award of a contract, without holding a competition, to a public undertaking such as *Tragsa*.

EU law: Article 1 of Directives 92/50, 93/36 and 93/37 (predecessors of Directive 2004/18/EC); Directive 2014/24/EU – definition of a “contracting authority”; articles 43, 49 and 86 of the EC Treaty (currently articles 49, 56 and 106 of the Treaty on the Functioning of the European Union – freedom of establishment, freedom to provide services and rules on competition)

Spanish law: *Ley 13/1995 de Contratos de las Administraciones Públicas* (law on contracts of public administrations)

Judgment (paragraphs 25-66)

Application of the directives to contracts awarded to another public body

In its earlier decision in C-107/98 *Teckal*, the CJ had ruled that in principle the procurement directives applied to contracts awarded by one public body to another public body. However, in that case the CJ also recognised that the directives did not apply if two conditions were met:

- The contracting authority exercises over the party awarded the agreement “a control which is similar to that which it exercises over its own departments” (the “control” condition).
- The party awarded the contract carries out “the essential part” of its activities for the controlling entity (the “essential activity” condition).

When those conditions are met, the agreement between the parties is considered to be an “in-house” administrative arrangement. It is not a contract with an external provider, to which the directives apply. In the present case, the CJ had to analyse whether those two conditions were met.

The “control” condition: The CJ confirmed the principle accepted in C-340/04 *Carbotermo* that the control test could be met when more than one entity shared control of the entity concerned (paragraph 57). The CJ stated that the fact that a contracting authority held – either by itself or with other contracting authorities – 100% of the share capital “[tended] to indicate, generally” that it exercised sufficient control (paragraph 57). The CJ expressly rejected the argument claiming that the fact that the Autonomous Communities held only 1% of the shares between them was insufficient (paragraph 59).

The “essential activity” condition: The CJ confirmed that activities undertaken by the entity with all of the controlling authorities had to be assessed. It was not necessary to limit the assessment to only the activity carried out by the entity for the controlling authority that had awarded the current contract (paragraph 62). The CJ then stated that the fact that *Tragsa* carried out more than 55% of its activities with the Autonomous Communities and nearly 35% with the Spanish State was sufficient (paragraph 63). This assessment implies that if approximately 90% of activities were carried out for the controlling entities, it would be more than sufficient to meet the condition.

Public Sector Directive 2014/24/EU

Article 12 of the 2014 Public Sector Directive includes a condition requiring more than 80% of activities to be performed for the controlling authority or authorities.

The meaning of “contract” under the directives

The directives apply only when there is a procedure for awarding a “contract”. The CJ indicated that if *Tragsa* had no choice, to either accept the work or set the price for this work, the directives would not apply because in that case a “contract” would not exist (paragraph 54).

Decision (paraphrased):

The CJ held that the national legal provisions governing *Tragsa*, which incorporated the *Teckal* conditions, were not contrary to EU public procurement directives.

Other issues

Application of Article 86 of the Treaty to the participation of in-house entities in public procurement markets

It was claimed that the regime in this case contravened article 86 (1) of the Treaty (currently article 106 of TFEU). This article prohibits Member States from enacting or maintaining in force any measure that is contrary to the Treaty related to public undertakings and undertakings with special or exclusive rights. This case raised the important question of whether the award of contracts without competition to in-house entities violated that provision. However, the CJ did not consider the question, which it found to be inadmissible for technical reasons.

C-324/07 Coditel Brabant

Coditel Brabant v Commune d’Uccle and Région de Bruxelles – Capitale

Judgment dated 13 November 2008, Opinion of the Advocate General dated 4 June 2008

Reference for a preliminary ruling

This case is of particular relevance to the following topic:

“In-house” procurement

Key sections of the judgment for the purposes of this topic:

Legal context – Belgian law	paragraphs 3-7
Facts	paragraphs 8-21
Questions referred to CJEU	paragraph 22
Analysis and judgment	paragraphs 23-54

References to paragraphs below (in parentheses) are to paragraphs of the judgment.

Summary of facts (paragraphs 8-21)

For the 30 years prior to 1999, the *Municipality of Uccle* (hereafter referred to as “*Uccle*”) in Belgium had authorised the company *Coditel* to install and operate a cable television network in the territory of Uccle. In 1999 *Uccle* decided to purchase the network, with effect as from 1 January 2000. *Uccle* launched a call for tenders, with a view to granting the right to operate the network to a concessionaire. Four companies, including *Coditel*, submitted tenders.

However, *Uccle* then decided against awarding a concession for the operation of its cable television network. It opted instead to sell the network. A notice advertising the sale was published in the Belgian official journal. Five companies, including *Coditel*, submitted purchase bids. In addition, *Brutélé*, an inter-municipal co-operative society, submitted to *Uccle* an offer of affiliation as an associate member instead of a purchase bid.

Uccle found four of the five bids inadmissible. The only admissible bid, submitted by *Coditel*, was too low. *Uccle* decided not to sell the municipal cable television network but rather to become a member of *Brutélé*, entrusting this co-operative society with the management of its cable television network. *Coditel* challenged that decision.

Coditel claimed that *Uccle* should have compared the benefits of joining *Brutélé* with the benefits of awarding a concession. *Coditel* also claimed that entrusting the management of the network to *Brutélé* without undertaking such comparative research violated the principles of non-discrimination and transparency under the EC Treaty. *Uccle* argued that the Treaty did not apply, as the award was an “in-house” *Teckal*-type arrangement, which was outside the Treaty.

The national review body examining *Coditel’s* appeal decided to stay the procedure and referred three questions to the CJ. These questions concerned the interpretation of EU rules on application of the “in-house” doctrine.

Belgian law (paragraphs 3-7): Law of 22 December 1986 on inter-municipal co-operatives (*Loi relative aux intercommunales*)

Judgment (paragraphs 23-54)

Application of the directives and the Treaty to contracts awarded to another public body

Two “Teckal” conditions

In its earlier decision C-107/98 *Teckal*, the CJ had ruled that in principle the procurement directives applied to contracts awarded by a public body to a separate legal person. However, according to the CJ this rule does not apply if two conditions are met:

1. The contracting authority exercises over the party awarded the agreement “a control which is similar to that which it exercises over its own departments”. This control requires a power of decisive influence over both strategic objectives and significant decisions of the body awarded the contract (the “control” condition).
2. The party awarded the contract carries out “the essential part” of its activities for the controlling entity (the “essential activity” condition).

When both of those conditions are met, the agreement between the parties is considered to be an “in-house” administrative arrangement. It is not a contract with an external provider, to which the directives apply.

The referring court considered that in this case the second *Teckal* condition, the “essential activity” condition, was met. It sought the CJ’s opinion on the first *Teckal* condition, the “control” condition.

The *Teckal* control condition: The CJ concluded that, subject to verification of the facts by the national court, the *Teckal* control condition was met. The CJ considered that the fact that the contracting authority held, either alone or together with other public authorities, all of the share capital in an entity tended to indicate “generally, but not conclusively” that the control condition was satisfied (paragraph 31).

The CJ then considered it relevant to examine both i) the composition of the decision-making bodies of *Brutélé*, and ii) the extent of the powers of its governing council.

With regard to the first element, the CJ noted that the governing council consisted of representatives of the affiliated municipalities, who had been appointed by the general assembly of *Brutélé*. The representatives of the general assembly itself had been appointed by all of the municipal councils from among the municipal councillors, mayors and aldermen. The CJ considered that the fact that *Brutélé*’s decision-making bodies were composed of representatives of the affiliated public bodies showed that they were under the control of those public bodies. Those public bodies were thus able to exercise a decisive influence over *Brutélé*’s strategic objectives and significant decisions (paragraph 34), as required by the *Teckal* control condition.

The CJ then considered whether the very wide powers enjoyed by the council were nevertheless such that *Brutélé* had become market-oriented. These powers included the power to fix the charges for the service provided. The CJ considered whether these wide powers were sufficient to render the control tenuous and thereby indicate that the control condition was not met.

The CJ concluded that this was not the case. In this respect, it noted that *Brutélé* took a particular legal form under Belgian law. This legal form, an inter-municipal co-operative society, was not allowed to have a commercial character. Combined with its specific statutes, the form required *Brutélé* to act solely in the interests of its affiliated entities (paragraphs 37-38).

Various sector and sub-sector boards of *Brutélé* were also concerned with the activities of a limited number of municipalities. The council could delegate its powers relating to the activities in question

to those boards. The CJ noted that the considerations concerning compliance with the “control” condition were “all the more applicable” where decisions had been delegated in this way. This was the case because the control exercised was even stricter than when powers were exercised by general decision-making bodies (paragraph 40). However, the CJ did not regard the existence of such delegation arrangements as essential for the “control” condition to be met.

Control performed jointly by a number of public authorities: The CJ also confirmed that the control test might be satisfied when more than one entity exercised control jointly over the service provider (paragraph 50). The CJ recognised that while the control exercised by the awarding authority had to be similar to the control that it exercised over its own departments, it did not need to be identical in every respect. It was possible that the control could be exercised collectively rather than individually (paragraph 46). The CJ also stated that the decision-making procedure for exercising that control was “of no importance” (paragraph 51). It stated specifically that the fact that decisions of the body exercising control were made by a majority did not preclude the control condition from being satisfied (paragraphs 51 and 54).

The CJ stated that its conclusion had not been affected by its ruling in C-231/03 *Coname* that a share interest of 0.97% was too small for an authority to exercise control over a provider. The CJ stated that it had not, in that case, addressed the possibility of joint control. In C-295/05 *Asemfo*, a smaller share of 0.25% had been recognised as sufficient in certain cases (paragraph 53).

Decision (paraphrased)

1. A public authority may award, without competition, a public service concession to an inter-municipal co-operative society of which all of the members are public authorities. Such an award is permitted where both of the *Teckal* conditions are satisfied and where the award is not in breach of EU rules.
2. The *Teckal* control condition can be satisfied if decisions are taken by bodies created in accordance with the statutes of that society, which is composed of representatives of the affiliated public authorities.
3. The authorities participating in the inter-municipal co-operative society may satisfy jointly the *Teckal* control condition, with decisions being taken by a majority.

C-196/08 Acoset

Acoset Conferenza Sindaci e Presidenza Prov. Reg. ATO Indrico Ragusa

Judgment dated 15 October 2009, Opinion of the Advocate General dated 2 June 2009

Reference for a preliminary ruling

This case is of particular relevance to the following topic:

“In-house” procurement –*Teckal*, selection of a private partner, and award of a contract to a public-private company

Note: Arrangements where a public-private company is set up to provide a service, involving a private partner that will both invest in the company and provide the service, are often referred to as “institutionalised public-private partnerships” (IPPPs). (See the *Commission’s Interpretative Communication on the application of Community Law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships*).

Key sections of the judgment for the purposes of this topic:

Legal context – European Union law	paragraphs 3-14
Legal context – Italian law	paragraph 15
Facts	paragraphs 16-27
Question referred to CJEU	paragraph 28
Analysis and judgment	paragraphs 29-63

References to paragraphs below (in parentheses) are to paragraphs of the judgment.

Summary of facts (paragraphs 16-27)

The proceedings in Italy arose out of an arrangement for service provision made by *ATO*, which was a body established by various public authorities in the Italian province of Ragusa. It was responsible for the province’s water service. *ATO* had published a notice in the *Official Journal of the European Union (OJEU)* for the recruitment of a partner that would become a minority shareholder in a new company that was to be mainly publicly owned. The new company was to be entrusted for a period of three years with the operation of i) an integrated water service, and ii) work relating to the exclusive management of the service. An Italian review body referred a question to the CJ concerning the application of EU law to such arrangements.

EU law (paragraphs 3-14)

Articles 43, 49 and 86 of the EC Treaty (currently articles 49, 56 and 106 of the Treaty on the Functioning of the European Union): right of establishment, freedom to provide services, and rules applicable to undertakings; articles 1, 3, 7 and 21 of Directive 2004/18/EC and articles 1, 4, 9 and 18 of Directive 2004/17/EC: scope of application, definition of services contracts, definition of services concessions, exemption of services concessions

Italian law (paragraph 15)

Article 113 (5) of Legislative Decree No. 267 laying down the consolidated text of the laws on the organisation of local authorities:

“The service contract [for the provision of local public services by a local authority] shall be awarded in accordance with the rules of the sector and in compliance with the legislation of the European Union, entitlement to provide the service being granted to:

(a) companies with share capital selected by means of public and open tendering procedures;

(b) companies with share capital with mixed public and private ownership in which the private partner has been selected by means of public and open tendering procedures that have ensured compliance with domestic and Community legislation on competition, in accordance with the guidelines issued by the competent authorities in specific measures or circulars;

(c) companies with share capital belonging entirely to the public sector, on condition that the public authority or authorities holding the share capital exercise over the company control comparable to that exercised over their own departments and that the company carries out the essential part of its activities with the controlling public authority or authorities.”

Judgment (paragraphs 22-63)

The CJ proceeded on the assumption that the arrangement was a services concession. It therefore was subject to only the principles of the Treaty.

General principle of the Treaty

The CJ reiterated the general principle that under the Treaty a contract could not be awarded to a body in which a private undertaking held shares without a transparent procedure. Referring to C-26/03 *Stadt Halle*, the CJ confirmed that, in principle, the award of contracts to separate legal persons was covered by EU law. The *Teckal* Doctrine does not apply where a private person has a shareholding in the company that is awarded the contract (paragraph 56 of the judgment).

Single versus double procedure

The CJ concluded, however, that an award of contract to a public-private company was permitted where the private partner in the company had itself been selected through a suitable tendering procedure. If that is the case, it is not required to undertake two separate competitive procedures: i) one to select the shareholder for the company to which the authority wishes to entrust the services, and then ii) a second procedure to award the management of those services. The contracting authority can hold a single, transparent competition to select a private partner that will both take a shareholding in a public-private company and perform work for that company (paragraph 59).

In the opinion of the CJ, it would be impractical and excessively formalistic to require the use of a double procedure, i.e. two separate competitive procedures (paragraph 58).

What are the criteria for selecting the private partner?

The CJ also stated that the criteria used to select the private partner should not be limited to the capital contribution of the partner. The criteria should be concerned first of all with the partner's technical capacity to provide the service and with the economic and other advantages that its tender brings to the arrangement (paragraph 59). As the selection of the public-private company for the

concession is an “indirect” result of the first procedure to select the private partner for the company, a second procedure is not needed (paragraph 60).

The CJ also stated that the company had to “retain the same corporate purpose” throughout the duration of the concession. If there were any material amendment to the contract, then it would be necessary to launch a new competitive tendering procedure (paragraph 62).

Impact of the ruling on contracts covered by the procurement directives

This case concerned the award of a contract covered only by the Treaty and not by the directives. However, the principle that a single tendering procedure can be used to select a private partner to both take a share in the company and undertake work for the company seems to be equally applicable to contracts covered by either the Directive or the Utilities Directive.

Decision (paraphrased)

The direct award of a public service to a semi-public company formed specifically for the purposes of providing that service and possessing a single corporate purpose is allowed under the Treaty (currently articles 49, 56 and 106 of the TFEU) if the following conditions are met:

- The private participant in the company is selected by means of a public and open procedure, following verification of the financial, technical, operational and managerial requirements that are specific to the service to be provided.
- The tendering procedure in question is compatible with the principles of transparency, equal treatment and competition.

Concessions Directive 2014/23/EU

The new Concessions Directive regulates the award of services and works concessions above the financial threshold of EUR 5 186 000.

C-159/11 Ordine degli Ingegneri della Provincia di Lecce and Others

Azienda Sanitaria Locale di Lecce, Università del Salento v Ordine degli Ingegneri della Provincia di Lecce

Judgment dated 19 December 2012, Opinion of the Advocate General dated 23 May 2012

Reference for a preliminary ruling

This case is of particular relevance to the following topic:

“In-house” procurement – co-operation between public authorities

Key sections of the judgment for the purposes of this topic:

Legal context – European Union law	paragraphs 3-9
Legal context – Italian law	paragraphs 10-11
Facts	paragraphs 12-20
Question referred to CJEU	paragraph 21
Analysis and judgment	paragraphs 22-40

References to paragraphs below (in parentheses) are to paragraphs of the judgment.

Summary of facts (paragraphs 12-21)

The proceedings in Italy concerned a consultancy arrangement between *Azienda Sanitaria Locale di Lecce*, a local health authority, and the *University of Salento* (hereafter referred to as “*the University*”). Under this consultancy arrangement, the *University* was to conduct a study to assess the vulnerability to earthquakes of hospital buildings in the health authority’s area. The payments made were intended to cover the *University*’s costs. The consultancy arrangement was entered into in accordance with national legislation permitting an award without competition.

The arrangement was challenged in the Italian courts as being in breach of EU procurement rules. The referring court asked the CJ whether the Directive precluded national legislation that permitted an arrangement of this type between two contracting authorities without holding a competition, as required by the Directive.

EU law (paragraphs 3-9)

Directive 2004/18/EC: Recital 2 in the preamble; article 1 paragraph 2 a) and d), paragraphs 8-9 – definition of “public contracts” and “public service contracts”; article 2 – principles of awarding public contracts; article 7 – thresholds of application of the Directive

Italian law (paragraphs 10-11)

Article 15 (1) of Law No. 241, introducing new rules governing administrative procedure and relating to the right of access to administrative documents, stipulates that public administrative authorities

may at any time enter into agreements among themselves with a view to laying down rules to govern co-operation in activities of common interest.

Judgment (paragraphs 22-40)

Meaning of pecuniary interest in the context of the definition of a public contract: The arrangement between the two bodies merely provided for the reimbursement to the *University* of the costs of the work achieved. The CJ stated briefly that an arrangement did not fall outside the concept of a public contract merely because the remuneration paid was limited to reimbursement of the costs incurred to provide the agreed service (paragraph 29 of the judgment).

Obligation to extend an invitation to tender in relation to arrangements between public bodies: The CJ confirmed that two types of contracts concluded by a public body did not fall within the scope of the Directive. The first type is a contract falling under the *Teckal* Doctrine. The CJ outlined the two *Teckal* conditions. The CJ concluded that, in this case, the control condition was not met (paragraph 33). The second type of contract, excluded from the scope of EU procurement directives, falls under the *Hamburg Waste* Doctrine. This type of contract concerns arrangements to establish co-operation between public entities, with the aim of ensuring that a public task that they all have to perform is carried out (paragraph 34).

Conditions for co-operation between public bodies: The CJ stated that this kind of co-operation required that three further conditions be met (paragraph 35). These conditions were cumulative, i.e. all three conditions had to be satisfied:

- The contracts are concluded exclusively by public entities without the participation of a private party.
- No private provider of services is placed in a position of advantage in relation to its competitors.
- Implementation of the co-operation is governed solely by considerations and requirements relating to the pursuit of public interest objectives.

In this case the CJ noted that the arrangement permitted the use of external collaborators. The CJ considered that this possibility of involving private service providers could create an advantage of these service providers over their competitors. However, whether or not this involvement constituted an advantage had to be determined by the national review body (paragraph 38).

The CJ indicated that the task entrusted to the *University* corresponded in “a significant or even major part” to activities usually carried out by architects or engineers. This task did not constitute academic research, although it was based on it. For this reason, the CJ did not consider that the task to be carried out under the arrangement was one that both parties to the arrangement had to perform (paragraph 37)

Application of the Treaty on the Functioning of the European Union (TFEU)

The CJ clarified that its view concerning public-public co-operation was relevant not only for contracts covered by the procurement directives but also for smaller-value contracts below the EU financial thresholds that are subject to the TFEU only. In the present case, the contract was close to the threshold for application of the Directive, but it was unclear whether the contract was marginally above or marginally below that threshold. The CJ considered that clarification on this point made no difference in determining whether or not an invitation to tender was required (paragraph 24 of the judgment).

Decision (paraphrased)

European Union public procurement law allows the conclusion of a contract that establishes co-operation between public entities, without an invitation to tender. Such a contract is permitted if the following three conditions are cumulatively satisfied:

- The purpose of the contract is to ensure the completion of a public task that all of those entities have to perform.

- The contract is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest.
- The contract does not place a private provider of services in a position of advantage in relation to its competitors.

Other issues raised in the case:

Two other issues were raised but not addressed by the CJ:

- Time at which the value of a contract is to be determined for threshold purposes when no competition is held;
- Time at which it is determined which directive, or version of a directive, is to apply when no competition is held.

Chapter 5 Selecting economic operators – Grounds for exclusion

Context

The purpose of selecting economic operators is to identify those that will be eligible to perform the contract.

The selection of economic operators generally comprises two distinct stages:

1. The contracting authority establishes whether there are grounds for excluding an economic operator from participating in a contract award procedure.
2. The contracting authority considers whether the economic operators that have not been excluded meet the minimum requirements for selection.

The key cases relating to the second stage of selection are covered below in chapter 6, “Selecting economic operators – Qualification”.

In two-stage procedures¹⁶, economic operators that have been selected will then be invited to submit tenders, negotiate or participate in dialogue. In the case of the open procedure, only tenders submitted by selected economic operators will be evaluated.

Mandatory grounds for exclusion: A contracting authority is obliged to exclude certain economic operators from participation in a contract award procedure. Those excluded are economic operators that have been convicted by final judgment for one or more of the criminal activities listed in article 45(1) of the Directive. The activities listed include participation in a criminal organisation, corruption, fraud and money laundering. National legislation must not narrow down the Directive’s list.

Optional grounds for exclusion: A contracting authority is permitted, but not obliged, to exclude from participation in a contract award procedure those economic operators that are covered by situations listed in article 45(2) of the Directive. These situations relate to matters such as bankruptcy, offences relating to professional conduct, grave professional misconduct, non-payment of tax and social security contributions, and serious misrepresentation. National legislation may decide to make some or all of these grounds mandatory grounds for exclusion.

EU Member States have to decide how to incorporate these grounds into their national legislation. They also have the possibility of establishing additional grounds for exclusion, except for exclusion related to professional qualities. When Member States establish additional grounds for exclusion, the measures must be proportional to the scope and nature of the contract. National laws on exclusion have been the object of CJ case law, which is discussed in further detail below.

Evidence that an economic operator does not fall under the mandatory or optional grounds for exclusion: A contracting authority must indicate in the contract notice the grounds for mandatory and/or optional exclusion that will be applied. It must also indicate the information required from economic operators to prove that they do not fall under the grounds justifying exclusion.

A contracting authority is obliged to accept as sufficient evidence the type of documents listed in article 45(3) of the Directive. In some cases related to optional grounds for exclusion, the contracting authority may determine the acceptable types of evidence.

¹⁶ Two-stage procedures are the restricted procedure, the negotiated procedure with prior publication of a contract notice, and the competitive dialogue procedure.

For further information, see:

Sigma Public Procurement Brief 7, “Selecting Economic Operators” (January 2011) – http://www.sigmaweb.org/publications/Economic_Operators_Public_Procurement_2011.pdf

Sigma Public Procurement Brief 24, “Automatic Exclusion Lists in Public Procurement” (2013) – http://www.sigmaweb.org/publications/Exclusion_Lists_Public_Procurement_2013.pdf

Sigma Public Procurement Training Manual, Module E3, “Selection (Qualification) of Candidates” – <http://www.sigmaweb.org/publications/46179317.pdf>

Key learning points

1. It is important for national legislation to make a clear distinction between grounds for exclusion and selection criteria:
 - Grounds for exclusion apply to economic operators, irrespective of the nature, size or subject matter of the contract.
 - Selection criteria should be related to the ability of the economic operator to perform the contract, and they should be related and proportionate to the subject matter of the contract.
2. If mandatory grounds for exclusion apply, the exclusion of the economic operator concerned is automatic, e.g. if an economic operator is convicted by final judgment for money laundering.
3. Grave professional misconduct as the reason to exclude must be proved by contracting authorities and assessed on a case-by case basis.

Automatic exclusion lists

The general principles of EU law and CJ case law indicate that the use of official, automatic exclusion lists is generally not permitted under EU law.

See, for example, *C-213/07 Michaniki*, *C-538/07 Assitur*, *C-376/08 Serrantoni and Consorzio stabile edili* and *C-465/11 Forposta and ABC Direct Contact*.

For further discussion on this issue, see Sigma Public Procurement Brief 24, “Automatic Exclusion Lists in Public Procurement” (2013) – http://www.sigmaweb.org/publications/Exclusion_Lists_Public_Procurement_2013.pdf

Summary of CJEU approach and decisions

Exclusion on the basis of eligibility requirements relating to the structure or legal form of an economic operator

The CJ considered the specific wording of national legislation that excluded certain types of economic operators from tendering for public contracts. The decision to exclude in these cases was not based on the mandatory or optional grounds for exclusion listed in the Directive. The reason for exclusion was the structure or legal form of the economic operator.

In *C-357/06 Frigerio Luigi & C.*, the CJ ruled that the Services Directive did not permit national legislation that limited participation to a certain type of company with share capital. It also confirmed that groups of service providers could not be required to assume a specific legal form in order to submit a tender. In *C-305/08 CoNISMa*, the CJ confirmed the principle that any person or entity that believes it is capable of carrying out the contract is eligible to submit a tender. The CJ's view was that the Directive did not permit national legislation that prevented groups of universities and ministries from tendering.

Exclusion on the grounds listed in the directives

The CJ has considered, over a number of years, whether the optional grounds for exclusion listed in the Directives were exhaustive or whether the list might be expanded. It has also looked at the way in which Member States implement the grounds for exclusion in practice. The CJ has concluded that the principles of proportionality, transparency and equal treatment applied.

The CJ has ruled that the grounds listed in the directives (now in article 45(2) of the Directive – see context section above for further detail) were exhaustive and did not include grounds for exclusion related to professional qualities. Member States or contracting authorities are not permitted to add to the list of grounds for exclusion any grounds based on professional qualities. For example, in *C-31/87 Beentjes* the CJ rejected the possibility of excluding a candidate who was considered by a purchaser to be unable to meet workforce-related contract conditions. See below *C-213/07 Michaniki* for further discussion.

Additional grounds for exclusion

The CJ has clarified that the grounds listed in the directives are exhaustive only in relation to grounds for exclusion related to professional qualities. Member States or contracting authorities are therefore entitled to use additional exclusionary measures designed to ensure observance of the principles of equal treatment and transparency. The principle of proportionality means that such measures must not go beyond what is necessary and justified by the scope and nature of the contract.

For example, in *C-213/07 Michaniki* the CJ commented that Community law did not preclude the adoption of national measures aimed at avoiding the occurrence of practices that could jeopardise transparency or distort competition.

The measures in *C-213/07 Michaniki* concerned the exclusion of tenderers that were also involved in the media sector. Exclusion on those grounds was driven by concerns that there was a risk of interference by the powerful media in contract award procedures. There were also concerns relating to fraud and corruption. As measures designed to ensure observance of the principles of equal treatment and transparency, these types of measures could be permissible grounds for exclusion. However, additional measures are subject to the very important caveat that the measures must be proportional and must not go beyond what is necessary to achieve the objective. In *C-213/07 Michaniki* the measures were considered to be disproportionate and therefore unlawful.

The CJ has ruled in a number of other cases that additional grounds for exclusion applied by

Member States were disproportionate and did go beyond what was necessary to achieve the objective (see below, C-538/07 *Assitur* and C-376/08 *Serrantoni and Consorzio stabile edili*). In C-465/11 *Forposta and ABC Direct Contact*, the CJ concluded that a national law requiring the automatic exclusion of contractors for prior poor performance of public contracts was in breach of the proportionality principle. The grounds for exclusion were “grave professional misconduct”.

The principles of transparency and equal treatment were confirmed in relation to exclusion on the grounds of failure to pay taxes and social security contributions. These grounds are among the optional grounds listed in the Directive (see below, C-226/04 *La Cascina and Others*).

In C-74/09 *Bâtiments and Ponts Construction and WISAG Produktionservice*, the CJ considered the evidence required to demonstrate payment of tax and social security contributions. It considered, in particular, whether it was permitted to oblige foreign tenderers to be registered in the Member State in which the contracting authority was based. The CJ concluded that this requirement was permissible, subject to meeting specific conditions linked to equal treatment. These conditions are discussed in the case summary section below.

Case law

Groups of economic operators – eligibility to participate

C-357/06 *Frigerio Luigi & C.*

Frigerio Luigi & C. Snc v Comune di Triuggio

Judgment dated 18 December 2007, no Opinion of the Advocate General

Reference for a preliminary ruling

This case concerned Italian national rules limiting the types of economic operators that were eligible to participate in tendering for specific types of contracts. The effect of the national rules was to automatically exclude certain types of economic operators from participating in some tenders.

The *Comune di Triuggio* (the contracting authority) proposed to award a five-year contract for environmental hygiene services to a company in which it intended to take a controlling interest. The proposed award was made without a competitive tendering procedure. Another company, *Frigerio Luigi (FL)*, had previously provided these services for six months through a temporary joint venture partnership arrangement.

FL challenged the proposed contract award. The contracting authority argued that *FL*'s claim was inadmissible, as under the relevant Italian law a contracting authority could only award the contract concerned to certain types of companies with share capital. *FL* did not meet those eligibility requirements.

The lawfulness of the Italian national rules was considered in the light of articles 26(1) and 26(2) of the Services Directive. These provisions are now included in articles 4(1) and 4(2) of the Directive. In its judgment, the CJ referred to the underlying intentions of the Services Directive, which were to promote the internal market and, in that context, ensure the free movement of goods, persons, services and capital, and to eliminate practices that restricted competition.

Article 26(1) of the Services Directive permits tenders to be submitted by groups of service providers. That article stipulates that “these groups may not be required to assume a specific legal form in order to submit the tender...”. Article 26(2) further specifies that candidates or tenderers that are entitled to carry out the relevant service activity in the Member State in which they are established “shall not

be rejected solely on the grounds that, under the law of the member state in which the contract is awarded, they would have been required to be either natural or legal persons”.

The CJ ruled that article 26(2) precluded national legislation of the type that was under consideration in this case. Such legislation excluded economic operators from a tender process on the grounds that they did not have a particular legal form. It also confirmed that article 26(1) of the Services Directive meant that groups of service providers could not be required to assume a specific legal form in order to submit a tender.

Public Sector Directive 2014/24/EU

Article 19 of the 2014 Public Sector Directive contains provisions similar to those in article 26 of the Services Directive and article 4 of the Directive:

Article 19(1): “Economic operators that, under the law of the Member State in which they are established are entitled to provide the relevant service, shall not be restricted solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either legal or natural persons.”

C-305/08 *CoNISMa*

Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa) v Regione Marche

Judgment dated 23 December 2009, Opinion of the Advocate General dated 3 September 2009

Reference for a preliminary ruling

This case arose from the decision of an Italian contracting authority to exclude a group of non-profit bodies from tendering for a contract.

The case concerned a call for tenders by the *Regione Marche* for a contract to provide marine and seismic data services and related activities. *CoNISMa* was a group of 14 universities and government ministries that wished to submit a tender. *Regione Marche* was of the view that Italian legislation excluded this type of body from those eligible to tender. It therefore excluded *CoNISMa* from the tender process. *CoNISMa* appealed against this decision.

The CJ held that article 45 of the Directive did not prevent a group (consortium) of this type from participating in a procurement process. It stated that this eligibility to participate was valid even when the group (consortium) was predominantly non-profit making and did not have an organised business structure or a regular presence on the market. The CJ concluded that any person or entity that believed it was capable of carrying out the contract was eligible to submit a tender (paragraph 42). The CJ commented that “the Community legislature did not intend to restrict the concept of ‘economic operator which offers its service on the market’ solely to operators which are structured as a business or to impose specific conditions which can restrict access to tendering procedures, from the outset, on the basis of the legal form and internal organisation of the economic operator” (paragraph 35).

The CJ also held that the Directive precluded the interpretation of national legislation such as the one under consideration in this case. The national legislation had been interpreted as prohibiting from tendering such entities as universities and research institutes, which were primarily non-profit making.

Public Sector Directive 2014/24/EU

Article 19 of the 2014 Public Sector Directive confirms this principle:

Article 19(2) “Groups of economic operators, including temporary associations, may participate in procurement procedures. They shall not be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate.”

Comment

Five cases are discussed below. In the first three cases (C-213/07 *Michaniki*, C-538/07 *Assitur and C-376/08 Serrantoni and Consorzio stabile edili*), the CJ considered the issue of exclusion where there were no detailed EU provisions that were relevant. In such cases, consideration of the general principles is of key importance. In the last two cases (C-465/11 *Forposta and ABC Direct Contact* and C-74/09 *Bâtiments and Ponts and WISAG Produktionservice*), the general principles were applied in situations where there was relevant EU legislation on grounds for exclusion, but Member States had discretion as to how they implemented the Directive in detail.

Exhaustive list of grounds for exclusion related to professional qualities and additional grounds for exclusion subject to the proportionality principle

C-213/ 07 *Michaniki*

Michaniki v Ethniko Simvoulío Raiditileorasis

Judgment dated 16 December 2008, Opinion of the Advocate General dated 8 October 2008

Reference for a preliminary ruling

This case concerned a Greek law that prohibited the award of public contracts to media undertakings or to certain companies or individuals linked to or working for media undertakings. The effect of the national law was to automatically exclude certain types of economic operators from participating in tenders for public contracts.

Michaniki was an unsuccessful tenderer in a competitive procurement process to award a works contract for the construction of the embankment and technical infrastructure for a new high-speed railway line. The Works Directive applied to the award procedure. The contracting authority made the decision to award the contract to *Company S*. In order to enter into the contract with *Company S*, the contracting authority required a formal certificate issued by an official body. The certificate confirmed that *Company S* complied with the law related to media undertakings. *Michaniki*, an unsuccessful tenderer, demanded the annulment of the certificate related to *Company S*.

Exhaustive list of grounds for exclusion related to professional qualities: Article 24(1) of the Works Directive lists seven optional grounds for excluding economic operators from participation relating to “professional qualities”. These qualities cover matters such as professional honesty, solvency, and economic and financial capacity.

Grounds for exclusion related to professional qualities

Works Directive – Article 24 (1)

“Any contractor may be excluded from participation in the contract who:

- (a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;
- (b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;
- (c) has been convicted of an offence concerning his professional conduct by a judgment which has the force of *res judicata*;
- (d) has been guilty of grave professional misconduct proved by any means which the contracting authorities can justify;
- (e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;
- (f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or those of the country of the contracting authority;
- (g) is guilty of serious misrepresentation in supplying the information required under this Chapter.”

Public Sector Directive 2014/24/EU

Grounds for exclusion are set out in article 57 of the 2014 Public Sector Directive. See note at the end of this section for further details.

In relation to article 24 of the Works Directive, the CJ pointed out that the approach of the legislator was “to adopt only grounds of exclusion based on the objective finding of facts or conduct specific to the contractor concerned, such as to cast discredit on his professional reputation or call into question his economic or financial ability to complete the works covered by the public contract for which he is tendering” (paragraph 42).

The CJ ruled that the list of grounds for exclusion for reasons relating to an economic operator’s professional qualities was an exhaustive list. Member States or contracting authorities were not permitted to add to the list of grounds for exclusion based on professional qualities.

According to the CJ, the exhaustive nature of the list of grounds “does not preclude the option for Member States to maintain or adopt substantive rules designed, in particular, to ensure...observance of the principle of equal treatment...and transparency...in any procedure for the award of a public contract” (paragraph 43).

The CJ went on to explain that those principles meant that economic operators had to be in a position of equality, both when preparing their tenders and when those tenders were assessed. Those principles constitute the basis of the procurement directive, which contracting authorities have

the duty to observe. Contracting authorities must also ensure that there is no discrimination between economic operators (paragraphs 45 and 46).

Additional grounds for exclusion subject to the proportionality principle: The CJ concluded that a Member State was entitled to provide for additional exclusionary measures designed to ensure observance of the principles of equal treatment and transparency. Such additional measures are permitted when they do not relate to professional qualities. The CJ confirmed that Member States were allowed a certain amount of discretion when adopting those measures. However, in accordance with the principle of proportionality, such measures must not go beyond what is necessary to achieve the objective (paragraphs 47, 48 and 55-57).

In C-213/07 *Michaniki*, Greece took the view that there was a risk that media undertakings would unlawfully influence the contract award decision for a public contract, for example by using mass information campaigns. The CJ confirmed that Community law did not preclude the application of national law that was designed to avoid the risk of practices that might jeopardise transparency and distort competition. However, the Greek law in question had the consequence of automatically excluding economic operators because of their media links. These economic operators had no way of showing that there was no real risk of being faced with the danger that the measure was designed to avoid. The CJ ruled that the automatic and absolute nature of the prohibition was disproportionate and was not permitted under EU law (paragraphs 58-68).

C-538/07 *Assitur*

Assitur v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano

Judgment dated 19 May 2009, Opinion of the Advocate General dated 10 February 2009

Reference for a preliminary ruling

The CJ considered again this issue of additional grounds for exclusion in relation to an Italian law. This law excluded tenderers from participating in the same tender procedure where there were particular relationships of control and affiliation. The effect of the national law was to automatically exclude certain linked or affiliated economic operators from participating in tenders for public contracts.

This case concerned the award of a contract for courier services. The Services Directive applied at the time that the procedure was conducted. The contracting authority invited three tenders to participate in the tender process: *SDA*, *Poste Italiane* and *Assitur*. *Assitur* asked the contracting authority to exclude *SDA* and *Poste Italiane* from the tender process because of links between the two companies. The contracting authority investigated the alleged links. It rejected *Assitur's* request and decided to award the contract to *SDA*, which had submitted the lowest bid. *Assitur* brought an action to annul the contract award decision.

The CJ took the approach that it had taken in the C-213/07 *Michaniki* case. It confirmed that the list of seven grounds for exclusion related to professional qualities was an exhaustive list. However, this list did not prevent Member States from having substantive rules designed to ensure transparency and the equal treatment of tenderers. According to the CJ, it was clear that the national law at issue was intended to i) prevent any collusion between participants in the procedure for the award of contracts, and ii) safeguard equal treatment and transparency. The national legislation must nevertheless be examined with regard to the principle of proportionality (paragraphs 19-24).

In considering the principle of proportionality, the CJ also referred to the need to ensure the widest possible participation of tenderers. The CJ ruled that the national legislation in question went beyond what was necessary to achieve the objective of ensuring equal treatment and transparency

(paragraph 30). The national law systematically excluded affiliated tenderers. This exclusion occurred without allowing tenderers the opportunity to demonstrate that there was no real risk of jeopardising transparency and distorting competition. The national legislation was incompatible with EU law.

C-376/08 *Serrantoni*

Serrantoni Srl, Consorzio stabile edili Srl v Comune di Milano

Judgment dated 23 December 2009, no Opinion of the Advocate General

Reference for a preliminary ruling

The CJ considered this issue further in relation to another Italian law. The law in question prohibited members of a permanent consortium¹⁷ and individual consortium members from participating in the same tendering procedure. The effect of the national law was to automatically exclude permanent consortia and their members from participating in certain award procedures.

This case arose from a call for tenders for a works contract related to district registry offices. The value of the contract was below the EU financial threshold for works contracts, which meant that the detailed provisions of the Directive did not apply. The CJ therefore limited its consideration to the application of basic principles.

The Italian law at issue treated permanent consortia differently than other joint working arrangements between economic operators. The CJ ruled that automatic exclusion applying to a single type of consortium did not constitute equal treatment. The CJ ruled that even if the exclusion were applied without distinction, a provision that required automatic exclusion would be incompatible with the principle of proportionality. The CJ was also of the view that a provision of this kind was likely to have a dissuasive effect on economic operators from other Member States. The provision could dissuade economic operators from establishing themselves in a particular Member State by setting up permanent consortia with national economic operators. This provision could therefore impede the freedom of establishment and the freedom to provide services. The national legislation was incompatible with EU law.

Optional grounds for exclusion and application in practice

In the case C-226/04 *La Cascina and Others*¹⁸, the CJ considered how the optional grounds for exclusion for non-payment of tax or social security contributions were applied in practice in Italy.

The CJ confirmed that Member States could choose not to apply the optional grounds for exclusion. Where they did choose to apply those grounds, they had discretion as to how the grounds were applied. The CJ acknowledged that practices might vary between Member States (paragraph 23).

In this case, the particular issue was the date by which taxes and social security contributions had to be paid. The CJ outlined a number of options as to the possible date. It confirmed that the period could be either fixed by national legislation or determined by the contracting authorities. From a practical perspective, a key finding of the CJ was that the principles of transparency and equal treatment required the [period] to “be determined with absolute certainty and made public”. This

¹⁷ According to Italian law, a permanent consortium is created when economic operators agree to jointly participate in public contracts. The agreement, valid for a period of not less than five years, establishes a joint undertaking.

¹⁸ Joint cases C-226/04 and C-228/04; the Services Directive applied to the procedure.

measure ensured that economic operators would know exactly what the procedural requirements were and that the same requirements applied to all (paragraph 32).

More recently, the CJ considered how other optional grounds for exclusion were applied in practice, this time in Poland. The case *C-465/11 Forposta and ABC Direct Contact*¹⁹ concerned the grounds for exclusion specified in article 45(2)(d) of the Directive, related to grave professional misconduct.

Article 45(2)(d) of the Directive

“Any economic operator may be excluded from participation in a contract where that economic operator:

...

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate...”

The CJ considered a Polish law that obliged contracting authorities to exclude economic operators that had poorly performed previous public contracts. The effect of the law was to automatically exclude certain poorly performing economic operators from participation in tenders for public contracts.

In its judgment, the CJ expressed its view on what constituted “professional misconduct” and “grave misconduct” in the context of article 45(2)(1) of the Directive. It concluded that the provisions in the Polish PPL exceeded the discretion available to EU Member States in implementing the grounds for exclusion set out in article 45(2) of the Directive. It also held that the automatic nature of the exclusion was in breach of the Directive, as it deprived the contracting authority of the power to assess, on a case-by-case basis, the seriousness of the alleged wrongful conduct.

A full transcript of *C-465/11 Forposta and ABC Direct Contact* and a more detailed analysis is included in this publication.

Note: The general principles of EU law and CJ case law indicate that the use of official, automatic exclusion lists is generally not permitted under EU law. For further discussion on this issue, see Sigma Public Procurement Brief 24, “Automatic Exclusion Lists in Public Procurement” (2013) – http://www.sigmaxweb.org/publications/Exclusion_Lists_Public_Procurement_2013.pdf

Public Sector Directive 2014/24/EU

Grounds for exclusion are set out in article 57 of the 2014 Public Sector Directive.

Article 57(4) lists the optional grounds for exclusion, which a Member State may make mandatory. This list now includes grounds relating to prior poor performance of a contract.

Article 57(4)(g)

“...where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other

¹⁹ C- 465/11 *Forposta SA, ABC Direct Contact sp. z o.o. v Poczta Polska*

comparable sanctions.”

Evidence of compliance

C-74/09 *Bâtiments et Ponts and WISAG Produktionservice*

Bâtiments et Ponts Construction and WISAG Produktionservice GmbH v Berlaymont 2000

Judgment dated 15 July 2010, Opinion of the Advocate General dated 15 April 2010

Reference for a preliminary ruling

In this case, the CJ considered whether the evidence required by a contracting authority from tenderers to demonstrate payment of tax and social security contributions was permitted under EU law.

This case arose from a long dispute over a contract awarded in 1995 for the renovation of the European Commission’s main office building (*Berlaymont*) in Brussels. The amended advertisement in the *Official Journal of the European Union (OJEU)* for the renovation works required evidence that tax and social security payments had been made. Belgian firms were required to be listed on the professional register in Belgium. Foreign firms were required to provide a copy of a certificate of application to the competent Belgian authority (a registration committee). The registration committee would then assess compliance, based on evidence submitted to it by the foreign firm. The *OJEU* advertisement stated:

“As regards the validity of the tender (at the time it is submitted), it will be sufficient for a copy of the application for registration to be attached to the tender. No decision to award the contract will be taken before the competent authority has ruled on the application.”

BPC, a Belgian company, and *WIG*, a German company, formed a consortium, *BPC-WIG*, for the purposes of submitting a tender. *BPC* was listed on the appropriate Belgian professional register. *WIG* submitted documents from the German authorities to demonstrate that it had paid tax and social security contributions. Neither *WIG* nor *BPC-WIG* submitted copies of the application for registration with the competent Belgian authority. In fact, they did not make those applications until after the closing date for the submission of tenders. Their registrations were not confirmed until after the date of the award of the contract.

The *BPC-WIG* consortium was unsuccessful in the tendering process. It appealed against that decision and claimed damages. The Belgian court held that the *BPC-WIG* consortium was ineligible to tender due to its failure to submit the required documents.

The CJ confirmed that the wording of the Works Directive²⁰ was clear: a contracting authority can exclude a tenderer that has not met the obligations in the Member State where the contracting authority is based. A separate check is also permitted (paragraph 48). It is lawful to require a tenderer to register in the Member State where the contracting authority is based, provided that the registration requirements do not i) complicate or delay the participation of the tenderer concerned, or ii) give rise to excessive administrative charges (paragraphs 42 and 49). In this case, the evidence required was limited to a copy of the certificate of application. The award decision was not going to be made until after the completion of registration. The CJ concluded that the ruling of the Belgian court was lawful.

²⁰ This case relates to article 24 of the Works Directive, now article 45(2) of Directive 2004/18/EC.

The CJ confirmed that it was also permitted to check that tax and social security payments had been made in the Member State where the tenderer was based. The Works Directive expressly states that contracting authorities must accept certificates of compliance from competent authorities in other Member States as conclusive evidence. The check is therefore to be limited to formal issues. Formal issues include ensuring that the submitted certificates from the tenderer's Member State are authentic or sufficiently recent (paragraphs 63-64).

This case relates to the grounds for exclusion for non-payment of taxes and social security contributions. The CJ was clear that its decision was of a wider application and that it applied to each of the grounds for exclusion listed in the Works Directive²¹. This decision is to be applied "provided that such an obligation does not hinder or delay the contractor's participation in the public contract or give rise to excessive administrative charges and provided that its sole objective is to check the professional qualities of the contractor concerned for the purposes of that provision" (paragraph 53).

Public Sector Directive 2014/24/EU

The 2014 Public Sector Directive contains expanded and revised provisions covering the grounds for exclusion. These provisions are set out in article 57.

Article 57 (1) includes new additional mandatory grounds for exclusion, including child labour and human trafficking offences and non-payment of tax and social security contributions.

Article 57(4) includes new additional optional grounds for exclusion, including collusive behaviour, conflicts of interest and "significant or persistent deficiencies" in the performance of public contracts.

Article 57(6) provides that in some cases a contracting authority will not be permitted to exclude an economic operator from a procurement process even though grounds for exclusion are recognised. This provision is applied when the economic operator can demonstrate that it is sufficiently reliable, despite the existence of relevant grounds for exclusion, and when it satisfies certain stringent conditions.

²¹ Article 24 of the Works Directive, now article 45(2) of the Directive

C-465/11 Forposta and ABC Direct Contact

Forposta SA, ABC Direct Contact sp. z o.o. v Poczta Polska

Judgment dated 13 December 2012, no Opinion of the Advocate General

Reference for a preliminary ruling

This case is of particular relevance to the following topic:

Selecting economic operators – optional grounds for exclusion

Key sections of the judgment for the purposes of this topic:

Legal context – European Union law	paragraphs 3-5
Legal context – Polish law	paragraph 6
Facts	paragraphs 7-14
Questions referred to CJEU	paragraph 15
Analysis and judgment	paragraphs 22-41

References to paragraphs below (in parentheses) are to paragraphs of the judgment.

Summary of facts (paragraphs 7-14)

In this case, the CJ considered a provision of the Polish Public Procurement Law (Polish PPL) requiring the automatic exclusion of candidates or bidders from a tender procedure. The provision related to exclusion on the grounds of grave professional misconduct in specified circumstances.

Poczta Polska (PP) is a company owned by the Polish Treasury that is active in the postal services sector. It is a contracting authority according to the meaning of the Utilities Directive. *PP* conducted an open procurement procedure for the award of a public contract, in lots, for the delivery of certain postal services.

PP selected the tenders submitted by *Forposta SA* and *ABC Direct Contract sp. z o.o (ABC)* as the most favourable compared to the other tender lots. *PP* then proposed contracts to *Forposta* and *ABC*. On the day of the deadline for conclusion of the contracts, *PP* cancelled the tender procedure on the grounds that *Forposta* and *ABC* were subject to compulsory exclusion from the procedure under article 24(1)(1a) of the Polish PPL.

EU law (paragraphs 3-5)

Article 45(2) of Directive 2004/18/EC – personal situation of the candidate or tenderer; article 53 of Directive 2004/17/EC – qualification and qualitative selection; and article 54 of Directive 2004/17/EC – criteria for qualitative selection

Polish law (paragraph 6)

Article 24(1)(1a) of the Polish PPL, which applies to both the public sector and the utilities sector, stipulates:

“The following shall be excluded from procedures for the award of public contracts:

(1a) economic operators with which the contracting authority concerned annulled, terminated, or renounced a public contract owing to circumstances for which the economic operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract’s value.”

Forposta and *ABC* appealed against the decision to cancel the tender procedure. They claimed that the provision in the Polish PPL was contrary to article 45(2)(d) of the Directive.

Directive 2004/18/EC

Article 45(2)(d)

“Any economic operator may be excluded from participation in a contract where that economic operator:

...

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate...”

The companies argued that the scope of the conditions laid down in the Polish PPL was much broader than the conditions laid down in EU law. They claimed that no grave professional misconduct had occurred in this case.

Judgment (paragraphs 22-41)

The CJ confirmed that the concepts of “professional”, “grave” and “misconduct” in article 45(2)(d) of the Directive could be “specified and explained” in national law, provided that the national law had regard for EU law (paragraph 26). The CJ then considered these concepts and the provisions of the Polish PPL in the light of EU law.

What is “professional misconduct”? The CJ confirmed that “professional misconduct” covered all misconduct that had an impact on the professional credibility of the economic operator. Professional misconduct was not limited to violations of ethical standards established by a professional disciplinary body. It was also not limited to a judgment that had the force of *res judicata*. The CJ referred to the requirement for the contracting authority to prove professional misconduct “by any demonstrable means”. The CJ held that the failure of an economic operator to abide by its contractual obligations could, in principle, be considered as professional misconduct (paragraphs 27-29).

What is “grave misconduct”? The CJ found that the concept of “grave misconduct” should normally be understood as conduct that had “a wrongful intent or negligence of a certain gravity”. It was of the view that incorrect, imprecise or defective performance of all or part of a contract could, potentially, demonstrate limited professional competence. However, such performance did not automatically amount to “grave misconduct” (paragraph 30).

Automatic exclusion not permitted: The CJ stated: “In order to find whether ‘grave misconduct’ exists, a specific and individual assessment of the economic operator concerned must, in principle, be carried out” (paragraph 31). It noted that the Polish PPL established parameters requiring a

contracting authority to automatically exclude an economic operator due to previous wrongful conduct. The CJ held that the Polish PPL deprived the contracting authority of the power to assess, on a case-by-case basis, the seriousness of the alleged wrongful conduct (paragraph 34).

Polish Public Procurement Law (Polish PPL): The CJ held that the concept in the Polish PPL of “circumstances for which the economic operator concerned is responsible” was very broad. It could extend to other situations besides the conduct denoting wrongful intent or grave negligence. The CJ concluded that the concept of “grave misconduct” could not be replaced by the concept in the Polish PPL of “circumstances for which the economic operator concerned is responsible” (paragraph 33).

The CJ decided that article 24(1)(1a) of the Polish PPL exceeded the discretion available to EU Member States in implementing the conditions for the grounds for exclusion set out in article 45(2) of the Directive (paragraph 40).

The grounds for exclusion in article 24(1)(1a) of the Polish PPL:

- extended beyond the scope of the exhaustive list;
- could not be justified on the grounds of protection of the public interest, legitimate interests of contracting authorities, or maintenance of fair competition between economic operators;
- were not permissible under the principles or other rules of EU public procurement law (paragraph 37).

Exhaustive list of grounds for exclusion relating to professional qualities: The CJ considered the list of grounds for exclusion relating to professional qualities in article 45(2) of the Directive. The CJ confirmed that this list related to professional qualities was exhaustive, and Member States were therefore precluded from adding to the list (paragraph 40).

Only when the grounds for exclusion *did not relate to the professional qualities of economic operators* would it be possible to consider whether those grounds were permissible (paragraph 39).

Application to utilities: The wording of the Utilities Directive 2004/17/EC in relation to the grounds for exclusion is not the same as in the Directive 2004/18/EC. The CJ nevertheless made it clear that the grounds for exclusion relating to professional qualities, including the grounds of grave professional misconduct, could also apply to the utilities sector (paragraphs 23-24).

Decision (paraphrased)

1. Article 45(2) of the Directive does not permit national legislation, such as the Polish PPL, that defines cases of grave professional misconduct leading to the automatic exclusion of an economic operator from a procurement procedure.
2. EU procurement principles or rules do not permit national legislation to automatically exclude an economic operator on the grounds of (i) protection of the public interest, (ii) protection of the legitimate interests of contracting authorities, or (iii) maintenance of fair competition between economic operators.

Other issues covered in the judgment

Jurisdiction of the Polish decision-making body	paragraphs 16-18
Admissibility of the reference for a preliminary ruling	paragraphs 19-21
Temporal effect of the judgment	paragraphs 42-49

Chapter 6 Selecting economic operators – Qualification

Context

The purpose of selecting economic operators is to identify those that will be eligible to perform the contract.

The selection of economic operators generally comprises two distinct stages.

1. First, the contracting authority establishes whether there are grounds for excluding an economic operator from participating in a contract award procedure.
2. Second, the contracting authority considers whether the economic operators that have not been excluded meet the minimum requirements for selection.

The key cases relating to the first stage of selection are covered above in Chapter 5, “Selecting economic operators – Grounds for exclusion”.

In two-stage procedures²², economic operators that have been selected will then be invited to submit tenders, negotiate or participate in dialogue. In the case of the open procedure, only tenders submitted by selected economic operators will be evaluated.

Articles 47 to 51 of the Directive set out the information or evidence that contracting authorities may request from economic operators when selecting tenderers in order to assess whether they meet the relevant minimum requirements for selection. There are two categories of assessment, relating to:

- “economic and financial standing” (article 47)
- “technical and/or professional ability” (article 48)

See the note at the end of this chapter on articles 58-64 of the new Public Sector Directive 2014/24/EU, which cover the selection of economic operators.

Contracting authorities are permitted, but are not obliged, to consider economic and financial standing and technical and/or professional ability.

For further information, see:

SIGMA (January 2011), “Selecting Economic Operators”, Public Procurement Policy Briefs No. 7 – http://www.sigmaweb.org/publications/Economic_Operators_Public_Procurement_2011.pdf

SIGMA (2010), “Selection (Qualification) of Candidates”, *Public Procurement Training Manual*, Module E3 – <http://www.sigmaweb.org/publications/46179317.pdf>

²² Two-stage procedures are the restricted procedure, the negotiated procedure with prior publication of a contract notice, and the competitive dialogue procedure.

Key learning points

1. Selection criteria are related to the capacity of an economic operator to perform the contract in question.
2. Selection criteria must be related and proportionate to the subject matter of the contract.
3. When an economic operator demonstrates that it meets the minimum requirements defined by the contracting authority, it may rely on the capacities of other entities where appropriate and for a specific contract. This is the case regardless of the legal nature of the links that the economic operator has with the other entities. The economic operator can rely on the resources of other entities provided that it can prove that the resources necessary will genuinely be at its disposal. National legislation must include provisions to that effect.

Public Sector Directive 2014/24/EU

Article 63(1) provides that, in relation to criteria concerning educational and professional qualifications or to relevant professional experience, "...economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required".

Summary of CJEU approach and decisions

Economic and financial standing: Article 47(1) of the Directive provides a list of information or evidence that may be requested from economic operators to demonstrate suitable economic and financial standing. The CJ has confirmed that it is not an exhaustive list. The CJ has also stated that it was not the purpose of the rules on economic and financial standing to constrain Member States as to the level or manner in which they fixed requirements (*C-76/81 Transporoute v Ministère des travaux publics*, *C-29/86 Bellini*, *C-31/87 Beentjes v State of Netherlands*).

In the case *C-218/11 Édukövízig and Hochtief Construction*, the CJ confirmed the non-exhaustive nature of the list of information or evidence to demonstrate economic and financial standing. It also confirmed that Member States had discretion to set additional requirements in that context.

Technical and/or professional ability: Article 48(2) of the Directive sets out the list of information or evidence that may be requested from economic operators to demonstrate technical and/or professional ability. The CJ had confirmed in earlier case law that this was an exhaustive list. This ruling was confirmed by the CJ in *C-218/11 Édukövízig and Hochtief Construction* and *C-368/10 Commission v Netherlands*. The CJ confirmed that it was not the purpose of the regulations concerning technical and professional ability to constrain Member States as to the level or manner in which they fixed requirements in this context (*C-31/87 Beentjes v State of Netherlands*).

Reliance on the capacities of other entities: Articles 47(2) and 47(3) permit an economic operator, where appropriate and for a specific contract, to rely on the capacities of other entities when demonstrating that it meets the requirements of economic and financial standing set by the contracting authority. This permission is subject to the economic operator proving that it will genuinely have at its disposal the resources necessary. Articles 48(3) and 48(4) lay down the same provisions related to technical and/or professional ability.

The possibility of relying on the capacities of other entities was confirmed by the CJ in *C-218 Édukövízig and Hochtief Construction*. In *C-94/12 Swm Costruzioni 2 and Mannocchi Luigino*, the CJ held that it was not permitted to set a general rule restricting the number of other entities on which an economic operator could rely. In *C-95/10 Strong Segurança*, however, the CJ concluded that these provisions were not implied in the process for the award of a contract for Annex II B (non-priority) services.

Procedural issues relating to the submission of evidence/proof at the qualification stage: The case *C-336/12 Manova* related to the application stage of a process for the award of Annex II B services. The CJ confirmed that it was permissible for a contracting authority to request and receive information or documents that had been missing from the original application. Those documents, however, had to be objectively shown as pre-dating the deadline for applications. In addition, the request could not unduly favour or disadvantage the relevant candidate.

Case law

Evidence of economic and financial standing and reliance on the capacities of other entities

C-218/11 *Édukövízig and Hochtief Construction*

Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság (Édukövízig), Hochtief Construction v Magyarországi Fióktelepe, now Hochtief Solutions v Magyarországi Fióktelepe

Judgment dated 18 October 2012, no Opinion of the Advocate General

Reference for a preliminary ruling

A full transcript of this ruling and a more detailed analysis are included in this publication.

In this case, the CJ considered the lawfulness of national requirements relating to evidence of economic and financial standing. The case concerned the conduct of a restricted procedure for the award of transport infrastructure works in Hungary. The procedure was carried out under the Directive.

The CJ considered the lawfulness of the minimum requirements relating to evidence of economic and financial standing. The evidence required by the contracting authority was based on Hungarian accounting rules. *Hochtief Hungary (HH)* was a wholly owned subsidiary of a German company. *HH* was unable to satisfy the minimum requirements set by the contracting authority due to differences between Hungarian and German accounting rules.

According to the CJ, the Directive left “a fair degree of freedom to the contracting authorities” to decide minimum levels of economic and financial standing. The CJ emphasised that this discretion was not unlimited and the minimum capacity level had to be related and proportionate to the subject matter of the contract (paragraph 29).

The CJ held that in this case the only option available to *HH* was to rely on the capacities of another entity, its parent company *Hochtief AG*. This option was permitted under the Directive.

Reliance on the capacities of more than one entity

C-94/12 *Swm Costruzioni 2 and Mannocchi Luigino*

Swm Costruzioni 2 SpA, Mannocchi Luigino DI v Provincia di Fermo

Judgment dated 10 October 2013, Opinion of the Advocate General dated 28 February 2013

Reference for a preliminary ruling

This case arose from a contracting authority’s decision to exclude a consortium from tendering for a works contract for the modernisation and extension of a road. The procedure was carried out under the Directive.

The consortium was excluded on the basis of an Italian law that limited the extent to which an economic operator could rely on other entities to demonstrate that it met qualification requirements. In the case of works contracts, an economic operator could rely on the resources of only one other entity. Only in exceptional cases was an economic operator permitted to rely on the resources of more than one other entity.

The CJ held that the Directive had to be interpreted as precluding such a restriction. The CJ referred to the wording in articles 47(2) and 48(3), which expressly stated that economic operators could rely on the capacities of other “entities” – in plural (paragraphs 30-31). The CJ concluded that the Directive permitted the economic operator to rely on the combination of capacities of more than one other entity for the purposes of satisfying minimum requirements. This option was permitted provided that the economic operator could prove that it would actually have those resources available for the execution of the contract (paragraph 33).

The CJ acknowledged the possibility of specific cases where the combined capacities of a number of economic operators might not be suitable. This unsuitability would arise in the context of the particular requirements of a contract. However, such cases constituted an exception and the restriction should not be laid down as a general rule (paragraphs 35 and 36).

C-95/10 *Strong Segurança*

Strong Segurança SA v Município de Sintra

Judgment dated 17 March 2011, no Opinion of the Advocate General

Reference for a preliminary ruling

In this case, the CJ considered the provisions with regard to reliance on the capacities of other entities in the context of the award of a contract for “non-priority” (Annex II B) services. Under the Directive, non-priority services are regulated to a very small degree. Articles 47 and 48 are not specifically intended to apply to the award of contracts for non-priority services²³.

The question considered by the CJ was whether an economic operator could rely on the capacities of other entities in order to meet the minimum qualification requirements for the award of a contract for non-priority services.

The contract in this case concerned security and surveillance services for a municipal council in Portugal. The contracting authority advertised in the *Official Journal of the European Union (OJEU)* and conducted an open tender to award the contract. The contract was initially awarded to *Strong Segurança*, but the award decision would subsequently be changed. This change occurred when one of the unsuccessful tenderers complained that the contracting authority had not been permitted to award the contract to *Strong Segurança*. This complaint was made on the grounds that *Strong Segurança* relied on the capacities of another entity to demonstrate its ability to perform the contract. *Strong Segurança* challenged the decision of the contracting authority to not award it the contract.

The CJ held that the provisions in the Directive allowing economic operators to rely on the capacities of other entities to meet minimum qualification requirements did not apply to the award of a contract for non-priority services (paragraph 34). It also held that neither the principle of transparency nor the principle of equal treatment imposed an obligation on the contracting authority to allow economic operators to rely on the capacities of other entities to meet minimum qualification requirements when awarding a contract for non-priority services (paragraph 39).

Technical and/or professional ability

²³ See SIGMA (January 2011), “Which Contracts are Covered by the Directives?”, Public Procurement Policy Briefs No. 4, and SIGMA (2010) *Public Procurement Training Manual*, Module D3, for further explanations of the application of procurement rules to Annex II B (non-priority) services.

C-368/10 *Commission v Netherlands*

European Commission v Netherlands

Judgment dated 10 May 2012, Opinion of the Advocate General dated 15 December 2011

Action brought by the Commission

A full transcript of this ruling and a more detailed analysis are included in this publication. See Chapter 7, “Contract award”.

This case related to the award of a contract by the province of North Holland for the supply and management of automatic tea and coffee machines. The procedure was carried out under the Directive.

The contracting authority stated in the contract documents that economic operators should fulfil “criteria concerning sustainable purchases and socially responsible business”. This requirement was included under the general heading, “Suitability conditions/minimum conditions”, and the sub-heading, “Quality conditions”. The contracting authority asked economic operators to explain the way in which they fulfilled those criteria. The contracting authority also asked them to indicate how they contributed “to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production” (paragraphs 24 to 26).

The CJ was of the view that these requirements set the minimum levels of professional capacity and should therefore be considered in the light of article 48 of the Directive (paragraphs 102 to 104). The CJ confirmed that article 48 provided an exhaustive list of the information or evidence that a contracting authority could use to assess the technical and professional abilities of tenderers (paragraph 105). The requirements set by the contracting authority in relation to sustainable purchases and socially responsible business were not included in the exhaustive list, and these requirements were therefore not permitted as selection criteria.

The CJ also confirmed earlier case law (*C-496/99 Commission v CAS Succhi di Frutta*) that the principle of transparency implied that all of the rules of the award procedure had to be clear,

precise and unequivocal. This requirement is meant to ensure that (i) all reasonably informed tenderers understand the exact significance of the rules and interpret them in the same way, and (ii) the contracting authority is able to ascertain whether the tenders submitted satisfy the selection criteria. The CJ agreed with the Advocate General’s view that in this case the selection criteria did not meet the requirement of transparency (paragraphs 109 to 111).

In the case *C-218/11 Édukövízig and Hochtief Construction*, the CJ also stated that, in relation to technical and professional capacity, the Directive established “a closed system which limits the methods of assessment and verification available to [contracting authorities] and, therefore, limits their opportunities to lay down requirements”(paragraph 28).

Procedural issues

C-336/12 *Manova*

Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S

Judgment dated 10 October 2012, no Opinion of the Advocate General

Reference for a preliminary ruling

This case concerned a call for tender for the award of a framework agreement for the operation of seven occupational guidance and advice centres. The services were non-priority (Annex II B) services²⁴. The Directive was in force at the time that the procedure was conducted.

The contracting authority required candidates to submit specific information with their preliminary applications. This information included copies of the candidates' balance sheets.

Two of the nine candidates did not submit copies of their balance sheets by the set deadline. The contracting authority subsequently asked these two candidates to submit the missing documents. Both candidates did so, completed the application process, were appointed to the framework agreement and were awarded contracts. One of the unsuccessful economic operators participating in the process challenged the award decisions.

The referring court asked the CJ "whether the principle of equal treatment meant that, after the deadline for applications to take part in a tendering procedure, a contracting authority may not ask a candidate to forward a copy of its most recent balance sheet...if the candidate did not provide such documents with its application".

The CJ considered the question in the light of the equal treatment and transparency principles. It referred to the general principles and rules that it had laid down in *C-599/10 SAG ELV Slovensko and Others*²⁵ (discussed in more detail in chapter 7, "Contract award"). These principles and rules included a general rule that a tender could not be amended after it had been submitted (paragraph 31). The Directive does not, however, preclude corrections or "amplifications" (i.e. provision of further information) to a tender, on a limited and specific basis. This is particularly the case when it is clear that the amendment is merely a "clarification" or the correction of an obvious material error (paragraph 32).

In the case *C-599/10 SAG ELV Slovensko and Others*, the CJ provided detailed guidance on the issue of permitted clarification in the context of award criteria. In *C-336/12 Manova*, the CJ considered this guidance and applied it to the application (selection) stage (paragraph 38).

The CJ concluded that a contracting authority could request the correction or amplification of the details of an application, on a limited and specific basis. This amendment is permitted as long as the request relates to details or information that are objectively shown to pre-date the deadline for submission of applications (paragraph 39). The CJ also emphasised an overriding condition: the request for missing information must not unduly favour or disadvantage the candidate concerned (paragraph 42).

The CJ applied these conditions to the facts in *C-336/12 Manova*. It confirmed that the balance sheets already existed and were published prior to the deadline for applications. It concluded that by accepting copies of the balance sheets after the closing date for applications the contracting authority was not in breach of the principle of equal treatment. The CJ explained that this would not be the case, however, if the contract documents stated that applications would be rejected if the specific documents were not provided with the application.

²⁴ See comment above on the application of procurement rules to non-priority (Annex II B) services under the case *C-95/10 Strong Segurança*.

Public Sector Directive 2014/24/EU

Articles 58 to 64 of the 2014 Public Sector Directive cover the selection stage.

Article 58 includes several new provisions that are not provided in the Directive. These provisions concern:

- minimum levels of financial turnover that may be required of an economic operator;
- information that can be requested in relation to annual accounts;
- application of economic and financial selection criteria in the context of lots and framework agreements;
- necessary professional qualifications in a situation where there is a conflict of interest that may negatively affect contract performance.

Article 59 introduces a new concept and document: the European Single Procurement Document (ESPD).

The ESPD is a standard-form, electronic document that will be drawn up by the European Commission. It will comprise a formal self-declaration provided by an economic operator to the contracting authority. The economic operator will be able to use the ESPD to confirm that it fulfils the following conditions:

- It is not in one of the situations to which grounds for exclusion apply.
- It meets relevant selection criteria.
- It meets, where applicable, the rules and criteria set for reduction of the number of qualified candidates invited to participate.

Contracting authorities are obliged to accept the ESPD as preliminary evidence in replacement of certificates issued by public authorities or third parties. An ESPD can be used more than once.

A contracting authority may subsequently ask tenderers or candidates to submit all or part of the supporting documents. Before awarding the contract, the contracting authority must require the successful tenderer to submit supporting documents that are up to date. Where certificates can be obtained free of charge by the contracting authority through a national database in any Member State, it cannot ask the economic operator for those documents.

Article 63(1) concerns reliance on the capacities of other entities. It provides that, in relation to criteria concerning educational and professional qualifications or to the relevant professional experience "... economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required".

See the full text of the 2014 Public Sector Directive for details and for other articles related to the selection process.

C-218/11 *Édukövízig* and *Hochtief Construction*

Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság (Édukövízig), Hochtief Construction v Magyarországi Fióktelepe, now Hochtief Solutions AG v Magyarországi Fióktelepe

Judgment dated 18 October 2012, no Opinion of the Advocate General

Reference for a preliminary ruling

This case is of particular relevance to the following topic:

Selecting economic operators – Qualification: economic and financial standing

Key sections of the judgment for the purposes of this topic:

Legal context – European Union law	paragraphs 3-8
Legal context – German law; Hungarian law	paragraph 9
Facts	paragraphs 10-18
Questions referred to CJEU	paragraph 19
Analysis and judgment	paragraphs 25-39

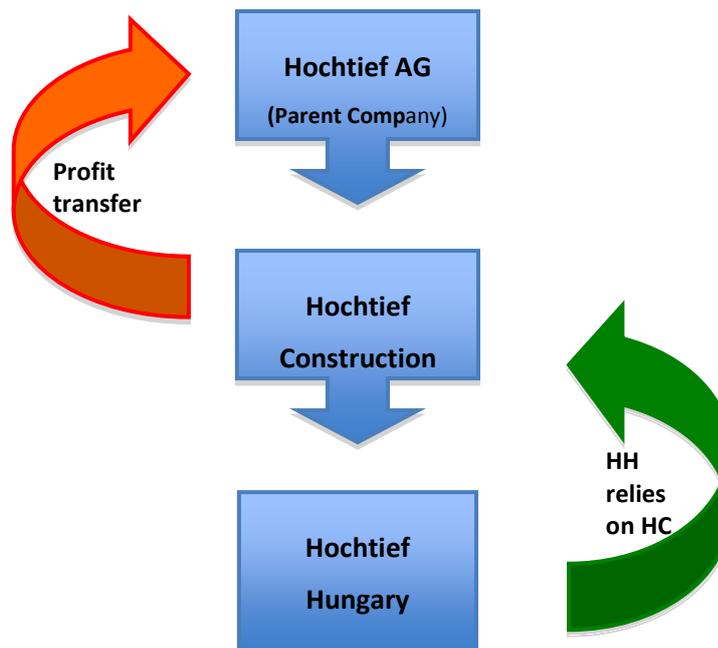
References to paragraphs below (in parentheses) are to paragraphs of the judgment.

Summary of facts (paragraphs 10-18)

In July 2006 the contracting authority, *Édukövízig*, launched a restricted procedure for the award of transport infrastructure works in Hungary. The estimated value of the work was between EUR 23 300 000 and EUR 24 870 000. The Directive applied to the conduct of the procedure.

As part of the qualification requirements, *Édukövízig* obliged economic operators to submit a uniform financial document, which had been drawn up in accordance with Hungarian accounting rules. *Edukövízig* fixed a minimum requirement related to economic and financial standing. The minimum requirement was that the profit/loss (P&L) item on the balance sheet could not have been negative for more than one year in the last three financial years. That information was to be shown in the uniform financial document.

Hochtief Hungary (HH) wished to participate in the tender process. *HH* was the Hungarian subsidiary of *Hochtief Construction (HC)*, which was a wholly owned subsidiary of *Hochtief AG*. Both of these companies were incorporated in Germany.



German accounting rules applying to group companies incorporated in Germany permitted a company to transfer profits to another group company. This rule meant that it was possible for a company to have positive P&L after taxes, even though negative P&L was shown on the balance sheet. This possibility was not permitted under Hungarian accounting rules.

HC had a profit transfer agreement under which it transferred profits to *Hochtief AG*. It therefore had zero or negative P&L on its balance sheet. *HH* wished to rely on the financial standing of *HC* to satisfy the minimum requirements set by *Édukövízig*. Due to the treatment of *HC*'s accounts, *HH* was unable to satisfy *Édukövízig*'s requirements relating to P&L.

HH questioned the lawfulness of *Édukövízig*'s requirement in the Hungarian courts. These courts referred a number of questions to the CJ for a preliminary ruling.

EU law (paragraphs 3-8)

Directive 2004/18/EC: Recitals 2, 39 and 40 and articles 2, 44, 47 and 48; Fourth Council Directive 78/660/EEC of 25 July 1978 based on article 54(3)(g) of the Treaty on the annual accounts of certain types of companies

Judgment (paragraphs 20-39)

The CJ considered the following questions (paraphrased):

Minimum level of economic and financial standing: Does the Directive permit a contracting authority to fix a minimum level of economic and financial standing with reference to a given item on the balance sheet? Is this permitted even if the legislation on annual accounts varies between Member States and as a result balance sheets also vary (paragraph 25)?

Evidence that an economic operator meets the minimum level of economic and financial standing: What are the provisions of the Directive when an economic operator cannot meet the minimum level of economic and financial standing required by the contracting authority?

In relation to the balance sheet requirement in this particular case, is the economic operator permitted to rely on the capacities of a third party? Under the provisions of the Directive, must the economic operator prove its economic standing by submitting an appropriate document?

Decision (paraphrased)

Minimum level of economic and financial standing: The CJ confirmed that the Directive permitted a contracting authority to require a minimum level of economic and financial standing (paragraph 26).

The CJ also noted that the Directive permitted a contracting authority to require economic operators to provide proof of that standing through the presentation of its balance sheet. The CJ went on to observe that a minimum level of economic and financial standing could not in general be established by reference to a balance sheet. The contracting authority can, therefore, make reference to one or more particular aspects of the balance sheet (paragraphs 26-27).

The CJ confirmed that, in this context, the Directive left “a fair degree of freedom to the contracting authorities”. According to the CJ, the Directive “expressly authorises contracting authorities to choose the probative references which must be produced by [economic operators] to furnish proof of their economic and financial standing.”

The CJ emphasised that the freedom available to contracting authorities was not unlimited. The minimum capacity level set by the contracting authority had to be related and proportionate to the subject matter of the contract (paragraph 29). The aspects of a balance sheet chosen by a contracting authority to demonstrate a minimum level of economic and financial standing must:

- provide objective information on such standing;
- adapt to the size of the contract concerned;
- do not go beyond what is reasonable for the purpose (paragraph 29).

The CJ contrasted the assessment of economic and financial standing with the assessment of technical and professional capacity. The CJ stated that, in relation to technical and professional capacity, the Directive established “a closed system which limits the method of assessment and verification available and therefore limits [the contracting authorities’] opportunities to lay down requirements” (paragraph 28).

The CJ noted that the legislation of Member States regarding the annual accounts of companies was not the subject of full harmonisation. It cannot, therefore, be ruled out that there may be differences with regard to a particular aspect of a balance sheet. There may be differences in the aspects of a balance sheet by which a contracting authority establishes a minimum capacity level. The CJ stated that, in relation to the proof of economic and financial standing, contracting authorities could legitimately require a reference “...even if, objectively, not every candidate or tenderer [was] able to produce it...because of a difference in legislation”. The CJ held that “such a requirement [could] not in itself be considered to constitute discrimination” (paragraphs 30-31).

Evidence that an economic operator meets the minimum level of economic and financial standing: The CJ held, based on the facts of this case, that there was only one option available to the economic operator (*HH*) in order to satisfy the balance sheet requirement. That option was to rely on the capacities of another entity, in this case *HH*'s parent company. When the economic operator relies on the capacities of another entity, the Directive [article 47(2)] then requires proof in the form of a legal undertaking (paragraph 39).

Differences in legislation between two Member States with regard to annual accounts and transfer of profits are irrelevant (paragraph 39).

Decision (paraphrased)

1. Under the provisions of the Directive, a contracting authority may require a minimum level of economic and financial standing. In doing so, it may require a reference to one or more aspects of a balance sheet. Those aspects must relate to the economic and financial standing of the economic operator.
2. The level of economic and financial standing required must be adapted to the size of the particular contract. The level required must not go beyond what is reasonably necessary for the purpose of establishing the standing.
3. The requirement of a minimum level of economic and financial standing cannot be disregarded solely because of the differences in legislation between Member States.
4. Based on the facts of this case, the economic operator concerned has only one option. It must rely on the capacities of another entity in accordance with article 47(2) of the Directive. The differences in legislation between Member States with regard to annual accounts and transfer of profits are irrelevant.

Other issues covered in the judgment

Admissibility of questions referred to the CJEU paragraphs 20-24

Chapter 7 Contract award

Context

The award criteria constitute the basis on which a contracting authority chooses the best tender for a contract. These criteria must be established and communicated to potential tenderers in advance by the contracting authority. The award criteria must not be prejudicial to fair competition.

Article 53 (1) of the Directive limits the criteria that a contracting authority may apply for the award of a public contract. The criteria that may be used are either i) the lowest price, or ii) the most economically advantageous tender (MEAT), for which criteria in addition to, or other than, price are applied.

The Directive also lays down general rules concerning the formulation of the specific criteria that may be applied when the MEAT criterion is used. It establishes disclosure obligations concerning these criteria. The main objective is to ensure that intra-Community trade is not restricted by discriminatory award criteria.

When setting and applying the award criteria, a contracting authority must also operate with respect to Treaty principles and in particular ensure:

- **Equal treatment and non-discrimination:** the award criteria must be non-discriminatory and must not be prejudicial to fair competition;
- **Transparency:** the award criteria must be set in advance and disclosed to tenderers to ensure that:
 - tenderers prepare their tenders with a view to best meeting the stated priorities of the contracting authority;
 - the evaluation of tenders is carried out by the contracting authority in a transparent and reliable way and as objectively as possible;
 - the relevant stakeholders, such as audit bodies, review bodies, other government bodies or economic operators, monitor the process so as to prevent the use of discriminatory or unauthorised award criteria.

The choice between the lowest-price criterion and the MEAT criterion is generally left to the discretion of the contracting authority. For a competitive dialogue procedure or a procedure in which the contracting authority accepts variants, the MEAT criterion must be used. The contracting authority must indicate in the contract notice whether it is going to apply the lowest price criterion or the MEAT criterion.

For further information, see:

SIGMA (January 2011), "Setting the Award Criteria", Public Procurement Policy Briefs No. 8 – http://www.sigmaweb.org/publications/Public_Procurement_Award_Criteria_2011.pdf

SIGMA (2010), "Contract Evaluation and Contract Award", *Public Procurement Training Manual*, Module E5 – <http://www.sigmaweb.org/publications/46179317.pdf>

Key learning points

1. Contracting authorities are free to choose between the lowest-price criterion and the MEAT criterion except where the use of the MEAT criterion is obligatory (competitive dialogue and variants).
2. National legislation should not impose additional requirements on contracting authorities that choose to use the MEAT criterion, such as justification by contracting authorities or approvals by relevant bodies.
3. A clear distinction must be made between selection criteria and award criteria. Selection criteria cannot be used as award criteria and *vice versa*.

See notes at the end of this chapter on the relevant provisions in the 2014 Public Sector Directive (2014/24/EU).

Summary of CJEU approach and decisions

Distinction between selection criteria and award criteria: The CJ made it clear in earlier case law that the selection of economic operators and the contract award represented two distinct stages of the procurement process, with distinct purposes. Different criteria apply to each stage.

In the case C-532/06 *Lianakis and Others*, the CJ confirmed that criteria used at the selection stage were linked to an evaluation of the tenderer's capability to perform the contract. Criteria used at the tender award stage aimed to identify the best tender.

Nature of award criteria and general principle of transparency: The list of criteria in the Directive for identifying the most economically advantageous tender is not exhaustive. In C-368/10 *Commission v Netherlands*, the CJ confirmed a well-established principle that award criteria had to be linked to the subject matter of the contract, objective, and in compliance with the principles of equal treatment and transparency.

The requirement for transparency was also considered in C-532/06 *Lianakis and Others*. Here the CJ confirmed that potential tenderers had to be in a position to ascertain, when preparing their tenders, all of the elements to be taken into account by the contracting authority in identifying the most economically advantageous tender.

Transparency of weightings and sub-criteria: The CJ also confirmed in C-532/06 *Lianakis and Others* that the contracting authority could not apply weighting rules and/or sub-criteria that it had not previously brought to the tenderers' attention.

Social and environmental criteria: The question of whether award criteria related to social and environmental issues were permissible was considered in C-368/10 *Commission v Netherlands*. The CJ held that award criteria could be qualitative as well as economic. Qualitative award criteria can include environmental characteristics and also "criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons".

In the case C-226/09 *Commission v Ireland*, the CJ laid down a number of important principles concerning the use and disclosure of award criteria when awarding an Annex II B (non-priority) services contract.

Procedural issues – clarification of tenders: In C-599/10 *SAG ELV Slovensko and Others*, the CJ considered the extent to which contracting authorities were obliged or permitted to ask for a clarification of tenders. This clarification was demanded in situations where, in their view, the tenders were imprecise or did not meet specification requirements. The CJ concluded that in the

context of a restricted procedure there was no general obligation on the contracting authority to seek clarification. In some circumstances, however, clarification and subsequent amendments may be permitted.

Case law

Distinction between selection criteria and award criteria – disclosure of weightings and sub-criteria

C-532/06 *Lianakis and Others*

Emm. G. Lianakis AE and Others v Dimos Alexandroupolis and Others

Judgment dated 24 January 2008, no Opinion of the Advocate General

Reference for a preliminary ruling

This case related to an award procedure for services provided to “a project in respect of the cadastre, town plan and implementing measure” for a part of a Greek municipality. The procedure was carried out under the Services Directive.

The award criteria were as follows, listed in order of priority:

1. Proven experience of the expert on projects carried out in the last three years
2. Manpower and equipment of the enterprise
3. Capability to complete the project by the deadline, together with the enterprise’s commitments and professional potential

After the receipt of tenders, during the evaluation phase, the contracting authority allocated weightings to each of the three award criteria listed above. It also established a scoring scheme. The scoring scheme granted different points depending on level of experience of the tenderer, size of its team, and value of its existing contractual commitments.

Selection criteria and award criteria: The CJ drew a clear distinction between the selection of economic operators and tender evaluation processes (paragraph 26). It distinguished the criteria used at the selection stage and criteria used for tender evaluation. Selection stage criteria are linked to the evaluation of the tenderer’s capability to perform the contract. Tender evaluation criteria are aimed at identifying the most economically advantageous tender (paragraph 29). The CJ held that the award criteria listed by the contracting authority in this case were not permitted under the Services Directive (paragraphs 30-32) because they related to an evaluation of the capability to perform the contract.

Sub-criteria and weightings: The CJ confirmed that when economic operators prepared their tenders they had to know all of the elements to be taken into account by the contracting authority in identifying the most economically advantageous offer (paragraphs 36-37). The contracting authority cannot apply weighting rules and/or sub-criteria that it has not previously brought to the tenderers’ attention (paragraph 37). It is prohibited from “stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice” (paragraph 45). This principle has been incorporated into article 53 of the Directive.

See note at the end of this chapter on the provisions in article 67 of the 2014 Public Sector Directive on contract award criteria.

C-599/10 SAG ELV Slovensko and Others

SAG ELV Slovensko and Others v Úrad pre verejné obstarávanie

Judgment dated 29 March 2012, no Opinion of the Advocate General

Reference for a preliminary ruling

A full transcript of C-599/10 *SAG ELV Slovensko and Others* and a more detailed analysis are included in this publication.

In this case, the CJ considered whether, in certain circumstances, a contracting authority could or would have to seek clarification from an economic operator that had submitted a tender in a restricted procedure. The relevant circumstances occur when a contracting authority takes the view that a tender submitted is abnormally low or imprecise or does not meet the technical requirements of the tender specifications.

Abnormally low tenders: The CJ decided that a contracting authority was obliged to ask an economic operator to clarify an abnormally low tender (paragraphs 32-34). This decision was based on the provisions of article 55 of the Directive, which relates to abnormally low tenders.

Imprecise tenders or tenders that do not meet specification requirements: The CJ concluded that a contracting authority was not obliged to seek clarification of a tender that it considered to be imprecise or incapable of meeting the technical requirements of the specifications. Furthermore, it could reject a tender on that basis (paragraphs 38-39).

Permitted clarification: The CJ was of the view that the Directive did permit “the correction or amplification of details of a tender, where appropriate, on an exceptional basis”. However, such changes were to be permitted only when a number of additional conditions were satisfied. These conditions are discussed in the more detailed analysis of C-599/10 *SAG ELV Slovensko and Others* included in this publication.

Environmental and social characteristics as award criteria

C-368/10 Commission v Netherlands

European Commission v Netherlands

Judgment dated 10 May 2012, Opinion of the Advocate General dated 15 December 2011

Action brought by the Commission

A full transcript of C-368/10 *Commission v Netherlands* and a more detailed analysis are included in this publication.

This action brought by the European Commission related to the award of a contract by the province of North Holland for the supply and management of automatic tea and coffee machines. The procedure was carried out under the Directive.

In the original tender documents, the contracting authority identified as a condition the use of organic and fair-trade tea and coffee bearing specific labels (EKO and MAX HAVELAAR). It also stated that, if possible, the other ingredients used should comply with these labels. The contracting authority allocated points in the evaluation scheme to reflect these preferences. In subsequent clarifications, the contracting authority confirmed that equivalents to the specified labels were acceptable.

The CJ noted that the contracting authority had established an award criterion consisting of a requirement that the ingredients to be supplied were to bear the EKO and MAX HAVELAAR labels.

The CJ held that award criteria could be qualitative as well as economic. Qualitative award criteria can include environmental characteristics and also “criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons” (paragraph 85). The CJ confirmed that award criteria had to be linked to the subject matter of the contract, objective, and in compliance with the principles of equal treatment and transparency.

Bearing those principles in mind, the CJ considered the characteristics underlying the EKO and MAX HAVELAAR labels. It concluded that the characteristics were environmental and social in nature and were permitted criteria. They did not need to be an intrinsic part of the product (paragraph 91). As they related to the ingredients to be supplied, they constituted part of the subject matter of the contract (paragraph 90). However, the CJ concluded that a reference to the labels alone was not lawful under the Directive, as it breached the principles of equal treatment, non-discrimination and transparency.

This conclusion can be contrasted with the CJ’s view of the requirement of the contracting authority with regard to the general purchasing policy of tenderers. The CJ found this criterion to be an unlawful qualification requirement (see chapter 6, “Selecting economic operators – Qualification”).

Equal treatment and transparency in the award of contracts for Annex II B (non-priority) services

C-226/09 *Commission v Ireland*

European Commission v Ireland

Judgment dated 18 December 2010, Opinion of the Advocate-General dated 29 June 2010

Action brought by the Commission

This case related to the tender process used by the Irish Department of Justice, Equality and Law Reform concerning a contract for translation services. The Directive was in force at the time that the procedure was carried out. Translation services are Annex II B (non-priority) services and are therefore regulated by the Directive to a very small degree.

The contracting authority published a contract notice in the *Official Journal of the European Union (OJEU)*, although it was not obliged to do so. In the contract notice it listed seven criteria that it would use to select the most economically advantageous tender. It stated that the seven criteria were not listed in descending order of importance. The contract notice did not allocate weightings to each of the listed criteria.

On the closing date for submission of tenders, members of the evaluation committee were provided with an evaluation matrix. In this matrix a proposed weighting was set for each of the seven criteria. The purpose of the matrix was to enable the committee members to carry out individually an initial review of tenders before the first meeting of the committee. At that first meeting, the members agreed to change the weightings. They then went ahead and evaluated the tenders on the basis of the revised weightings.

A complaint was lodged with the European Commission. As the Commission was subsequently dissatisfied with the responses that it had received from the Irish Government, it issued proceedings. The Commission argued that Ireland had violated the Treaty principles of transparency and equal treatment.

The CJ laid down a number of important principles concerning the use and disclosure of award

criteria when awarding Annex II B (non-priority) services contracts:

- There is no obligation to set weightings for evaluation criteria in advance (paragraph 43).
- If the contracting authority sets weightings, it is not necessary to disclose those weightings to tenderers prior to the submission of tenders (paragraph 44).
- Where the contracting authority lists the award criteria without reference to the order of importance, it does not imply that the award criteria are listed in descending order of importance or that they have equal weighting (paragraph 47).
- Where weightings have been set for the criteria, those weightings cannot be changed during the evaluation procedure (paragraphs 60-62).

In this case, the principles of equal treatment were violated. This violation was not due to the failure to disclose weightings in advance, as such disclosure was not a requirement for Annex II B (non-priority) services. It was due to the change in weightings after the evaluation process had begun.

Public Sector Directive 2014/24/EU

Articles 67 to 69 of the 2014 Public Sector Directive lay down provisions related to the award of a contract.

Contract award criteria: Article 67 stipulates that contracting authorities must base the award of contracts on the most economically advantageous tender criterion. Significant emphasis is given to the use of qualitative criteria.

Article 67(2):

“The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question. Such criteria may comprise, for instance:

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts.”

Article 67 also incorporates provisions linking “the process of production, provision or trading” to the subject matter of the contract. These provisions reflect the CJ’s decision in *C-368/10 Commission v Netherlands*. The 2014 Public Sector Directive also includes amended provisions related to the use of labels (article 43), influenced by the decision in *C-368/10 Commission v Netherlands*.

Article 67 includes a provision that permits an assessment of the organisation, qualification and experience of staff in certain circumstances. This provision is important for contracts where the quality of the staff can have a significant impact on the level of performance of the contract. One condition for the use of award criteria is that they cannot also be used as selection criteria. This provision addresses concerns arising from C-532/06 *Lianakis and Others*.

Article 68 defines the term “life-cycle costing” and indicates how this type of costing is used in the evaluation of tenders.

Abnormally low tenders: Article 69 covers the award of abnormally low tenders. Contracting authorities are obliged to seek explanations from economic operators concerning tenders that appear to be abnormally low. This provision reflects the CJ decision in C-599/10 *SAG ELV Slovensko and Others*.

C-368/10 Commission v Netherlands

European Commission v Kingdom of the Netherlands

Judgment dated 10 May 2012, Opinion of the Advocate General dated 15 December 2011

Action brought by the European Commission

This case is of particular relevance to the following topics:

- Technical specifications
- Contract award
- Selecting economic operators – Qualification

Key sections of the judgment for the purposes of these topics:

Legal context – European Union law	paragraphs 2-13
Facts	paragraphs 14-38
Questions referred to CJEU	paragraph 1
Analysis and judgment:	
- <i>Technical specifications</i>	paragraphs 58-79
- <i>Contract award</i>	paragraphs 84-97
- <i>Selecting economic operators – Qualification</i>	paragraphs 98-111

References to paragraphs below (in parentheses) are to paragraphs of the judgment.

Summary of facts (paragraphs 14-38)

In 2008 the province of North Holland undertook a procurement procedure for the supply and management of automatic coffee machines. The contract notice was published in the *OJEU*. The award was to be made to the most economically advantageous tender.

The province of North Holland explained in the contract notice that an important aspect of the tender was “the desire of the province of North Holland to increase the use of organic and fair trade products in automatic coffee machines”. The contract notice stated that tenders would be evaluated “both on the basis of qualitative and environmental criteria and on the basis of price”.

General social and environmental requirements: The contract notice referred to specifications, which included “suitability/minimum conditions”. According to the specifications, a tenderer must satisfy the suitability/minimum conditions for its tender to be considered. The CJ judgment recorded that these conditions “were expressed either as grounds for exclusion or as minimum conditions” (paragraph 24). Tenderers were required to provide responses to specific questions relating to the requirement of suitability/minimum conditions. One of the questions to which tenderers were asked to respond was: “In what way do you fulfil the criteria concerning sustainable purchasing and socially

responsible business?” Tenderers were also asked to state the way in which they contributed to “improving the sustainability of the coffee market and to environmentally, socially and economic coffee production” (paragraphs 23-26).

Specified labels: The specifications contained a section on “quality standards”, referring to a “Schedule of Conditions” with which tenderers were obliged to comply. In the Schedule of Conditions, a reference is made to specific environmental (EKO) and fair trade (MAX HAVELAAR) labels for the tea and coffee to be supplied (see note below for more information on these labels). In subsequent clarifications, the contracting authority confirmed that equivalents to the specified labels were acceptable.

The Schedule of Conditions also stated that, if possible, other ingredients used – such as milk, sugar and cocoa – should also comply with these labels. Points were allocated in the evaluation scheme to reflect this preference (paragraphs 26-31).

Note

Characteristics of the specified labels: The EKO is a label used in the Netherlands. It is granted to a product with at least 95% of its ingredients issuing from organic agricultural production. The MAX HAVELAAR label is more widely used in a number of EU Member States and is intended to promote the marketing of fair trade products. It certifies that a product with the MAX HAVELAAR label has been purchased at a fair price and under fair conditions from organisations made up of small-scale producers in developing countries.

The European Commission brought an action against the Netherlands. It raised a number of issues concerning the contracting authority’s social and environmental requirements. The issues raised by the Commission are explained further in the commentary on the judgment below.

EU law (paragraphs 2-13)

Directive 2004/18/EC: Recitals 2, 5, 29, 33, 39 and 46; articles 2, 23, 26, 39(2), 44(1), 48(1), 48(2) and 53

Judgment (paragraphs 58-112)

Use of EKO label as a technical specification (paragraphs 58-70)

The Commission argued that the requirement for the tea and coffee to have the EKO label or equivalent was a technical specification covered by article 23 of the Directive.

Article 23(6) of the Directive authorises the use of eco-labels that indicate environmental characteristics. Both parties agreed that the EKO label was an eco-label falling under this provision. The Commission was of the view that the provision nevertheless did not permit an eco-label to be used as a technical specification.

The Netherlands argued that the EKO label was well known to economic operators active in the sector. It would therefore be clear to them that this label referred to products of organic agriculture. It also argued that an economic operator exercising ordinary care would have easily found a description of the requirements for obtaining the EKO label. An economic operator could find the information on the Internet, or it could ask the contracting authority. The Netherlands was of the view that reference to the EKO label did not undermine the principle of equal treatment.

The CJ had the view that, by requiring the EKO label for the tea and coffee to be supplied, the contracting authority had established a technical specification. According to the CJ, technical specifications must:

- afford equal access for tenderers;
- refrain from creating unjustified obstacles to the opening up of public procurement to competition;
- be sufficiently precise so as to enable tenderers to determine the subject matter of the contract and understand all of the requirements of the contracting authority.

(paragraphs 61-62)

The CJ considered that a contracting authority did have the right to expect economic operators to be informed and reasonably aware. However, that expectation did not relieve the contracting authorities of obligations under the Directive.

The Directive requires an express mention of the detailed environmental characteristics required. Reference to a particular label is not sufficient. Contracting authorities must explain their specific requirements, and if a particular label is of relevance, use the detailed specifications defined by that label rather than just referring to the label (paragraphs 64-70).

Use of MAX HAVELAAR label as a technical specification (paragraphs 71-79)

The Commission argued that the requirement for the tea and coffee to have the MAX HAVELAAR label or equivalent was a technical specification covered by article 23 of the Directive. That requirement would breach article 23(8) of the Directive, which prohibits technical specifications from referring to “ a specific make or source, or a particular process ...or a specific origin...with the effect of favouring or eliminating certain undertakings or products”.

The Netherlands argued that the criteria on which the MAX HAVELAAR label was based were social conditions covered by the concept of “conditions of performance of the contract” under article 26 of the Directive. These criteria were not requirements relating to a process or a method of production. It argued, as an alternative, that if the label were to be regarded as a technical specification, then article 23(8) did not apply.

The CJ held that the MAX HAVELAAR label was not a technical specification. In its view, the definition of a technical specification relates exclusively to the characteristics of the products themselves and not to the conditions under which the supplier acquired them from the manufacturer. The MAX HAVELAAR label relates to the conditions of supply and not to production methods.

The CJ held that the requirements did fall within the concept of “conditions of performance of the contract” under article 26 of the Directive. The CJ did not carry on to consider the legitimacy of the requirements as conditions of performance of the contract. As the Commission had not raised this issue at the reasoned opinion stage of the proceeding, it was not an admissible issue. See chapter 1, “Introduction”, for an explanation of the issues that are admissible before the CJ.

Contract award criteria – link to the subject matter of the contract (paragraphs 84-92)

The CJ found, on examining the facts of this case, that the contracting authority had established an award criterion. This criterion consisted of a requirement that the ingredients to be supplied were to bear the EKO and MAX HAVELAAR labels.

The Commission argued that this criterion was not permitted, as it was not linked to the subject matter of the contract since the requirements underlying the labels concerned the general policy of the tenderer and not the products themselves. This missing link to the subject matter was particularly the case with regard to the MAX HAVELAAR label.

The CJ rejected the Commission’s arguments. It confirmed that qualitative award criteria could include environmental characteristics and also “criteria based on considerations of a social nature,

which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons” (paragraph 85).

The CJ found that the award criterion concerned social and environmental characteristics that did fall within the scope of permitted award criteria. The criterion related to the ingredients to be supplied, and they constituted part of the subject matter of the contract (paragraphs 89-90).

According to the CJ, “there is no requirement that an award criterion relates to the intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof” (paragraph 91).

Contract award criteria – reference only to the labels (paragraphs 84-88 and 93-97)

After consideration of the facts of the case, the CJ rejected an argument by the Netherlands that references to the labels were only illustrative. The CJ was of the view that the meaning of the contracting authority’s requirements had to be determined by adopting the perspective of the potential tenderers. In this case, the requirements had to be understood as referring to possession of the labels mentioned.

The CJ commented that the subsequent clarification by the contracting authority that equivalent labels were acceptable was not simply a clarification. It changed the essential conditions on which economic operators would have relied when deciding whether to submit a tender or participate. This change was in breach of the principles of equal treatment and transparency, which required the award criteria to be clearly defined at the beginning of the award procedure (paragraphs 54-56).

The CJ concluded that the original contract and tender documents determined the subject matter as well as the criteria governing the award of the contract. These conditions required the coffee and tea to bear the EKO and MAX HAVELAAR labels and indicated the preference for other ingredients supplied to bear the same labels.

The CJ concluded that a reference to the labels alone as an award criterion was not lawful under the Directive, as it breached the principles of equal treatment, non-discrimination and transparency.

The CJ accepted the Commission’s argument that the principles of equal access, non-discrimination and transparency had been breached because potential tenderers outside the Netherlands or lacking the EKO and/or MAX HAVELAAR labels for their products would be at a disadvantage (paragraph 97).

Selecting economic operators – Qualification (paragraphs 98-111)

The CJ considered the requirements that tenderers were to demonstrate how they had met the “criteria of sustainable purchasing and socially responsible business” and contributed to “improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production”. The CJ found that these requirements related to minimum levels of professional capacity under the meaning of articles 44(2) and 48 of the Directive. The CJ then assessed the lawfulness of the requirements in that context.

The CJ held that the criteria of sustainable purchasing and socially responsible business were not connected to the factors listed in article 48 of the Directive. The contracting authority used these criteria to set a minimum level of technical ability, which was not authorised by the Directive. The use of these criteria was unlawful (paragraphs 105-108).

The CJ also confirmed that “the principle of transparency [implied] that all the conditions and detailed rules of the award procedure [had to] be drawn up in a clear, precise and unequivocal manner”. This requirement is intended to ensure that:

- “all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way”;
- “the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract”.

(paragraph 109)

The CJ found that the criteria of sustainable purchasing and socially responsible business were not sufficiently clear, precise and unequivocal. The criteria did not satisfy the principle of transparency.

Decision (paraphrased)

The Kingdom of the Netherlands failed to fulfil its obligations under the procurement rules.

This failure in the tendering procedure concerned was attributable to the following actions of the province of North Holland:

- The contracting authority (the province of North Holland) established a technical specification that was incompatible with article 23(6) of the Directive. It required products to bear a specifically named eco-label rather than using detailed specifications to explain the requirements.
- The contracting authority established award criteria that were incompatible with article 53(1)(a) of the Directive. It allocated additional points in the tender evaluation to products bearing specific labels. These allocations were made without listing the criteria underlying those labels and without allowing proof by other means that a product satisfied those underlying criteria.

The requirements for tenderers to demonstrate how they had met the “criteria of sustainable purchasing and socially responsible business” and contributed to “improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production” were:

- in breach of articles 44(2) and 48 of the Directive, as these requirements established minimum requirements, which is not permitted under those articles;
- in breach of the principle of transparency laid down in article 2 of the Directive.

Note: See section on the 2014 Public Sector Directive (2014/24/EU) in the commentary in chapter 7, “Contract award”.

C-599/10 SAG ELV Slovensko and Others

SAG ELV Slovensko and Others v Úrad pre verejné obstarávanie

Judgment dated 29 March 2012, no Opinion of the Advocate General

Reference for a preliminary ruling

This case is of particular relevance to the following topics:

Contract award – abnormally low tenders

Technical specifications

Key sections of the judgment for the purposes of these topics:

Legal context – European Union law	paragraphs 3-5
Legal context – Slovak law	paragraph 6
Facts	paragraphs 7-13
Questions referred to CJEU	paragraphs 22-26
Analysis and judgment	
- <i>Contract award</i>	paragraphs 27-34
- <i>Technical specifications</i>	paragraphs 35-44

References to paragraphs below (in parentheses) are to paragraphs of the judgment.

Summary of facts (paragraphs 7-13)

NDS is a national highway management company wholly owned by the Slovak State. In September 2007 *NDS* launched a tender process to award a contract for toll collection services on motorways and certain roads. The estimated value of the contract was in excess of EUR 600 million. The Directive applied to the award procedure.

The *NDS* advertised the contract in the *OJEU* and ran a restricted procedure. In the course of that procedure, the contracting authority sent requests for tender clarification to two groups of economic operators that had submitted tenders. The contracting authority asked each group to i) clarify the abnormally low tender prices that it had proposed, and ii) respond to questions related to technical issues, which were specific to each tender.

Both groups were subsequently excluded from the tender process and they appealed against that decision. They appealed to the competent administrative body, the *Úrad* (Public Procurement Office).

The *Úrad* held that two of the grounds used by the *NDS* to exclude the two groups of tenderers were justified. First, the two groups had failed to provide adequate responses to the request for clarification of the abnormally low prices proposed in their tenders. Second, those tenders failed to comply with certain conditions set out in the tender specifications. In one case, the failure related to the parameters for calculating tolls. In the other case, the failure related to the requirement for provision of a diesel-powered electricity generator.

The two groups appealed against the decision of the *Úrad*, and the cases eventually reached the Supreme Court of the Slovak Republic. The Supreme Court stayed the proceedings and referred a number of questions to the CJ for a preliminary ruling.

EU law (paragraphs 3-5)

Articles 2 and 55 of Directive 2004/18/EC

Extract from Article 55 of Directive 2004/18/EC

“1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

- (a) the economics of the construction method, the manufacturing process or the services provided;
- (b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;
- (c) the originality of the work, supplies or services proposed by the tenderer;
- (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;
- (e) the possibility of the tenderer obtaining State aid

2. The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.”

Slovak law (paragraph 6)

Law No. 25/2006 on Public Procurement

Article 42 – Procedure for assessment of tenders: In summary, this article provides that tenders be assessed by a committee *in camera*. Tenders that fail to meet the requirements of the contract are to be excluded.

Article 37(3) – Evaluation of tenders: In summary, this provision allows the committee to ask tenderers to explain their tenders in writing. However, the committee may not seek or accept a proposal from a tenderer to make a change that would be to the tenderer’s advantage. The committee is obliged to seek a written explanation from a tenderer when the tender contains an abnormally low price.

Judgment (paragraphs 22-44)

The CJ considered the following questions (paraphrased):

Context: In a restricted public procurement procedure, a contracting authority receives a tender that it considers to be i) abnormally low, or ii) imprecise or failing to meet the technical specification requirements.

In either of these circumstances, is a contracting authority permitted or obliged to seek clarification from a tenderer? Can a contracting authority claim that it is not obliged to request clarification from a tenderer about an abnormally low price?

Abnormally low tenders: The CJ decided that a contracting authority was obliged to ask a tenderer to clarify an abnormally low tender price (paragraphs 32-34). This decision was made on the basis of the express provisions of article 55 of the Directive. The CJ confirmed that the requirement to examine the details of an abnormally low tender and seek explanations from the tenderer was mandatory.

The CJ stated that “the existence of a proper exchange of views ... to enable the [tenderer] to demonstrate that its tender is genuine, constitutes a fundamental requirement of Directive 2004/18...”. This requirement aims “to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings” (paragraphs 28-29).

The CJ also pointed out that the list in article 55(1) was not exhaustive, but it was also “not purely indicative” (paragraph 30). It concluded that contracting authorities were not free to determine the relevant factors to be taken into consideration before rejecting a tender that appeared to be abnormally low. In addition, the CJ confirmed that the contracting authority had to make a clear request to the tenderer concerned. The tenderers “must be in a position fully and effectively to show that their tenders are genuine” (paragraph 31).

The Directive requires a provision in national legislation obliging a contracting authority to seek clarification of a tender that contains an abnormally low price (paragraph 33). The Directive precludes a contracting authority from claiming that it is not obliged to ask a tenderer to clarify an abnormally low price (paragraph 34).

Imprecise tenders or tenders that do not meet specification requirements: The CJ noted that no express provisions in the Directive covered this situation (paragraph 35).

The CJ stated that the very nature of the restricted procedure meant that once tenders had been submitted, those tenders could no longer be amended. The principle of equal treatment and transparency mean that the contracting authority may not negotiate with tenderers.

The CJ concluded that a contracting authority was not obliged to seek clarification of a tender that it regarded as imprecise or as failing to meet technical specification requirements. It could reject a tender on that basis (paragraphs 38-39).

Permitted clarification: The CJ was of the view that the Directive did permit “the correction or amplification of details of a tender, where appropriate, on an exceptional basis” (paragraph 39). This permission is granted in particular when it is clear that the contracting authority requires “mere clarification” or the correction of “obvious material errors” (paragraph 40).

This clarification is only permitted when:

- the amendment does not lead in reality to the submission of a new tender (paragraph 40);
- all tenderers are treated equally and fairly. A request for clarification must not appear to unduly favour the tenderer to whom the request was addressed (paragraph 41).

The CJ laid down additional conditions to be applied when a contracting authority sought clarification:

- The clarification of a tender may be made only after the contracting authority has examined all of the tenders (paragraph 42).
- The request must be sent to all undertakings that are in the same situation unless objectively verifiable grounds justify a different treatment of the tenderers (paragraph 43).
- The request must relate to all sections of the tender that are imprecise or that do not meet the technical requirements (paragraph 44).

- The contracting authority cannot reject a tender because of a lack of clarity in a part of the tender when that part was not covered in the contracting authority's request (paragraph 44).

Decision (paraphrased)

1. Abnormally low tenders

- The Directive requires the inclusion in national legislation of provisions obliging a contracting authority to seek clarification of an abnormally low tender.
- It is for the national courts to determine whether the request for clarification enabled the tenderer to provide a sufficient explanation.
- The Directive precludes a contracting authority from taking the view that it is not required to ask a tenderer to clarify an abnormally low price.

2. Clarification of imprecise tenders or tenders that do not meet technical requirements

- The Directive does not preclude a national law according to which a contracting authority may ask tenderers to clarify their tenders, without requesting or accepting any amendment to the tender.
- When clarifying tenders the contracting authority must treat tenderers equally and fairly. The request for clarification cannot appear to favour or disadvantage the tenderer with whom the clarification is sought.

Other issues covered in the judgment

Analysis and judgment on admissibility of questions referred	paragraphs 15-21
Suspension of the effects of the judgment	paragraphs 46-47

Chapter 8 Technical specifications

Context

The correct description of the object of a public procurement contract constitutes an essential part of the public procurement regime. The main purpose of EU procurement rules, which is to open public contracts to competition, could not be achieved if it were possible to define the object of a procurement procedure indiscriminately.

The description of the object of the procurement procedure is a definition of what the purchaser wishes to buy. In order to obtain the required products, services or works, the contracting authority should define precisely its expectations concerning the products/services/works to be procured. This definition should include the scope, size, quality and conditions of execution. EU rules on public procurement, in general, do not restrict the purchaser's decision on what to buy. These rules do seek to prevent the procurement procedure from being conducted in a way that distorts the market.

Technical specifications

When describing the subject matter of public procurement, contracting authorities make use of "technical specifications". Technical specifications are usually understood to mean the totality of the technical requirements. The technical specifications define the characteristics required from works, products or services that fulfil the use for which they are intended by the contracting authority. Technical requirements often include levels of quality, performance, safety or dimensions, quality assurance, terminology, symbols, testing and test methods as well as packaging, marking or labelling. They may also include rules relating to design and costing; testing, inspection and acceptances for works and methods or techniques of construction; and all other technical conditions that the contracting authority is in a position to prescribe, under general or specific regulations.

Ways of formulating technical specifications

Article 23(3) of the Directive provides that technical specifications may be formulated by reference to i) specific standards; ii) performance or functional requirements, including environmental characteristics; or iii) a mixture of these two methods.

Forbidden references

Article 23(2) provides that "technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles in the opening up of public procurement to competition".

Article 23(8) prohibits contracting authorities from applying technical specifications that "refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products".

Derogation from the above rule is permitted, but on an exceptional basis. Derogation is only permitted if the contracting authority is unable to provide a description of the subject matter of the procurement that is sufficiently precise and fully intelligible by using objective technical specifications. In such a case, the contracting authority must specify that it will accept products, services or methods that are equivalent in terms of their properties by adding the words "or equivalent".

Use of eco-labels

When contracting authorities include environmental characteristics in performance or functional requirements, they may use all or part of the detailed specifications, as defined by eco-labels [article 23(6) of the Directive]. These requirements can be based on European, multinational and national eco-labels or on any other eco-label. These eco-labels are permitted provided that:

- the specifications are appropriate for defining the characteristics of the supplies or services that are the object of the contract;
- the requirements for the label are drawn up on the basis of scientific information;
- the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate;
- they are accessible to all interested parties.

Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents. They must nevertheless accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report of a recognised body.

For further information, see:

SIGMA (January 2011), "Incorporating Environmental Considerations into Procurement", Public Procurement Policy Briefs No. 13

http://www.sigmaweb.org/publications/Environmental_Considerations_Public_Procurement_2011.pdf

SIGMA (2010), "Preparation of Procurement", *Public Procurement Training Manual*, Module C2 –

<http://www.sigmaweb.org/publications/46179115.pdf>

Key learning points

1. Contracting authorities must ensure that technical specifications are written in a manner that will open up public procurement to competition.
2. Technical specifications must afford equal access for tenderers and should not have the effect of creating unjustified obstacles to opening up the procurement to competition.
3. The use of a specific origin, trademark or production is not permitted unless it is justified by the subject matter of the procurement and then only in exceptional, defined circumstances. Such a reference must be accompanied by the words "or equivalent".

Summary of CJEU approach and decisions

The use of types or of a specific origin or production is forbidden, unless it is accompanied by the words "or equivalent".

In cases such as *C-45/87 Commission v Ireland*, *C-359/93 Commission v Netherlands* and *C-59/00 Vestergaard*, the contracting authorities required special trademarks or certificates of compliance with national standard specifications. The requirements were set down without the accompanying words "or equivalent". The CJ concluded that those requirements were contrary to article 28 of the Treaty (currently article 34 of TFEU), as they had the effect of restricting the contracts to suppliers intending to use the systems specifically indicated.

In the case *C-225/98 Commission v France*, the CJ held that the principle of equal treatment prohibited not only overt discrimination on grounds of nationality but also all covert forms of

discrimination that had the same effect. In the *Commission v France* case, the contracting authority required compliance with a French standard. The CJ held that the specifications drafted by the contracting authority were so specific and abstruse that only national bidders were able to immediately understand their relevance. In consequence, the use of those references could have the effect of supplying more information to domestic companies, making it easier for those undertakings to submit tenders.

Technical specifications must afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition. In C-6/05 *Medipac-Kazantzidis* and C-489/06 *Commission v Greece*, the CJ considered the issue of competition and public procurement in the context of the interface between the public procurement rules and the Medical Devices Directive (MDD). Under the MDD, medical devices meeting specified standards were required to be lawfully admitted for sale in all Member States. The CJ held that the particular practice in Greek hospitals of refusing, on safety grounds, to accept medical devices meeting the standards specified under the MDD was in breach of equal treatment and transparency obligations.

Technical specifications must be sufficiently precise to allow tenderers to determine the subject matter of the contract and understand all of the requirements of the contracting authority. The Directive requires express mention of the detailed environmental characteristics required. Reference to a particular label is not sufficient (C-368/10 *Commission v the Netherlands*). See note below on the 2014 Public Sector Directive (2014/24/EU) for comments on the new provisions on the use of labels.

The procurement directives do not allow the contracting authority to negotiate tenders that do not comply with the mandatory requirements laid down in the technical specifications (C-561/12 *Nordecon and Ramboll Eesti*).

2014 Public Sector Directive and 2014 Utilities Directive

Article 42 of the 2014 Public Sector Directive (2014/24/EU) covers “technical specifications”. The same provisions are laid down in article 60 of the 2014 Utilities Directive (2014/25/EU).

Article 42 of the 2014 Public Sector Directive permits contracting authorities to formulate technical specifications by reference to specific standards, performance/functional requirements, or a mixture of the two.

Article 43 covers the use of labels (social, environmental and other). The same provisions are laid down in article 61 of the 2014 Utilities Directive.

Article 43 provides that a contracting authority requiring works, supplies or services with specific environmental, social or other characteristics may require a specific label as a means of proof that the works, supplies or services possess the required characteristics. Such label requirements must fulfil certain conditions related to the way in which the labels are established and accorded. A contracting authority requiring a specific label should also accept all labels confirming that the works, supplies or services meet equivalent label requirements [article 43(1)].

Case law

Use of technical specifications – obligation to accept tenders compliant with EU standards

C-6/05 *Medipac-Kazantzidis*

Medipac-Kazantzidis AE v Venizeleio-Pananeio (PE.S.Y. KRITIS)

Judgment dated 14 June 2007, Opinion of the Advocate General dated 21 November 2006

Reference for a preliminary ruling

A full transcript of this ruling and a more detailed analysis are included in this publication.

This case related to a tender procedure for a contract for the supply of sutures to a Greek hospital. The estimated value of the contract was below the threshold of the relevant EU procurement directive. Greek national law nevertheless required the procurement procedure to be conducted in accordance with the Supplies Directive.

The technical specifications required that the sutures supplied comply with the Medical Devices Directive 93/42 (MDD). The MDD stipulated, in turn, that the sutures had to meet certain essential requirements, attested by the affixation of the CE mark, in order to be lawfully sold within the EU. Sutures meeting these standards were to be lawfully admitted for sale in all EU Member States. This requirement was subject to the possibility that a Member State might invoke a special “safeguard” procedure where it considered that the directive did not adequately protect public health. The MDD also provided that these requirements were to constitute a European standard for the products in question.

The CJ held that the contracting authority was in breach of the principle of equal treatment and the obligation of transparency when it rejected a tender on the grounds of protection of public health, as the products tendered complied with the relevant standards and bore the CE mark.

The CJ noted that compliance with the MDD established a presumption that the products in question were fit for the purposes intended. The CJ then stated that a contracting authority could not reject devices that were certified to be in compliance with the MDD. However, the grounds for this conclusion were not entirely clear. In particular, the CJ did not make it clear whether its conclusion was based on the fact that the tender documents had merely required that the sutures met the standards of the MDD, and therefore the contracting authority was obliged to accept that the tender complied with the authority’s specifications.

The CJ ruled that a contracting authority was entitled to reject a tender for medical devices bearing the CE mark on the grounds of technical inadequacy, but only in the context of the safeguard procedure provided for in the MDD. The authority must inform the relevant Member State, which then must invoke the safeguard procedure and refer the matter to the Commission.

C-489/06 *Commission v Greece*

Commission of the European Communities v Hellenic Republic

Judgment dated 19 March 2009, Opinion of the Advocate General dated 20 November 2008

Action brought by the Commission

This case concerned the practice of some hospitals in Greece of rejecting in certain cases tenders for the supply of sutures on the grounds that they did not meet health needs. This practice was carried out despite the fact that the products in question bore the CE mark (see *C-6/05 Medipac-Kazantzidis* above for further explanation of requirements relating to the CE mark and medical devices).

The CJ found that this practice was a violation of the provision on technical specifications in the Supplies Directive. This provision required technical specifications to be defined by reference to national standards that implemented European standards or by reference to European technical approvals or common technical specifications. It should be noted, however, that this obligation no longer applies under the Directive.

In *C-6/05 Medipac-Kazantzidis*, the CJ had concluded that the rejection of a tender violated the Treaty obligation of transparency and principle of equal treatment. This conclusion was made because the products in question complied with the Medical Devices Directive (MDD). In that case, the Greek Government did not express a wish to adopt higher standards than those in the MDD. It contested whether those products met the MDD standards even though the contestation procedure provided by the MDD had not been followed.

The case *C-489/06 Commission v Greece* did not clearly determine whether the specification of standards higher than those in the MDD violated the EC Treaty. This clarification was lacking because the Greek Government accepted that the conduct of the Greek hospitals had violated EU law. However, the CJ, referring to its previous ruling, stated that a contracting authority could not reject a medical device that bore the CE mark. This conclusion may suggest that there is a limit on the discretion to set specifications on health protection in relation to medical devices falling under the MDD. In other words, it may be argued that a contracting authority is not permitted to reject medical devices that comply with the MDD, even when the authority has set higher requirements in the technical specifications.

Note on changes in the wording of directives: The allegation and establishment of a violation of EU law were based in this case on article 8 (2) of the Supplies Directive. This provision required procuring entities generally to specify the products they required in contracts by reference to European standards and other European specifications where they existed. Such an obligation is no longer valid. Under the Directive, contracting authorities are free to describe the object of procurement by reference to either various standards or performance requirements. The same approach is taken in the 2014 Public Sector Directive (see note above on the 2014 Public Sector Directive).

Reference to eco-labels and fair-trade labels in technical specifications

C-368/10 Commission v Netherlands

European Commission v Kingdom of the Netherlands

Judgment dated 10 May 2012, Opinion of the Advocate General dated 15 December 2011

Action brought by the Commission

A full transcript of this ruling and a more detailed analysis are included in this publication (chapter 7, "Contract award").

This action brought by the European Commission proceedings related to a tender procedure under the Directive conducted by the province of North Holland for the supply and management of automatic tea and coffee machines.

The tender documents included a requirement that the tea and coffee supplied were to have:

- An EKO label: The EKO label is used in the Netherlands. It is granted to a product having at least 95% of its ingredients originating from organic agricultural production.
- A MAX HAVELAAR label: The MAX HAVELAAR label is more widely used in a number of Member States. It is intended to promote the marketing of fair-trade products. It certifies that the products granted this label have been purchased at a fair price and under fair conditions from organisations made up of small-scale producers in developing countries.

Use of the EKO label as a technical specification (paragraphs 58-70): Article 23(6) of the Directive authorises the use of eco-labels to describe environmental characteristics. In this case, both parties agreed that the EKO label was an eco-label falling within the meaning of this provision. The Commission was of the view that the provision did not permit, however, the use of an eco-label as a technical specification.

The CJ took the view that by requiring the EKO label for the tea and coffee to be supplied, the contracting authority had established a technical specification. Technical specifications must:

- afford equal access to tenderers;
- avoid the creation of unjustified obstacles to the opening up of public procurement to competition;
- use sufficiently precise wording to enable tenderers to determine the subject matter of the contract and understand all of the contracting authority's requirements.

(paragraphs 61-62)

The Directive requires express mention of the detailed environmental characteristics required. Reference to a particular label is not sufficient. Contracting authorities must explain their specific requirements and if a particular label is of relevance, use the detailed specifications defined by that label and not just refer to the label (paragraphs 64-70).

Use of the MAX HAVELAAR label as a technical specification (paragraphs 71-79): The Commission argued that the requirement for the tea and coffee to have the MAX HAVELAAR label or equivalent was also a technical specification covered by article 23. The Commission was of the view that the requirement was in breach of article 23(8), which prohibited technical specifications from referring to "a specific make or source, or a particular process...or a specific origin or, with the effect of favouring or eliminating certain undertakings or products".

The CJ held that the MAX HAVELAAR label was not a technical specification. This ruling was based on the fact that the definition of a technical specification related exclusively to the characteristics of the product itself, rather than to the conditions under which the supplier had acquired the products from the manufacturer. The MAX HAVELAAR label relates to the conditions of supply, not to production methods.

The CJ held that the requirements did fall within the concept of "conditions of performance of the contract" under article 26 of the Directive. The CJ did not proceed further to consider the legitimacy of the requirements as conditions of performance of the contract, as the Commission had not raised this issue at the reasoned opinion stage of the proceedings. The issue was therefore inadmissible.

Public Sector Directive 2014/24/EU

The 2014 Public Sector Directive includes a provision relating to the use of labels in article 43.

Negotiations with bidders whose offers are not compliant with mandatory requirements

C-561/12 *Nordecon and Ramboll Eesti*

Nordecon AS and Ramboll Eesti AS v Rahandusministeerium

Judgment dated 5 December 2012, no Opinion of the Advocate General

Reference for a preliminary ruling

A full transcript of this ruling and a more detailed analysis are included in this publication.

The key question of the Estonian court in this case was whether article 30(2) of the Directive permitted negotiations with a bidder submitting an offer that did not comply with the mandatory requirements contained in the technical specifications.

Article 30 covers cases justifying the use of the negotiated procedure without prior publication of a contract notice.

Article 30(2) provides that where a contracting authority is justified in using that procedure, it shall “negotiate with tenderers the tenders submitted by them in order to adapt them to the requirements which they have set in the contract notice, specifications and additional documents, if any, and to seek out the best tender...”

The CJ underlined that in certain cases article 30(2) allowed the negotiated procedure to be used in order to adapt the tenders submitted to the requirements set down in the contract notice, specifications and additional documents.

At the same time, under article 2 contracting authorities are obliged to treat economic operators equally and in a non-discriminatory manner and to act in a transparent way. The obligation of transparency is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. The contracting authority has the power to negotiate in the context of a negotiated procedure. It is nevertheless still bound to ensure compliance with the mandatory requirements of the contract. Were that not the case, the obligation of transparency would be breached.

In addition, the acceptance of a tender from a single tenderer that had not complied with the mandatory requirements would mean that the contracting authority did not negotiate with all tenderers on a common basis. The acceptance of such a tender would amount to unequal treatment.

The CJ concluded that article 30(2) did not allow the contracting authority to negotiate tenders that did not comply with the mandatory requirements laid down in the technical specifications.

C-6/05 Medipac-Kazantzidis

Medipac-Kazantzidis AE v Venizeleio-Pananeio (PE.S.Y. KRITIS)

Judgment dated 14 June 2007, Opinion of the Advocate General dated 21 November 2006

Reference for a preliminary ruling

This case is of particular relevance to the following topic:

Technical specifications

Key sections of the judgment for the purposes of this topic:

Legal context – European Union law	paragraphs 3-19
Legal context – Greek law	paragraph 20
Facts	paragraphs 21-26
Questions referred to CJEU	paragraph 27
Analysis and judgment	paragraphs 28-62

References to paragraphs below (in parentheses) are to paragraphs of the judgment.

Summary of facts (paragraphs 21-26)

This case related to a tender procedure for a contract to supply various surgical sutures to a Greek hospital. The estimated value of the contract was EUR 131 500 including VAT, which was below the relevant EU financial threshold. Greek national law nevertheless required the procurement procedure to be conducted in accordance with the Supplies Directive. The contract was to be awarded on the basis of the lowest price as the only award criterion.

The notice advertising the tender specified that the sutures had to be certified in accordance with the European Pharmacopoeia and bear the CE mark. Nine companies, including *Medipac*, submitted tenders. The materials proposed by *Medipac* bore the required CE mark. The tender committee issued a recommendation to the hospital that the PGA²⁶ type of sutures proposed by *Medipac* should be excluded, as the knots made with PGA-type materials slipped easily and closed prematurely, the needles frequently twisted or broke, and the sutures did not hold sufficiently. The hospital rejected the tender from *Medipac*, stating that the PGA-type sutures proposed did not meet the technical specifications of the contract.

Medipac submitted an appeal against this decision. It argued that the technical specifications on which the rejection of its tender was based had not been set down in the invitation to tender. In addition, the technical specifications were imprecise, to the point of being incomprehensible. They did not permit a proper assessment of the requirements relating to the materials to be supplied. They also diverged from the technical characteristics for such materials, referred to in Directive 93/42/EEC, the Medical Devices Directive (MDD). *Medipac* also maintained that the materials it proposed, which complied with the requirements of the European Pharmacopoeia, did not and could not have the technical imperfections that had been referred to by the hospital.

The Greek review body decided to stay the proceedings and to refer to the CJ for a preliminary ruling. The review body asked whether a contracting authority was allowed to reject a tender for medical devices that bore the CE mark and had undergone a quality check by the competent certification body. In these circumstances was it permitted to reject the tender as technically unacceptable on the basis of objections relating to the adequacy of the products in terms of quality and fitness for use?

²⁶ Sutures made of polyglycolide or polyglycolic acid – a biodegradable, thermoplastic polymer

EU law (paragraphs 3-19): Article 5(1) of Directive 93/36/EEC (currently article 7 of Directive 2004/18/EC); Directive 93/42/EEC, the Medical Devices Directive (MDD)

Greek law (paragraph 20): Joint Ministerial Decree No. DI7/ik.2480 of 19 August 1994, transposing Directive 93/42/EEC (MDD) of 14 June 1993

Judgment (paragraphs 28-62)

Application of general EU principles to contracts below the thresholds

The estimated value of the contract in question was below the relevant EU financial threshold. Greek law nevertheless required the procurement procedure to be conducted in accordance with the Supplies Directive.

The CJ did not find it relevant to consider directly the rules of the procurement directives, as the contract was below the threshold. It did consider, however, whether the procedure complied with general principles of EU law (the Treaty), including the equal treatment principle (paragraphs 30-36).

Requirements of the Medical Devices Directive 93/42/EEC (MDD) and application of Treaty principles

The technical specifications for the contract required that the sutures supplied conform to the MDD. The MDD in turn required that the sutures meet certain essential requirements (attested by the affixation of the CE mark) in order to be lawfully sold within the EU. Sutures meeting these standards must be lawfully admitted for sale in all EU Member States. This provision is subject to the possibility that Member States may invoke a special “safeguard” procedure if they consider that the MDD does not adequately protect public health. The MDD also provides that the requirements set by the MDD constitute a European standard for the products in question.

The MDD was intended to promote the free movement of medical devices that have been certified to be in compliance with the MDD. This freedom of movement was to be achieved by replacing the various measures taken in this area in each of the Member States. These individual measures could be an obstacle to free movement. The reconciliation of the free movement of these devices with the protection of patients’ health is needed. The need to reconcile these interests means that when a risk emerges that is linked to a device certified as MDD-compliant, the Member State must then implement the safeguard procedure. This procedure is provided for in article 8 of the MDD. Bodies that are not empowered to implement the safeguard procedure are not permitted to take unilateral action in such circumstances.

Where proposed CE-marked products give rise to concern as to patients’ health or safety, the safeguard procedure must then be used to avoid arbitrary behaviour. The principle of equal treatment of tenderers and the obligation of transparency prevent the contracting authority from rejecting directly the tender in question. The principle of equal treatment and the obligation of transparency apply, irrespective of whether the Directive applies. They apply to contracts below the EU financial thresholds.

The purpose of the safeguard procedure is to ensure objective and independent assessment and checking of the alleged risks. The principle of equal treatment and the obligation of transparency prohibit the contracting authority from rejecting a tender that satisfies the requirements of the invitation to tender on grounds that are i) not set down in the tender specifications, and ii) relied on subsequent to the submission of the tender.

Discretion in setting technical specifications, including where EU standards exist

The CJ noted that compliance with the MDD established a presumption that the products in question were fit for the purposes intended (paragraph 42). The CJ then stated that a contracting authority could not reject devices that were certified to be in compliance with the MDD (paragraph 52).

It was not clear whether the CJ considered that this restriction was to always apply or merely for the time being, as compliance with the MDD was the only relevant requirement in the technical specifications set by the contracting authority.

If the contracting authority is obliged to accept products that comply with the MDD, this obligation may imply that the contracting authority's discretion is limited. It may be argued that the contracting authority cannot choose to set higher standards for health and safety – or for other matters, such as environmental matters – than those set out in directives of this kind, which set standards for admission into the single market and also act as European standards.

It may also even imply, more generally, that public authorities must accept products that either i) meet European standards for levels of safety or environmental characteristics, or ii) comply with levels of health and safety that are sufficient for them to be admitted into free circulation in the EU market. That restriction would mean that contracting authorities had to accept products of a lower standard of safety, provided they are permitted to be sold throughout the EU. However, another interpretation is also possible: that the CJ's ruling was based on the fact that the product in question was covered by the MDD and the Greek Government had not expressed a wish to adopt higher standards than those referred to in the Directive. If so, public authorities would be allowed to set their own standards when the use of the product was not specifically covered by the MDD or more generally.

Application of the MDD safeguard procedure in the context of public procurement

The MDD provides a procedure for rebutting the presumption that products bearing the CE mark comply with the essential requirements of the MDD on health and safety. It also provides a procedure for dealing with products that are considered to have failed to meet the requirements of the CE mark accorded to them.

EU Member States that identify a risk attached to a product bearing the CE mark are obliged to report this finding to the Commission for a decision on the adequacy of the product. In the meantime, pending the Commission's decision, the Member State may take safeguard measures to protect public health. The Greek court asked the CJ how these measures applied in the context of a public procurement procedure.

The CJ ruled that a contracting authority was entitled to reject a tender for medical devices bearing the CE mark on grounds of technical inadequacy, but only in the context of the safeguard procedure provided for in the MDD (paragraphs 57-58 of the judgment). The contracting authority must inform the relevant authorities in the Member State, which in turn must invoke the safeguard procedure and refer the matter to the Commission. According to the CJ, the contracting authority must also suspend the award procedure in question pending the decision of the Commission. This procedure gives the tenderer concerned the chance to have its tender properly considered.

The Commission's decision is binding on the contracting authority. If the Commission's decision confirms that the materials used do not comply with the requirements of the MDD, the contracting authority will be permitted to continue the procedure and reject the products offered.

The CJ pointed out, however, that if the suspension of the award procedure caused problems in running the hospital, it might be possible to invoke the public health derogation from the provisions on free movement of goods (paragraph 60). In a situation of urgency, a contracting authority is entitled to take all interim measures required to enable it to procure the medical devices necessary for its operation.

In such cases, the contracting authority must be able to show that a situation of urgency exists, justifying such a derogation from the principle of free movement of goods. The contracting authority must also demonstrate that the measures taken are proportionate (paragraph 61). The CJ did not explain, however, what it meant by the term “proportionate”. The Advocate General emphasised that any derogation would be “on a strictly limited basis and for a limited time” (paragraph 118 of the Opinion) and would not apply if there was no “real urgency” and if public health was not “immediately compromised” (paragraph 120 of the Opinion).

Decision (paraphrased)

1. Where a contracting authority specifies that medical devices must comply with the European Pharmacopoeia and bear relevant CE marks, it is not permitted to reject a tender on public health grounds if the tendered products satisfy the technical requirements. The direct rejection of such a tender is against the principle of equal treatment and the obligation of transparency. If the contracting authority considers that those products may jeopardise public health, it must inform the competent national authority, with a view to setting in motion the safeguard procedure provided in the MDD.
2. A contracting authority that has referred a matter, with a view to setting in motion the safeguard procedure, is required to suspend the tendering procedure until the conclusion of the safeguard procedure. The outcome of the safeguard procedure is binding on the contracting authority. If a safeguard procedure gives rise to delays that are liable to jeopardise the operation of a public hospital and thereby public health, the contracting authority is entitled to take all interim measures required to enable it to procure the materials necessary for the smooth running of that hospital. These interim measures are subject to compliance with the principle of proportionality.

C-561/12 *Nordecon and Ramboll Eesti*

Nordecon AS, Ramboll Eesti AS v Rahandusministeerium

Judgment dated 5 December 2012, no Opinion of the Advocate General

Reference for a preliminary ruling

This case is of particular relevance to the following topic:

Technical specifications

Key sections of the judgment for the purposes of this topic:

Legal context – European Union law	paragraphs 3-7
Legal context – Estonian law	paragraphs 8-11
Facts	paragraphs 12-25
Questions referred to CJEU	paragraph 26
Analysis and judgment	paragraphs 27-40

References to paragraphs below (in parentheses) are to paragraphs of the judgment.

Summary of facts (paragraphs 12-25)

The Estonian Highways Office launched a negotiated procedure with the prior publication of a contract notice. The contract was for the planning and construction of one section of a motorway. The tender specifications allowed the submission of alternative solutions, except for the construction of the surface structures of a main road, including access roads. The contract was to be awarded to the tenderer offering the lowest price. Price was the only criterion applied.

In accordance with the specifications, the central reservation of that section of road was to be 13.5 metres wide from the 26.6-kilometre mark to the 32-kilometre mark. It was to be six metres wide from the 32-kilometre mark to the 40-kilometre mark.

Four tenders were submitted. The tender from the *Nordecon* consortium was considered to be admissible. It was admissible even though the tender proposed a central reservation that was six metres wide along the entire length of that section of road.

During the negotiations that followed the submission of tenders, the Highways Office invited the tenderers, other than *Nordecon*, to amend their tenders. They invited those tenderers to alter the width of the central reservation and to set the width at six meters for the entire length of the section of road concerned. This revised specification was in line with the tender received from *Nordecon*. The tenderers concerned submitted their revised offers. The Highways Office made two decisions: i) it declared all of the tenders admissible, and ii) it accepted the tender of the *Lemminkäinen* consortium, which was the lowest in price.

Following a complaint by *Nordecon*, the review body annulled those two decisions and considered the conduct of a negotiated procedure with prior publication of a contract notice. It held that the negotiation conducted by the contracting authority in the context of that procedure did not relate to the requirements clearly and unambiguously laid down in the contract documents. These requirements included the specification related to the width of the central reservation.

The Highways Office then rejected the tender of the *Lemminkäinen* consortium and accepted the tender of *Nordecon*, which was the second lowest price.

Finally, the whole procurement procedure was annulled on the grounds that i) the contracting authority had unlawfully declared the tender of the *Nordecon* consortium admissible, and ii) the negotiations conducted by the contracting authority were not permitted.

Nordecon appealed against the annulment decision in the Estonian court. The court decided to put the review procedure on hold and referred four questions to the CJ. These questions related to the interpretation of the Directive, in particular article 30(2) concerning the negotiated procedure with prior publication of a contract notice.

EU law (paragraphs 3-7): Directive 2014/18, article 1(11) – definition of the negotiated procedure; article 2 – principles of awarding public contracts; article 23 – technical specifications; article 24 – variants; article 30 – cases justifying use of the negotiated procedure with prior publication

Estonian law (paragraphs 8-11): definition of the negotiated procedure, application of variants, conduct of the negotiated procedure

Judgment (paragraphs 27-40)

Possibility of negotiations with a bidder on an offer that did not satisfy mandatory requirements

The referring court asked whether article 30(2) of the Directive allowed a contracting authority to negotiate with tenderers on tenders that did not comply with the mandatory requirements laid down in the technical specifications.

The Estonian court referred three additional questions to the CJ. The Estonian court only required answers to the additional questions if the answer to the first question above was affirmative. In particular, the review body asked whether:

- article 30(2) allowed the contracting authority, during the negotiations and after the tenders had been opened, to alter the mandatory requirements of the technical specifications, provided that the subject matter of the contract was not altered and that equal treatment of all tenderers was ensured;
- article 30(2) precluded, after the tenders had been opened, the alteration of the mandatory requirements of the technical specifications during the negotiations;
- the contracting authority could accept a tender that, at the end of the negotiations, did not comply with the mandatory requirements of the technical specifications.

Article 30 covers cases for which the use of the negotiated procedure without prior publication of a contract notice can be justified. Article 30(2) provides that where a contracting authority is justified in using that procedure it shall “negotiate with tenderers the tenders submitted by them in order to

adapt them to the requirements which they have set in the contract notice, specifications and additional documents, if any, and to seek out the best tender...”.

According to the referring court, it was not disputed that i) the contracting authority did not allow the submission of alternative solutions, and ii) the evaluation of tenders was based on the criterion of the lowest price only.

The CJ underlined, that, in certain cases, article 30(2) allowed the negotiated procedure to be used in order to adapt the tenders submitted to the requirements set down in the contract notice, specifications and additional documents. At the same time, under article 2 contracting authorities are obliged to treat economic operators equally and in a non-discriminatory manner and to act in a transparent way.

Referring to case law, the CJ stated that the obligation of transparency was intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. With regard to the conduct of potential negotiations, the CJ observed that the contracting authority had the power to negotiate in the context of a negotiated procedure. The authority was nevertheless still bound to ensure compliance with the mandatory requirements of the contract. Were that not the case, the principle that contracting authorities were obliged to act in a transparent way would be breached, and the aim of transparency of the procedure could not be attained (paragraph 37).

In addition, accepting a tender that did not comply with the mandatory requirements would defeat the purpose of fixing mandatory conditions in the call for tenders. It would mean that the contracting authority did not negotiate with all tenderers on a common basis. It would amount to unequal treatment of economic operators (paragraph 38).

The CJ concluded that article 30(2) did not allow the contracting authority to negotiate tenders that did not comply with the mandatory requirements laid down in the technical specifications.

As the answer to the key question was negative, the CJ did not reply to the three additional questions.

Decision (paraphrased)

Article 30(2) of the Directive does not allow the contracting authority to negotiate with bidders in relation to tenders that do not comply with the mandatory requirements laid down in the technical specifications of the contract.

Chapter 9 Changes to contracts

Context

This chapter considers CJ decisions on the issue of determining whether changes in a concluded contract constitute a new contract award. This issue is important, as whenever a contracting authority makes a new contract award, an EU-compliant tender process is then generally required in relation to that award.

The Directive does not contain specific provisions on the extent to which changes in the terms of a concluded contract are permitted.

However, the Directive does list the circumstances justifying the use of the negotiated procedure without publication of a contract notice. In some cases, changes in the terms of a concluded contract fall under these provisions. In these situations, changes made to a contract will not be regarded as a new contract award.

The circumstances where the use of the negotiated procedure without publication of a contract notice is allowed are set out in article 31 of the Directive. In the context of post-contract changes, the circumstances most likely to fall under these provisions are as follows (in summary and subject to the conditions set down in article 31):

- Situations of extreme urgency [article 31(1)(b)];
- Additional deliveries of supplies required as partial replacement or extension of existing supplies, where a change in supplier would result in different technical characteristics of the materials, which would signify incompatibility or disproportionate technical difficulties [article 31(2)(b)];
- Additional works or services that have become necessary due to unforeseen circumstances, where such additional works or services cannot be separated from the original contract without major inconvenience or where they are strictly necessary for its completion [article 31(4)(a)];
- New works or services consisting of the repetition of similar works or services that are in conformity with the original project [article 31(4)(b)].

The circumstances listed in article 31 are situations where contracting authorities are permitted to depart from the usual obligations under the Directive relating to open competition and transparency. The CJ has ruled that i) the circumstances where this departure from the usual obligations is permitted are to be strictly interpreted; and ii) a strict approach is to be taken concerning their use, as the contracting authority has the burden of proof justifying the use of the procedure²⁷.

This section does not deal with the case law on article 31. It covers the case law on changes to concluded contracts that are not covered by the situations provided for in article 31.

The case C-454/06 *pressetext Nachrichtenagentur*, which is discussed in detail in this publication, was the first significant CJ case to set out clear principles applying to changes in contract terms and changes in the contractual partner and to examine whether those changes amounted to a new contract award.

Key learning points

²⁷ See, for example, case C-385/02 *Commission v Italy*.

1. The principles of equal treatment and transparency continue to apply after the conclusion of the contract. The contracting authority is therefore not at liberty to change an existing contract, even if agreement to this effect has been reached with the supplier.
2. These principles set boundaries to the changes that the contracting authority may make in an existing contract. If these changes are material, a new contract award procedure is required.
3. National legislation must cover not only the award stage of the procurement process but also the stage of performance of a contract.

Article 72 of the 2014 Public Sector Directive (2014/24/EU) codifies and expands upon the decision in C-454/06 *presstext Nachrichtenagentur*. Now detailed legal provisions have been laid down in relation to the modification of contracts during their term.

Summary of CJEU approach and decisions

In the case C-454/06 *presstext Nachrichtenagentur*, the CJ confirmed that amendments to a public contract during its term constituted a new contract award where they are “materially different in character from the original contract...such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract”.

The CJ set down a number of principles that applied when determining whether the changes to a contract were material. The principles set down in C-454/06 *presstext Nachrichtenagentur* were then applied in the cases C-160/08 *Commission v Germany* and

C-91/08 *Wall*.

In C-160/08 *Commission v Germany*, the CJ applied the principles established in C-454/06 *presstext Nachrichtenagentur* with regard to the extension of a services contract. It decided that the extension to the contract was a material change constituting a new contract award. The contract was extended to cover a significantly increased geographical area, and the contract value was increased by more than 15%.

In C-91/08 *Wall* the CJ applied the principles established in C-454/06 *presstext Nachrichtenagentur* to a service concession contract that was subject only to Treaty principles. The CJ decided that a change of sub-contractor could, in exceptional cases, constitute an amendment to one of the essential provisions of a concession contract. This exception could be made when the nature of the contract meant that the use of a particular sub-contractor was a decisive factor in the award of the contract.

Case law

C-454/06 *presstext Nachrichtenagentur*

presstext Nachrichtenagentur GmbH v Republik Österreich (Bund) and Others

Judgment dated 19 June 2008, Opinion of the Advocate General dated 13 March 2008

Reference for a preliminary ruling

A full transcript of this ruling and a more detailed analysis are included in this publication.

In this case, the CJ considered, in a situation where the terms of an existing contract had been amended, whether the amendments constituted a new award of contract.

The CJ confirmed that amendments to the provisions of a public contract during its term constituted a new contract award where the amendments were “materially different in character from the original contract...such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract”.

The CJ set out the circumstances where an amendment could be regarded as being “material”. An amendment is considered to be material when it:

- introduces conditions that, had they been part of the initial award procedure, would have allowed the admission of tenderers other than those initially admitted or the acceptance of a tender other than the one initially accepted; or
- extends the scope of the contract considerably to encompass services that were not originally covered; or
- changes the economic balance in favour of the contractor in a manner that was not provided for in the terms of the initial contract.

The CJ then considered three specific scenarios and concluded in each case that, based on the facts, the changes were not material and did not constitute a new contract award.

The principles established in *C-454/06 presstext Nachrichtenagentur* were applied in the cases *C-160/08 Commission v Germany* and *C-91/08 Wall* outlined below.

C-160/08 *Commission v Germany*

European Commission v Federal Republic of Germany

Judgment dated 29 April 2010, Opinion of the Advocate General dated 11 February 2010

Action brought by the Commission

One of the first issues considered by the CJ in this case was whether the award of several contracts for ambulance services fell under the derogations from EU procurement rules. It was argued that EU procurement rules did not apply to the award of the contracts in question because they either i) fell under the exercise of official authority, or ii) involved the provision of services of a general economic interest. The CJ concluded, however, that neither of these derogations was applicable. The various contracts, which had been awarded over a period of years, were covered by the Services Directive or the Directive.

The CJ also looked at the issue of the extension of existing contracts. With regard to one of the contracts, the CJ found that the local branch of the German Red Cross had been the provider of public administrative services in the district of Uelzen for many years. The contract for those services was subsequently extended to cover the operation of an additional ambulance station, without any prior publication of a contract notice. The extension applied to both geographical scope and value. The total value of the amended contract was EUR 4.45 million per year, and the value of the additional services was EUR 670 000 per year (paragraph 32). The CJ ruled, applying the principles established in C-454/06 *presstext Nachrichtenagentur*, that this extension was a material amendment, thereby constituting the new award of a contract. The amendments extended the scope of the contract considerably to encompass services that had not been covered originally (paragraphs 98-99).

C-91/08 Wall

Wall AG v Stadt Frankfurt am Main, Frankfurter Entsorgungs und Service (FES) GmbH

Judgment dated 13 April 2010, Opinion of the Advocate General dated 27 October 2009

Reference for a preliminary ruling

The CJ considered a number of issues in this case, including whether a change of sub-contractor constituted a new award of a service concession contract.

This case concerned the award of a contract for the operation and maintenance of public lavatories in Frankfurt. The service provider received remuneration through a combination of i) fees paid by users of the lavatories; and ii) fees for the use of advertising space on and in the lavatories and in other public spaces.

The contract was awarded to the *FES* company. The contract specified that a designated sub-contractor, *Wall*, would both provide the lavatories and market the advertising spaces. After the award of the contract, *FES* obtained the consent of the contracting authority to change the sub-contractor. *Wall* brought an action, seeking an order to prevent the contracting authority from proceeding on this basis.

The CJ confirmed that the arrangement was a services concession of potential cross-border interest. The issues raised therefore needed to be considered in the light of the general principles of equal treatment, non-discrimination and transparency.

The CJ applied the principle established in C-454/06 *presstext Nachrichtenagentur* that an amendment to a service concession contract during its term could be regarded as a material change if “it [introduced] conditions which, if they had been part of the original award procedure, would have allowed for the admission of tenderers other than those originally admitted or would have allowed for the acceptance of an offer other than that originally accepted”.

The CJ concluded that a change of sub-contractor could constitute, but in exceptional cases only, an amendment to one of the essential provisions of a service concession contract. This ruling would apply even if the possibility of a change had been provided for in the contract. A change of sub-contractor was considered to be a material change if the use of one sub-contractor rather than another had been a decisive factor when concluding the contract (paragraph 39).

Public Sector Directive 2014/24/EU

Article 72 of the 2014 Public Sector Directive codifies and expands upon the decision in C-454/06 *pressetext Nachrichtenagentur*. Detailed legal provisions have been laid down now with regard to the modification of contracts during their term.

Article 72 also incorporates a number of provisions of article 31 of the Directive on the use of the negotiated procedure without publication of a contract notice.

C-454/06 presstext Nachrichtenagentur

presstext Nachrichtenagentur GmbH v Republik Österreich (Bund) and Others

Judgment dated 19 June 2008, Opinion of the Advocate General dated 13 March 2008

Reference for a preliminary ruling

This case is of particular relevance to the following topic:

Changes to contracts

Key sections of the judgment for the purposes of this topic:

Legal context – European Union law	paragraphs 3-7
Facts	paragraphs 8-24
Questions referred to CJEU	paragraphs 25-27
Analysis and judgment	
- <i>Principles</i>	paragraphs 28-38
- <i>Changes to contracts</i>	
i) contractual partner	paragraphs 39-54
ii) price and indexation	paragraphs 55-70
iii) waiver and rebate	paragraphs 71-88

References to paragraphs below (in parentheses) are to paragraphs of the judgment.

Summary of facts (paragraphs 8-24)

In this case, the CJ considered whether various amendments to a contract during the life of that contract should be regarded as a new contract award.

APA was a long-established, limited liability, registered co-operative providing news agency services. Almost all Austrian daily newspapers as well as the Austrian radio and television broadcasting corporation were members of the *APA* co-operative.

The basic agreement: In 1994, prior to Austria's accession to the EU in 1995, the *Republik Österreich (Bund)* concluded an agreement ("the basic agreement") with *APA*. The basic agreement provided the contracting authority with access to *APA*'s database and its various current news, archive and text services. The duration of the basic agreement was for an indefinite period, subject to a fixed minimum period of 10 years during which both parties waived their right to terminate.

The basic agreement included provisions relating to the date of the first price increase, the maximum amount of the increase, and the indexation of prices by reference to a clearly specified consumer price index.

Transfer to a new company: In September 2000, *APA* established a wholly owned subsidiary company, *APA-OTS*. The two companies, *APA* and *APA-OTS*, were bound by a contract that provided for *APA-OTS* to be integrated financially, organisationally and economically within *APA*. *APA-OTS* was also required to conduct and manage its business on the basis of instructions from *APA* and to pass its annual profits to *APA*.

In September 2000, *APA* transferred to *APA-OTS* the operation of the text services that were to be provided under the basic agreement. This alteration to the agreement was notified to the contracting authority. The contracting authority was informed that, following the transfer, *APA* and *APA-OTS* would be jointly and severally liable. It was also told that there would be no change in the overall service performed.

The contracting authority authorised the future provision of the text services by *APA-OTS*. Remuneration for those services was subsequently paid to *APA-OTS*.

Changes in pricing: In 2001 the basic agreement was amended by a first supplemental agreement. The first supplemental agreement adjusted the basic agreement as follows:

- The annual charges and fixed fees for some services were to be converted to euros with effect as from 1 January 2002, when Austria joined the Eurozone. The converted figure was rounded down.
- The index used as the reference point for the indexation of charges was changed.
- Some prices, rather than being subject to indexation, were fixed for a two-year period. These fixed prices resulted in a price reduction.

Changes in other contract terms: In October 2005 the basic agreement was further amended by a second supplemental agreement. The second supplemental agreement adjusted the basic agreement as follows:

- A further waiver to the right to terminate was agreed for a period of three years, until December 2008.
- A rebate of 15% that had already been fixed for certain information services was increased to 25%.

In 2004 an Austrian news agency, *PN*, offered its news agency services to the contracting authority. That offer did not lead to the signing of an agreement.

In 2006 *PN* sought a declaration from the Federal Procurement Office (a specialist procurement review body). *PN* argued that the severance of the basic agreement following the restructuring of *APA* in 2000 and the two supplemental agreements were *de facto* awards and were unlawful. The Federal Procurement Office referred a number of questions to the CJ for a preliminary ruling.

EU law (paragraphs 3-7)

Services Directive 92/50/EC: Article 3(1) – application of procedures to award of the contract; articles 8-10 – treatment of contracts for priority/non-priority services; article 11(3) – award of a contract by negotiation without prior publication of a notice

Judgment (paragraphs 28-90)

The CJ considered the three changes to the contract. In each case it considered whether the changes made could be regarded as constituting a new contract award within the meaning of the Services Directive.

The three changes concerned i) the contractual partner, ii) the price and indexation, and iii) other contract terms relating to the waiver of termination rights and the payment of rebates.

The CJ acknowledged that the Services Directive did not provide a specific answer to the questions raised. *(Note: This continues to be the case under the Directive, but the 2014 Public Sector Directive contains provisions relating to changes to contracts.)* It was therefore important to consider the issue in the context of the overall framework of Community rules governing public procurement, including freedom of movement and opening up of undistorted competition, non-discrimination, equal treatment and transparency (paragraphs 28-33).

Material change: The CJ set down basic principles related to the issue of a material change constituting a new contract award.

The CJ confirmed that amendments to the provisions of a public contract during its term constituted a new contract award where the amended provisions are “materially different in character from the original contract...such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract” (paragraph 34).

The CJ then set down the circumstances where an amendment could be regarded as a “material” change. An amendment is considered to be a material change when it

- “introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted” (paragraph 35); or
- extends the scope of the contract considerably to encompass services not originally covered (paragraph 36); or
- changes the economic balance in favour of the contractor in a manner that was not provided for in the terms of the initial contract (paragraph 37).

The CJ then proceeded to consider three specific questions (paraphrased below).

Question 1: Change in contractual partner (paragraphs 39-54): Was the change in contractual partner in 2000, when APA transferred the performance of part of the contract to APA-OTS, a new award of contract within the meaning of the Services Directive?

The CJ held that “as a rule, the substitution of a new contractual partner for the one to which the contracting authority had originally awarded the contract must be regarded as a change to one of the essential terms of the contract...unless that substitution was provided for in the terms of the initial contract...”(paragraph 40).

In this case, however, the CJ was of the view that “some of the specific characteristics of the transfer of the activity” led to the conclusion that no change had been made in the essential terms of the contract. According to the CJ, the transfer arrangements were “in essence an internal reorganisation of the contractual partner, which does not modify in any fundamental manner the terms of the initial contract” (paragraphs 43-45).

Transfer of shares during the term of the contract (paragraphs 46-49): The CJ then considered a more theoretical question. The question was whether legal consequences followed from the fact that the contracting authority did not have an assurance with regard to the future ownership of shares. It did not have a specific assurance that the shares in APA-OTS would not be transferred to a third party during the term of the contract.

The CJ was of the view that if such a transfer occurred, it would no longer be an internal reorganisation but an actual change in the contractual partner. As a rule, this change would be an amendment to an essential term of the contract. It would be liable to constituting a new award of contract within the meaning of the Services Directive. The CJ stated that similar reasoning would apply if the transfer of shares to a third party had already been provided for at the time of the transfer of activities to a third party.

However, the situation is different where there is only the possibility of a future transfer of shares. In that case, the actual transfer that occurred did not amount to a material change.

Shares traded on a stock exchange and equivalent situations (paragraphs 50-54): The CJ also considered the situation where a contract was awarded to a company listed on a stock exchange. In these circumstances, shares are regularly traded and the composition of shareholders is likely to change at any time. There is therefore no guarantee when the contract is awarded that no changes will be made in the composition of the shareholders.

The CJ stated that “as a rule, such a situation does not affect the validity of the award of a public contract to such a company”. The CJ also commented that this principle would apply in an equivalent situation where the contract was awarded to a limited liability, registered co-operative and where there were changes in ownership.

The CJ stated that this might not be the rule in exceptional cases, such as a situation where there is a deliberate intent to circumvent public procurement rules.

Question 2: Prices and indexation (paragraphs 55-70): Did the changes in pricing and in the price index that had been agreed in 2001 constitute a new contract award?

Conversion of prices into euros (paragraphs 55-63): The CJ was of the view that the conversion of prices into euros following the change in currency was not a material amendment but only an adjustment to accommodate changes in external circumstances. This ruling stands provided that the prices are rounded off in accordance with the relevant provisions in force, including those relating to the introduction of the euro.

The CJ expressed the view that where the rounding-off exceeded the amount authorised by the relevant provisions, the new price in euros was then an amendment to the intrinsic contract price. The question then arises as to whether this change constitutes a new contract award.

The CJ confirmed that the price was an important condition of a public contract. Amending a price condition during the contract period, in the absence of express authority in the original contract to do so, might infringe on transparency and equal treatment principles. Nevertheless, a conversion of the price into euros that also involves a change in the intrinsic contract price is permissible. It is permissible provided that the adjustment is minimal and objectively justified. The CJ considered that this was the position in this case of the changes to the basic agreement between the parties. The CJ also commented that the changes were to the detriment of the contractor.

Change in price index provisions (paragraphs 64-69): Did the introduction of a new price index constitute the award of a new contract?

The CJ found that the basic agreement had set out a pricing index and had provided for the subsequent replacement of that index with a new index. The first supplemental agreement merely applied the terms of the basic agreement by keeping the price index up to date. The CJ confirmed that, in this case, the introduction of a new price index did not constitute an amendment to an essential condition. It did not constitute a new contract award.

Question 3: Changes to other contract terms (paragraphs 71-88): Did the waiver of the right to terminate or the change in the rebates that had been agreed in 2005 constitute a new contract?

Waiver of right to terminate (paragraphs 73-80): The CJ first noted that the practice of concluding a public sector contract for an indefinite period was “at odds with the scheme and purpose of the Community rules governing public contracts”. It commented that “such a practice might, over time, impede competition...and hinder the provisions of [the]...directives governing the advertising of procedures for the award of public contracts”.

The CJ noted, however, that Community law did not prohibit the conclusion of public service contracts for an indefinite period. A clause that enables parties to decide not to terminate a contract for a given period is not unlawful under public procurement law (paragraphs 73-75).

The CJ then considered the clause agreed in 2005 that enabled parties to waive the right to terminate for a three-year period until 31 December 2008 (the “waiver period”). It confirmed that nothing in the case file indicated that the contracting authority would have considered terminating the contract and going out to tender if the waiver had not been agreed. In addition, in the CJ’s view the waiver period was not excessive.

Based on the facts, the CJ held that such a waiver did not risk distorting competition to the detriment of potential new tenderers. The CJ did include a proviso, however, that this ruling was valid “provided that [the waiver was] not systematically re-inserted in the contract”.

Change in rebate (paragraphs 81-88): The CJ observed that the basic agreement provided for a price for certain services based on the official tariff less 15% (a rebate). This pricing arrangement was based on a degressive tariff, according to which the prices reduced when the use of the services increased. It also found that the increase in rebate from 15% to 25% was tantamount to a price reduction and therefore did not shift the economic balance of the contract in favour of the contractor. It also did not entail a distortion of competition that could be detrimental to potential tenderers. The CJ concluded that the increase in the rebate fell within the ambit of the pricing clauses in the basic agreement. It did not amount to a material change and thus was not to be considered as a new contract award.

Decision (paraphrased)

There is no new contract award where:

1. Services supplied to the contracting authority by the initial service provider (A) are transferred to another service provider (B) and where:
 - A is the sole shareholder in B; and
 - A controls B and gives instructions to B; and
 - A continues to assume responsibility for compliance with the contractual obligations.
2. An adjustment of the initial agreement aims to:
 - Accommodate changed external circumstances, such as the conversion to euros; or
 - Allow a minimal reduction in prices in order to round them off; or
 - Refer to a new price index where provision was made in the initial agreement to replace the earlier price index.
3. A contracting authority uses a supplemental agreement during the term of the contract to:
 - Renew a waiver of the right to terminate the contract by notice; or
 - Agree on higher rebates than those initially provided with regard to certain specified, volume-related prices.

Note: The summary above should be read in the light of the particular facts of the case considered by the CJ. The 2014 Public Sector Directive (2014/24/EU) contains specific provisions related to this issue in article 72 – modification of contracts during their term.

Chapter 10 Remedies

Context

Remedies are legal actions that allow economic operators to request the enforcement of public procurement rules and the protection of their rights under those rules.

The EU legal framework on remedies is laid down in:

- Directive 89/665/EEC, relating to public sector contract award procedures;
- Directive 92/13/EEC, relating to utilities contract award procedures .

Both of these directives were amended by Directive 2007/66/EC.

Some procedural rules are set down in the remedies directives, but much of the detail and specific procedural rules are implemented in national law.

Aims and principles: The aim of the remedies directives is to allow irregularities occurring in contract award procedures to be challenged and corrected as soon as they occur.

All national remedies procedures must be:

- clear and straightforward;
- available to all economic operators wishing to participate in a contract award procedure without discrimination, in particular on the grounds of nationality;
- effective in preventing or correcting instances of unlawfulness on the part of economic operators and/or contracting authorities.

EU Member States must observe the general principles of non-discrimination, effectiveness and transparency in the implementation of the remedies directives. These principles must also be observed by review bodies in Member States as well as by contracting authorities in their procurement procedures.

Availability of remedies: Remedies must be available to any economic operator that i) has or has had an interest in obtaining a particular contract; and ii) has been harmed, or risks being harmed, by an alleged infringement of the procurement rules.

Generally, national laws on standing and on representation in legal proceedings are applicable to the extent that they do not interfere with the requirements of the remedies directives.

Types of remedy: Detailed provisions relating to the types of remedy available are generally subject to national law. The remedies directives require Member States to ensure that three types of remedies are available: interim measures, setting aside and damages.

Standstill: For most contracts regulated by the remedies directives, a contracting authority is required to notify tenderers and/or candidates in writing of an award decision. The notification must include specific information. The contracting authority is obliged to wait a minimum of 10 days before concluding the contract with the successful tenderer. During this “standstill period”, the tenderers and/or candidates concerned may apply for the review of the award decision. They may ask for interim measures or for the setting aside of the award decision.

For further information, see:

SIGMA (January 2011), “Remedies”, Public Procurement Policy Briefs No. 12 – http://www.sigmaxweb.org/publications/Remedies_Public_Procurement_2011.pdf

Key learning points

1. The main goal of a national review and remedies system is to ensure that effective and rapid remedies are available against decisions taken by contracting authorities. This goal applies not only in the course of the procurement process but also after the contract has been concluded.
2. National rules on remedies should not restrict the availability of remedies provided under the remedies directives to those persons entitled to them.

Summary of CJEU approach and decisions

The CJ has considered a range of questions relating to remedies.

Standing to make a challenge: In the case C-100/12 *Fastweb*, the CJ considered the issue of the standing of economic operators to make a challenge. Under national rules, an economic operator could be denied standing on the basis of a later decision made by the court. The CJ concluded that this denial was not permitted under the remedies directives. The economic operator must have a chance to challenge the court's decision.

The CJ has also looked at standing in another context, where a contracting authority sought to challenge the decision of a non-judicial body. In C-570/08 *Simvoulio Apokhetefseon Lefkosias*, the CJ held that EU Member States were not required to grant to contracting authorities the right to seek judicial review of decisions made by non-judicial bodies. A Member State may nevertheless choose to grant such a right to a contracting authority.

Time limits: In cases concerning time limits, the CJ has held that it was permissible for national law to impose time limits for the submission of an application for review. However, national time limits could not be such "as to render virtually impossible or excessively difficult" the exercise of rights. These time limits should not be fixed in such a way that they expire before the irregularities can be identified in practice (C-241/06 *Lämmerzahl*). In addition, the way in which time limits are fixed must be "sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations" (C-406/08 *Uniplex UK*).

Standstill: The CJ has held in a number of cases that the Member States concerned had failed to properly implement the provisions of the remedies directives relating to standstill requirements. It is essential for national legislation to ensure that a real and effective opportunity is available to challenge a contract award decision before the contract is concluded. That requirement is to be met even in cases where it may be possible to annul the contract award decision (C-444/06 *Commission v Spain*, C-327/08 *Commission v France*) It is also of critical importance that tenderers and candidates are fully informed of the reasons for the contract award decision (C-455/08 *Commission v Ireland*).

Remedies and interim measures: The decision of the CJ in C-568/08 *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* confirmed that Member States had considerable discretion in deciding how to operate the system of remedies and interim measures, provided that this system complied with basic principles. However, they have no discretion as to whether the remedy of damages can be made dependent on the fault of the contracting authority. In C-314/09 *Strabag*, the CJ was very clear that the damages remedy had to be free of a fault requirement.

Case law

In the first two cases outlined below, the CJ looked at issues relating to legal standing to make a challenge.

Standing to make a challenge (*locus standi*) – economic operator

The facts and the decision of the CJ in the case C-100/12 *Fastweb* are quite difficult to follow. The case is easier to understand in the light of an earlier decision of the CJ, C-249/01 *Hackermüller*. This discussion will therefore focus first on C-249/01 *Hackermüller* before considering C-100/12 *Fastweb*.

C-249/01 *Hackermüller*

Werner Hackermüller v Bundesimmobiliengesellschaft mbH (BIG) and Wiener Entwicklungsgesellschaft mbH für den Donauraum AG (WED)

Judgment dated 13 June 2013, Opinion of the Advocate General dated 25 February 2003

Reference for a preliminary ruling

Mr. Hackermüller (Mr. H) was a tenderer who submitted a proposal in the first stage of a design competition for a new building at the Technical University in Vienna. In the first stage of the process, the contracting authority accepted *Mr. H's* proposal as being compliant. *Mr. H* was then invited to participate in the second stage and to submit a final design proposal. He was not awarded the contract.

Mr. H challenged the award decision. He alleged that the decision-making in the second stage had been unlawful. The review body considered *Mr. H's* claim and looked at the relevant tender documents. It concluded that the contracting authority had acted unlawfully by admitting *Mr. H* to the second stage of the process. The review body therefore decided that *Mr. H* lacked standing to challenge the contract award decision made in the second stage of the process. This decision was made on the basis that *Mr. H* had not been harmed and did not risk being harmed by the decision that he was seeking to challenge. In the review body's opinion, he was therefore not entitled to submit a tender.

The CJ held that the review body's decision to deny *Mr. H* a right to challenge was in breach of the Remedies Directive, as it had itself introduced a new decision that *Mr. H* was unable to challenge. The new decision was that *Mr. H* lacked legal standing to make a challenge. By its actions the review body had i) denied *Mr. H* the right to challenge the contract award decision, and ii) also denied *Mr. H* the right to challenge an earlier decision (the decision to exclude). These actions were in breach of the Remedies Directive.

According to the CJ in its ruling, a tenderer challenging a decision "must be allowed to challenge the ground of exclusion on the basis of which the review body intends to conclude that he neither has been nor risks being harmed by the decision he alleges to be unlawful".

C-100/12 *Fastweb*

Fastweb SpA v Azienda Sanitaria Locale di Alessandria

Judgment dated 4 July 2013, no Opinion of the Advocate General

Reference for a preliminary ruling

In this case, the CJ considered whether a practice of the Italian courts related to hearing procurement complaints complied with the requirements of the remedies directives.

This case relates to the award of a contract under a framework agreement. Two companies, *Fastweb* and *Telecom Italia (TI)*, were invited to submit tenders for a contract to provide voice and data telephone services to a local health authority.

The contract was awarded to *TI*. *Fastweb* challenged the award decision. In its claim it argued that *TI* should not have been awarded the contract because it had not submitted a compliant bid. *TI* then made a counterclaim on the same grounds, arguing that *Fastweb* had failed to submit a compliant bid.

A previous ruling of the Italian Council of State (appeal-level court) obliged the local Italian court that was hearing the case to examine the counterclaim first. Should the counterclaim prove to be well founded, the local court was required to declare the main action inadmissible. The court was required to do so without consideration of the merits of the main action. This requirement meant that if *TI*'s counterclaim were successful, the original claim of *Fastweb* would be dismissed without having been considered by the local court.

The CJ confirmed that the aim of the Remedies Directive was to ensure that decisions made by contracting authorities in breach of European Union law could be effectively reviewed. It referred to article 1(3) of that directive. Under that provision, Member States must ensure that review procedures are available "at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement".

The CJ referred to the particular circumstances of the case. The circumstances were that the claimant (*Fastweb*) and the counterclaimant (*TI*) each alleged that the other bid was not compliant and should have been rejected. The CJ decided that, in these circumstances, the right of review provided in the Remedies Directive precluded the claimant from being denied standing, and therefore only the counterclaim was considered. In the circumstances of this case, the original claim by *Fastweb* had to also be considered, and the issue of compliance of both tenders had to be determined.

Standing to make a challenge (*locus standi*) – contracting authorities and the right to challenge decisions by a non-judicial review body

C-570/08 *Simvoulio Apokhetefseon Lefkosias*

Simvoulio Apokhetefseon Lefkosias v Anatheoritiki Arkhi Prosforon

Judgment dated 21 October 2010, Opinion of the Advocate General dated 1 June 2010

Reference for a preliminary ruling

In this case, the CJ considered whether the remedies directives required contracting authorities to be given the right to challenge decisions made by non-judicial review bodies.

The Cyprus tender review authority had jurisdiction to hear appeals against decisions by contracting authorities. The authority had been set up under Cypriot law as a non-judicial authority exercising its powers under the Cyprus procurement laws. In certain cases, contracting authorities had the right to appeal against decisions made by the tender review authority to the Cyprus Supreme Court.

This case arose from the award procedure for a contract for the design, construction, operation and maintenance of a wastewater treatment plant in Cyprus. One of the unsuccessful tenderers asked the tender review authority to take an interim measure suspending the contract award decision.

The procurement law in Cyprus did not provide for the automatic suspension of the award procedure as from the date of application for review of the award decision by a tenderer. The contracting

authority therefore went ahead and awarded the contract. The tender review body annulled the contracting authority's decision. The contracting authority then filed an appeal with the Cyprus Supreme Court against the decision of the tender review body. The Cyprus Supreme Court sought a preliminary ruling from the CJ.

The question that the CJ considered was the following (to paraphrase): does article 2(8) of the Remedies Directive mean that Member States must give to contracting authorities the right to seek judicial review of the decisions of non-judicial bodies? This question relates to the situation where a non-judicial body is responsible for review procedures concerning the award of a public contract.

The CJ analysed the provisions of the Remedies Directive. It concluded that there was no requirement for Member States to provide contracting authorities with such a right of review. Member States could nevertheless choose to give this right to a contracting authority.

Time limits

The CJ has also considered the issue of the timing of challenges.

C-241/06 *Lämmerzahl*

Lämmerzahl GmbH v Freie Hansestadt Bremen

Judgment dated 11 October 2007, Opinion of the Advocate General dated 7 June 2007

Reference for a preliminary ruling

This case raised a number of questions relating to whether national law could impose a time limit for the submission of applications for the review of procurement decisions.

The case arose in the context of a national award procedure carried out by the City of Bremen. The procedure concerned the award of a contract for the computerised handling of cases in the area of adult social services and economic.

The contract had been advertised nationally in March 2005. The contract notice gave no indication of the value of the contract, its quantity or scope. The contract notice stated that the contract documents could be downloaded from the City of Bremen website. The contract documents available on the website provided information on the number of employees who were expected to use the system. There was no statement about the number of software licences that would be required. A tenderer was obliged to submit the unit price of a single licence (not the total number) in its tender.

Lämmerzahl (L), one of the tenderers, sought clarification from the City of Bremen about the specific number of licences required. The City of Bremen did not provide that information but merely asked *L* to provide an overall price.

L was not successful in the tender, and in July 2005 it applied to the local Public Procurement Board for a review procedure. *L* claimed that a European tender should have been organised since the relevant threshold of EUR 200 000 had been exceeded.

The Public Procurement Board dismissed the application for review as inadmissible on the grounds that *L* had been in a position to identify that breach from the date of publication of the contract notice. *L* had therefore applied for review after the deadline, according to the national rules on time limits for applications. The Board also held that since the application had been made after the deadline, *L* was precluded from seeking a remedy from the review bodies having jurisdiction for public procurement. *L* appealed against these decisions. The Higher Regional Court referred a number of questions to the CJ.

The CJ considered a number of questions, as follows (paraphrased):

- What requirements are imposed by EU law regarding the information in the contract notice on the estimated value of a contract? What remedies must be provided for in a situation where the required information is not provided in the contract notice?
- Does EU law permit national law, which imposes a time limit for the submission of applications for review of decisions on the choice of the award procedure and the estimation of the value of a contract? Such decisions are made in the first stages of an award procedure.

Note: In this case, national law imposed a time limit that ended on the date of expiry of the period of bidding or of applying to participate in an award procedure.

- If such a time limit (time bar) is permitted, can it then be extended generally to cover remedies against decisions of the contracting authority? Can the extension include decisions made at later stages of an award procedure?

Information on the estimated value of the contract and remedies: The CJ found that the Supplies Directive applied to the award of the contract. The provisions of that directive required notices to be drawn up using a standard model contract notice that provided for a reference to the total quantity or scope of the contract.

The CJ held that a contract notice for a supplies contract within the scope of the Supplies Directive had to state the total quantity or scope of the contract. The absence of such information had to be capable of review under the Remedies Directive (paragraphs 38-44).

Permitted time limits: The CJ confirmed that the Remedies Directive did not preclude national legislation from imposing specific time limits for the submission of applications for review. These time limits make it possible to ensure effective and rapid review. However, national time limits should not be such “as to render virtually impossible or excessively difficult” the exercise of rights derived from EU law (paragraphs 50-52).

Time limits applied in a way that is not permitted: The CJ held that the Remedies Directive did not permit a time bar rule to be laid down in national law, such as the rule considered in this case. The effect of the time bar rule in this case was to deny tenderers access to review concerning the choice of procedure or the estimated contract value in a situation where the contracting authority had not clearly stated the total quantity or scope (paragraphs 52-57).

Based on the facts of this case, the CJ held that *L* had sought to clarify the information, but the responses of the contracting authority were not clear and, on the contrary, were ambiguous and evasive. A contract notice lacking any information on the estimated value of the contract, followed by evasive conduct by the contracting authority, made it “excessively difficult” for *L* to exercise its rights (paragraph 54).

Fixing general time limits: The CJ also held that a limitation period expiring at the end of the period for submitting a bid or on the final date for submitting applications to participate in the award procedure had to be limited in its effect. The limitation period can only apply to irregularities capable of being identified before expiry of that period. A limitation period fixed in this way cannot be extended generally. It cannot apply to irregularities that, by definition, can only arise at later stages of the contract award procedure, such as irregularities that can only be discovered after the opening of tenders (58-64).

C-406/08 Uniplex (UK)

Uniplex (UK) Ltd v NHS Business Services Authority

Judgment dated 28 January 2010, Opinion of the Advocate General dated 29 October 2009

Reference for a preliminary ruling

This case concerned the establishment of the correct date from which the period for bringing proceedings in a public procurement procedure was to start.

The case arose in the context of the award by the UK National Health Service of a framework agreement for the supply of medical equipment.

On 22 November 2007 the contracting authority wrote to inform *Uniplex* that its tender had not been successful. The authority informed *Uniplex* that it had ranked in fifth place and that the top three bidders had been appointed to the framework. The letter also included information on the criteria, weightings and scores obtained by *Uniplex* and the other tenderers.

On 23 November *Uniplex* requested a debriefing from the contracting authority. The contracting authority replied on 13 December, providing further details on its approach to the evaluation of the award criteria in terms of the characteristics and relative advantages of the successful tenders.

On 28 January 2008 *Uniplex* sent to the contracting authority a formal legal letter indicating its intention to start legal proceedings. In that letter *Uniplex* stated that, in its view, the three-month time period for bringing proceedings had started to run on 13 December 2007. On 11 February 2008 the contracting authority informed *Uniplex* that it had discovered that one of the tenders had been non-compliant. The fourth-placed bidder had therefore been appointed to the framework.

On 12 March 2008 *Uniplex* issued legal proceedings in the UK courts. *Uniplex* sought damages, arguing that the contracting authority had been in breach of the procurement rules.

The CJ considered the following questions from the UK High Court (paraphrased):

- Does the Remedies Directive require the period for bringing proceedings to start as from i) the date of infringement of the procurement rules; or ii) the date on which the claimant knew, or ought to have known, of that infringement?
- The UK procurement regulations require proceedings to be brought “promptly and in any event within three months” from the date on which the grounds for those proceedings arose. Does the Remedies Directive preclude such a provision in the UK procurement regulations?
- To what extent does the Remedies Directive impact on the discretion of the national court to extend the period within which proceedings must be brought?

Date on which the period for bringing proceedings starts: The CJ confirmed that the objective of the Remedies Directive was to guarantee the availability of effective remedies. It confirmed that there were no specific provisions covering the time limits for submitting an application for review. It is up to the Member States to establish such time limits (paragraphs 25-26).

The CJ also confirmed that the Remedies Directive required Member States to guarantee that unlawful decisions by contracting authorities would be subject to effective review as swiftly as possible. The fact that a candidate or tenderer (“claimant”) learns that its application or tender has been rejected does not place it in a position to bring proceedings. That rejection is not sufficient to enable a claimant to establish whether any illegality has occurred that might constitute the subject matter of proceedings. It is only once the claimant has been informed of the reasons for its elimination that it may obtain an informed view (paragraphs 29-31).

The CJ concluded that the period for bringing proceedings started as from the date on which the claimant knew, or ought to have known, of the alleged infringement.

Note: This case relates to a procurement procedure that began before Directive 2007/66/EC came into effect. That directive introduced specific time limits for standstill.

National provisions requiring proceedings to be “brought promptly”: The CJ confirmed that Member States could impose limitation periods for making a challenge. That period is permitted in order to attain the objective of rapidity in the context of effective review proceedings. A system of limitation periods must be “sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations”. The requirement of effectiveness means that a national system of limitation periods “must not render impossible or excessively difficult the exercise of any rights... derive[d] from Community law...” (paragraphs 38-40).

The CJ concluded that the UK requirements for proceedings to be brought “promptly and in any event within three months” gave rise to uncertainty. These requirements were therefore not permitted under the Remedies Directive. The CJ concluded that it was possible that national courts would interpret those provisions as allowing them to dismiss an action as having missed the deadline even before the expiry of the three-month period. That dismissal could occur where the courts took the view that the action, submitted before expiry of the three-month period, had not been made “promptly” enough.

Discretion of national courts to extend time periods within which proceedings must be brought: The CJ held, in this case, that the Remedies Directive required the national court to exercise discretion to extend the limitation period. It must extend the limitation period so that it runs from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. If the national provisions do not lend themselves to an interpretation in accordance with the Remedies Directive, the national court must refrain from applying the national provisions. The national court must respect this rule in order to apply EU law fully and to protect the rights of individuals, as conferred by EU law.

Standstill

In each of the three cases discussed briefly below, the CJ decided that national legislation did not comply with the mandatory notification and standstill requirements in the remedies directives.

Note: The detailed standstill requirements set down in amending Directive 2007/66/EC were not in force when the European Commission issued proceedings against each of the Member States concerned.

C-444/06 Spain – Standstill

European Commission v Kingdom of Spain

Judgment dated 3 April 2008, no Opinion of the Advocate General

Action brought by the Commission

In this action brought by the European Commission, the CJ held that the relevant Spanish legislation did not provide for interested parties to effectively institute review of the contract award decision before conclusion of the contract.

The legislation in question provided that contracts were formed on award and then finalised within a period of 30 days following the notification of the award. Contracts could not be performed before they were finalised. The Spanish law authorised review proceedings against acts of contracting authorities prior to the award of the contract. Contracting authorities were under an obligation to

notify tenderers of the contract award decision. It was also possible for tenderers to initiate proceedings against procedural acts and obtain interim measures, including suspension of those acts.

The CJ held that the way in which the Spanish law applied meant that the contract award decision could not be the subject of specific review proceedings prior to conclusion of that contract (paragraph 42). The CJ noted that under Spanish law it was also possible for a contract to be finalised and for performance to commence before all of the notifications had been made. As a result, in certain cases no effective review proceedings can be brought in relation to the contract award before the performance of that contract commences (paragraphs 43-44).

The CJ also held that the fact that there was an option to bring proceedings for annulment of the contract did not compensate for the impossibility of challenging the contract award before the contract was concluded.

C-327/08 France – Standstill

European Commission v Republic of France

Judgment dated 11 June 2009, no Opinion of the Advocate General

Action brought by the Commission

In this case, the CJ held that certain provisions of the French procurement code implementing the remedies directives did not fulfil the requirements of those directives.

The relevant provisions in the procurement code introduced a minimum 10-day standstill period between notification and award. However, the provisions also required a party that intended to make a legal challenge to send a formal letter of intent to the contracting authority. The contracting authority then had 10 days to consider the notification received. No formal standstill applied to this second 10-day period. It was therefore possible for a contracting authority to award the contract during that period, despite the receipt of a formal letter of intent. The code also provided for a reduction in the minimum 10-day standstill period in cases of urgency.

10-day consideration period: The CJ held that the provisions of the code were in breach of the standstill rules in the Remedies Directive.

Reduction in the standstill period in cases of urgency: The CJ held that it was acceptable to permit a reduction in the minimum 10-day standstill period in cases of urgency, provided that a reasonable period of delay remained to permit economic operators to take action (paragraph 44). The definition of a “reasonable period of delay” in these circumstances was not explored by the CJ.

C-455/08 Ireland – Standstill

European Commission v Republic of Ireland

Judgment dated 23 December 2009, no Opinion of the Advocate General

Action brought by the Commission

In this case, the CJ held that certain provisions of Irish law implementing the remedies directives did not meet the requirements of those directives.

Irish procurement law included a requirement to notify tenderers of the award decision. The written notification was to include “the principal reason, or reasons, why the tender [was] not the selected tender”. Contracting authorities were also required to set down a standstill period of 14 days from the date of the notification. They were not permitted to enter into the contract during the 14-day standstill period.

However, the law did not lay down any obligation to include, in that first written notification, information on i) the characteristics and relative advantages of the selected tender, and ii) the name of the successful tenderer. Tenderers wishing to have this information had to make a further request to the contracting authority. The contracting authority then had 15 days to respond.

The CJ held that the provisions in the Irish law deprived tenderers of effective interim measures (paragraphs 31 and 34) and were therefore not in accordance with the requirements of the remedies directives.

Remedies – interim measures and damages

C-568/08 *Combinatie Spijker*

Combinatie Spijker Infrabouw-De Jonge Konstruktie, Van Spijker Infrabouw BV, De Jonge Konstruktie BV v Provincie Drenthe

Judgment dated 9 December 2010, Opinion of the Advocate General dated 14 September 2010

Reference for a preliminary ruling

In this case, the CJ considered the nature of the legal system for the application of interim measures. It also reflected on the possibility that the different courts deciding on interim measures and on the substantive case might arrive at different conclusions. In addition, the CJ examined the issue of the liability of the state to pay damages.

The case arose out of a procedure for the award of works contracts for the renovation of two bridges over a major navigable waterway. The contracting authority awarded the contract to the company *MFE*. A number of unsuccessful tenderers, including *Combinatie Spijker (Combinatie)*, challenged the award decision. *Combinatie* claimed that *MFE*'s tender was invalid. It argued that there was serious doubt as to whether *MFE* had met the award criteria, and thus the award was unlawful. The contracting authority then wrote to all tenderers, indicating that it had decided to withdraw the call for tenders due to procedural flaws. *MFE* intervened in *Combinatie*'s claim.

At a hearing on interim measures, the court was satisfied that *MFE* had in fact met the requirements of the contracting authority. The court declared, with immediate effect, that the contracting authority was prohibited from awarding the contract to any tenderer other than *MFE*. The contracting authority then awarded the contract to *MFE*.

This contract award prompted a further claim by *Combinatie* and others. The court that heard the claim concluded that the contract awarded to *MFE* was legally valid. The only action available to *Combinatie* and others was therefore an action for damages.

The court hearing the action for damages referred a number of quite complex questions to the CJ. The CJ did not consider all of the questions submitted, but decided to focus on a number of key issues, as follows:

System for rapid decision making on interim measures: The Remedies Directive does not preclude the establishment of a system where, in order to obtain a rapid decision, the only procedure available has the following characteristics:

- It is geared to the application of a rapid mandatory measure.
- Lawyers have no right to exchange views.
- No evidence is presented, as a rule, other than in written form.
- Statutory rules on evidence are not applicable.
- The judgment does not lead to the final determination of the legal situation and does not form part of a decision-making process leading to such a final decision.

Divergence in decisions by courts at interim hearing and substantive hearing: It is inherent in the review system established by the Remedies Directive that the court hearing the substantive case may adopt an interpretation of EU law that is different from that of the court hearing an application for interim measures. Such a divergence in assessment does not imply that a court system does not comply with the requirements of the Remedies Directive.

The Remedies Directive does not preclude a court that is considering an application for interim measures from interpreting the Remedies Directive in a manner that is subsequently classified as erroneous by another court hearing the substantive case.

State liability for damages arising from infringements of EU law: Where damage is caused to individuals by infringements of EU law for which the state may be held responsible, the individuals harmed have a right to redress where:

- the rule of EU law that has been infringed is intended to confer rights on them; and
- the breach of that rule is sufficiently serious; and
- there is a direct causal link between the breach and the loss or damage sustained by the individuals.

In the absence of any provisions of EU law, it is for the internal legal order of each Member State to determine the criteria for the award of damages arising from an infringement of EU procurement law. This award of damages is subject to satisfaction of the requirements outlined above and compliance with the principles of equivalence and effectiveness.

C-314/09 *Strabag*

Stadt Graz v Strabag AG, Teerag-Asdag AG, Bauunternehmung Granit GesmbH

Judgment dated 30 September 2010, no Opinion of the Advocate General

Reference for a preliminary ruling

In this case, the CJ considered whether the remedy of damages available under the Remedies Directive could be made conditional on the requirement of fault on the part of the contracting authority.

This case arose in 1998 in the context of a procedure for the award of a contract for the purchase of asphalt. A total of 14 tenders were submitted, and the company *HFB* was awarded the contract. *Strabag* was the second-placed tenderer.

Strabag and a number of other unsuccessful tenderers started review proceedings before the procurement review body. They claimed that *HFB's* tender should have been excluded because it did not possess the necessary plant to perform the contract.

At the same time, *Strabag* and others submitted an application to the procurement review body for interim measures. They asked the review body to prohibit the contracting authority from awarding the contract, pending a decision on the substance of the claim.

The procurement review body dismissed the review proceedings and the application for interim measures on 10 June 1999. Four days later, the contracting authority went ahead and awarded the contract to *HFB*.

In October 2002, the superior court annulled the decision of the procurement review body on the grounds that *HFB's* tender did not comply with the invitation to tender. The superior court considered that the tender failed to comply because *HFB* was unable to make use of the asphalt mixing plant until partway through the operation of the contract. In a further decision in 2003, the superior court held that the contract award to *HFB* was unlawful.

Strabag and others then brought an action against the contracting authority for damages amounting to EUR 300 000. They argued that *HFB's* tender should have been excluded on the grounds of an irreparable defect. Consequently, the *Strabag* tender should have been accepted. The contracting authority had erred by failing to reject *HFB's* tender as incompatible with the terms of the invitation to tender. The decision of the procurement review body could not exonerate the contracting authority, which had acted at its own risk. The contracting authority argued that it was bound by the decision of the procurement review body and was therefore not at fault.

National law provided that damages were available only when the contracting authority was at fault. However, under that legislation, fault on the part of the contracting authority was presumed, and the onus of proof was placed on the contracting authority to show absence of fault in order to avoid liability.

This case was pursued, on appeal, through the Austrian courts. The Austrian Supreme Court of Justice referred a number of issues to the CJ. The CJ considered the question below. In the light of its decision on this first question, the CJ decided that it did not need to consider the other questions referred by the national court.

Does the Remedies Directive preclude a national rule under which claims for damages for the contracting authority's infringement of Community procurement law are subject to the requirement of fault?

The CJ held that the damages remedy had to be free of a fault requirement.

The Remedies Directive precludes a national rule that requires fault on the part of the contracting authority in order to allow the entitlement to damages. This rule applies even in a case where fault is presumed. The principle that fault is irrelevant enables the determination of an effective remedy when other remedies cannot be obtained. This is the case, for example, where there is a time bar or where the only remedy available is to accord damages due to the timing of the claim (paragraphs 30-45).

Texts of the judgements of the Court of Justice of the European Union

C-274/09 Privater Rettungsdienst und Krankentransport Stadler

JUDGMENT OF THE COURT (Third Chamber)

10 March 2011 [\[*\]](#)

(Public procurement – Directive 2004/18/EC – Public service concession – Rescue service – Distinction between ‘public service contract’ and ‘service concession’)

In Case C-274/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberlandesgericht München (Germany), made by decision of 2 July 2009, received at the Court on 20 July 2009, in the proceedings

Privater Rettungsdienst und Krankentransport Stadler

v

Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau,

interveners:

Malteser Hilfsdienst eV,

Bayerisches Rotes Kreuz,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, E. Juhász (Rapporteur), G. Arestis and T. von Danwitz, Judges,

Advocate General: J. Mazák,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 24 June 2010,

after considering the observations submitted on behalf of:

- Privater Rettungsdienst und Krankentransport Stadler, by B. Stolz and P. Kraus, Rechtsanwälte,
- the Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau, by M. Kuffer and D. Bens, Rechtsanwälte,
- Malteser Hilfsdienst eV, by W. Schmitz-Rode, Rechtsanwalt,
- the Bayerisches Rotes Kreuz, by E. Rindtorff, Rechtsanwalt,

- the German Government, by M. Lumma and J. Möller, acting as Agents,
- the Czech Government, by M. Smolek, acting as Agent,
- the Swedish Government, by S. Johannesson, acting as Agent,
- the European Commission, by C. Zadra and G. Wilms, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2010,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 1(2)(a) and (d) and Article 1(4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).
- 2 The reference has been made in proceedings between Privater Rettungsdienst und Krankentransport Stadler ('Stadler') and the Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau (Municipal Association for the Rescue Service and Fire Alarm, Passau; 'Passau municipal association') regarding the award of service contracts in the field of rescue services. The parties are in dispute, in particular, concerning the classification of those contracts as 'public service contracts' or 'service concessions'.

Legal context

European Union legislation

- 3 Article 1 of Directive 2004/18 provides:

'...

2. (a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

...

- (d) "Public service contracts" are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

...

4. "Service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

...'

National legislation

- 4 The Bavarian law on rescue services (Bayerisches Rettungsdienstgesetz; 'the Bavarian law') entered into force on 1 January 2009. The relevant provisions of that law for the purposes of the present case are as follows.

'Article 1 Subject-matter and aim

This Law governs emergency rescue, transport of patients accompanied by a doctor, transport of the sick, mountain and cave rescue and water rescue (rescue service). The area-wide supply of rescue services is a public task and shall be ensured by a public rescue service ...

...

Article 4 Bodies entrusted with the task

(1) Districts and municipalities not forming part of a district shall have the task of ensuring provision of the public rescue service in rescue service areas in accordance with this Law ...

(2) The highest-level rescue service authority shall, after consulting the municipal umbrella organisations involved, determine by regulation the rescue service areas in such a way that the rescue service can be run in an effective and economic manner.

(3) The districts and the municipalities not forming part of a district that are within the same rescue service area shall perform their tasks under this Law in conjunction with a municipal association for the rescue service and fire alarm.

...

Article 13 Award of emergency rescue, of transport of patients accompanied by a doctor and of transport of the sick

(1) The municipal association for the rescue service and fire alarm shall entrust the carrying out on land of emergency rescue, of transport of patients accompanied by a doctor and of transport of the sick to

1. the Bayerisches Rotes Kreuz (Bavarian Red Cross)
2. the Arbeiter-Samariter-Bund (Workers' Samaritan Federation)
3. the Malteser-Hilfsdienst (Maltese Aid Service),
4. the Johanniter-Unfall-Hilfe (St. John's Accident Assistance) or
5. comparable aid organisations.

...

(2) In so far as the aid organisations are not prepared or in a position to take on the task, the municipal association for the rescue service and fire alarm shall entrust the carrying out of rescue services on land to third parties or shall carry them out itself or through its members.

(3) The municipal association for the rescue service and fire alarm shall make a decision in its discretion, after due assessment of the circumstances, as to the selection of the operator and as to the scope of the award. The selection decision shall be made transparently and in accordance with objective criteria. The municipal association for the rescue service and fire alarm shall publicise the forthcoming selection decision in an appropriate manner, so that interested service providers can apply.

(4) The legal relationship between the municipal association for the rescue service and fire alarm and the person entrusted with running the rescue service shall be governed by a public law contract.

...

Article 21 Requirement for authorisation

(1) Any person who engages in emergency rescue, transport of patients accompanied by a doctor or transport of the sick requires authorisation.

...

Article 24 Conditions for authorisation

...

(2) Authorisation for emergency rescue, the transport of patients accompanied by a doctor or transport of the sick in the public rescue service shall be granted if ... a public law contract pursuant to Article 13(4) ... is submitted ...

...

(4) Authorisation for transport of the sick outside the public rescue service shall be refused if it is to be anticipated that the public interest in an efficient rescue service ... will be compromised by exercise of the authorisation ...

...

Article 32 Charging and basis of usage fees

Usage fees shall be charged for the provision of rescue services, including the involvement of doctors. The usage fees shall be based on the costs that can be estimated in accordance with economic principles applicable to undertakings and are consistent with proper provision of services, economical and cost-efficient management and efficient organisation ...

...

Article 34 Usage fees of operators for emergency rescue, the transport of patients accompanied by a doctor and transport of the sick

...

(2) The social security institutions shall agree the usage fees to be paid by them for emergency rescue, the transport of patients accompanied by a doctor and transport of the sick in a uniform manner with the persons running the rescue service or their Land federations ...

- (3) The usage fee agreement shall be concluded annually in advance.
- (4) The costs of emergency rescue, of the transport of patients accompanied by a doctor and of transport of the sick shall be allocated in accordance with uniform standards to the users. The usage fees agreed with the social security institutions shall also be charged by the operators to all other persons and bodies which call upon the services of the public rescue service.
- (5) The usage fees shall in each case be based on the estimated allowable costs under the second sentence of Article 32 of providing the services in the service areas of emergency rescue, transport of patients accompanied by a doctor and transport of the sick and on the estimated operation numbers in the operational period. The costs of providing the services shall also include in particular the costs of the involvement of doctors in the rescue service, ... and the costs in respect of the activity of the Central Settlement Office for the Rescue Service in Bavaria in accordance with paragraph 8. The social security institutions shall agree in each case separately with the individual operators, with the operators of the integrated head offices and with the Central Settlement Office for the Rescue Service in Bavaria their estimated costs in the fee period. The costs can be agreed as a budget.
- (6) If a usage fee agreement under paragraph 2 or an agreement under paragraph 5 does not materialise by 30 November in the financial year preceding the fee period, arbitration proceedings before the fee arbitration board ... shall be held regarding the amount of the estimated costs and of the usage fees ... Usage fees shall not be adjusted retroactively.
- (7) The estimated costs agreed with the social security institutions or determined with binding force shall be met from the fees received for emergency rescue, for transport of patients accompanied by a doctor and in transporting the sick (revenue settlement). After a fee period has ended, every operator, every operator of an integrated head office and the Central Settlement Office for the Rescue Service in Bavaria shall prove the costs actually incurred in a final statement of account and compare them with those in the costs agreement (rendering of accounts). If a difference arises between the actual costs and the estimated costs recognised by the social security institutions for the costs agreement, the result of the rendering of accounts shall be dealt with at the next possible fee negotiations; this carrying forward is precluded if the costs of the operator ... or the Central Settlement Office ... have been agreed as a budget.
- (8) In implementing paragraphs 2 to 7 and Article 35, the services of a Central Settlement Office for the Rescue Service in Bavaria shall be called upon, which shall in particular:
1. participate as an adviser in relation to agreeing the usage fees pursuant to paragraph 2 and in relation to the agreements under paragraph 5;
 2. on the basis of the estimated costs of the parties involved and of the number of public rescue service operations to be anticipated, calculate the necessary usage fees and propose them for agreement to the parties involved; this shall also apply to the necessary adjustment of usage fees in the course of the current financial year;
 3. collect the usage fees for the services of the public rescue service ... from the persons liable to pay the costs ...;
 4. conduct the revenue settlement;

5. make [payments in respect of the] costs of providing the services to the operator of the service ...;
6. examine the operators' ... rendering of accounts with regard to plausibility and the correctness of the calculations;
7. draw up an audited overall final statement of account for the public rescue service.

The Central Settlement Office for the Rescue Service in Bavaria shall provide its services in this regard on a non-profit-making basis. All parties involved shall be obliged to support the Central Settlement Office for the Rescue Service in Bavaria in the performance of its tasks and to give to it the information and written documentation necessary for that purpose.

...

Article 48 Arbitration boards

...

(3) The fee arbitration board shall comprise, in addition to the chairman:

1. in disputes concerning land rescue usage fees three members for the land rescue operators and three members for the social security institutions ...

...

(5) The chairman of the fee arbitration board and his proxy shall be appointed jointly by the operators of the public rescue service, the Bavarian Association of Health-Insurance Doctors, the persons responsible for ensuring the presence of doctors to accompany transported patients, and the social security institutions.

Article 49 Rescue service authorities

(1) The authorities for implementing this Law ... shall be:

1. the Bavarian Ministry of Internal Affairs as the highest-level rescue service authority, ...

...

Article 53 Regulations and administrative provisions

(1) The highest-level rescue service authority may by regulation:

...

11. set up the Central Settlement Office for the Rescue Service in Bavaria ...

...'

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

- 5 Stadler provided rescue services to the Passau municipal association, in Bavaria, until 31 December 2008, when their contract with the association was terminated. It contested the

validity of that termination before the Verwaltungsgericht (Administrative Court) (Germany) and applied for an interim order allowing it to implement the contract pending a ruling in the main proceedings. All its claims were dismissed.

- 6 In the course of those proceedings, the Passau municipal association stated that it intended, without first putting the services out to tender, to entrust other undertakings with the carrying out of rescue services, initially on the basis of temporary contracts, before then awarding the final contract in the course of a procedure based on the selection procedure provided for under Article 13(3) of the Bavarian law.
- 7 The Passau municipal association drew up temporary contracts with the Malteser Hilfsdienst eV and the Bayerisches Rotes Kreuz.
- 8 Stadler, by letter of 17 December 2008, contested the procedure conducted by the Passau municipal association and brought an action before the Vergabekammer (Public Procurement Board), which dismissed it as inadmissible.
- 9 Stadler then appealed against that decision to the Oberlandesgericht München (Higher Regional Court, Munich) (Germany).
- 10 According to the referring court, the purpose of the proceedings is to determine whether the provision of the disputed services in Bavaria must be classified as a 'service concession' or a 'service contract' and what the legal consequences of that classification are. That classification depends on the interpretation of Article 1(4) of Directive 2004/18 which defines the concept of 'service concession'.
- 11 In Passau, contracts concerning the provision of rescue services to the public are concluded according to a so-called 'concession model' between a contracting authority, the Passau municipal authority, and a service provider.
- 12 The amount of the usage fees for those rescue services is agreed between the social security institution and the selected service provider. According to Article 32, second sentence, of the Bavarian law, the usage fees must be calculated on the basis of the costs that can be estimated in accordance with economic principles applicable to undertakings and are consistent with proper provision of services, economical and cost-efficient management and efficient organisation. The estimated costs agreed are met by the fees received for emergency rescue, for transport of patients accompanied by a doctor and for transporting the sick. Where the social security institution and the service provider differ as to the amount of those fees, the matter may be brought before an arbitration board, the decisions of which can be contested before the administrative courts.
- 13 The service provider selected receives his fees from a central settlement office set up by the Bavarian Minister for Internal Affairs, the services of which it is legally bound to use. That office transfers payments on account, on a weekly or monthly basis, to that service provider on the basis of an overall annual amount of remuneration calculated in advance independently of the number of rescues actually carried out. If a deficit appears at the end of the year, it will be the subject of subsequent negotiations.
- 14 Privately-insured and uninsured persons who, according to the referring court, represent 10% of debtors, are obliged to pay the same usage fee as persons insured under the compulsory statutory scheme.

- 15 The referring court notes that, in Germany, there is an alternative method of rescue service provision, known as the 'tender model'. In certain *Länder*, including Saxony, the contracting authority responsible for rescue services pays the service providers directly. The public bodies responsible for rescue services agree that remuneration in negotiations with the social security institutions and then pay it to the service providers. That model has already been classified by the Bundesgerichtshof (German Federal Court of Justice) as a 'service contract'.
- 16 The differences between the 'tender model' of *Länder* such as Saxony and the 'concession model' of *Länder* such as Bavaria are that, in the first case, the usage fees provided for by law are negotiated between the contracting authority responsible for rescue services and another contracting authority (the social security institution) and that the service provider is bound by that agreement, whereas, in the second case, the service provider agrees the amount of the usage fee with another contracting authority (the social security institution).
- 17 Therefore, for the referring court, the question arises whether simply choosing another negotiating method can mean that, in one case, the rescue service must be put out to tender as a 'service contract' pursuant to Directive 2004/18 and, in the other case, the application of the rules governing the award of public service contracts could be ruled out on the ground that the contract constitutes a 'service concession'.
- 18 In addition, the referring court is of the opinion that it can be inferred from the case-law of the Court of Justice that characterisation as a public service concession requires, where the remuneration is paid by a third party, that the contractor take the risk of operating the services in question. Thus, if the criterion for differentiating between a 'service concession' and a 'service contract' that is actually decisive is considered to be the assumption of the economic risk by the contractor, the question arises as to whether the assumption of a risk in any form suffices, so long as the entire risk otherwise falling on the contracting authority is assumed.
- 19 That distinction is all the more fine because, as the referring court emphasises, under the 'concession' model the service provider has to bear only a limited economic risk.
- 20 In those circumstances, the Oberlandesgericht München decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
 - (1) Is a contract relating to the supply of services (here, rescue services) under the terms of which the contracting authority does not make a direct payment of consideration to the contractor, but:
 - (a) the usage fee for the services to be provided is set by negotiation between the contractor and third parties who are contracting authorities (here, social security institutions),
 - (b) if agreement is not reached provision is made for a decision by an arbitration board established to this end, whose decision is subject to review by State courts, and,
 - (c) the fee is paid to the contractor not directly by the users, but in regular payments on account by a central settlement office whose services the contractor is statutorily required to call upon,

to be regarded for that reason alone as a service concession within the meaning of Article 1(4) of the Directive as distinct from a service contract for the purposes of Article 1(2)(a) and (d) of the Directive?

- (2) If the first question referred is to be answered in the negative, is there a service concession where the operating risk connected with the public services is limited because:
- (a) under a statutory provision, the usage fees for the provision of the services are to be based on the costs that can be estimated in accordance with economic principles applicable to undertakings and that are consistent with proper provision of services, economical and cost-efficient management and efficient organisation,
 - (b) the usage fees are due from solvent social security institutions,
 - (c) a certain exclusivity of exploitation is guaranteed in the contractually stipulated area,
- but the contractor assumes this limited risk entirely?'

The questions referred for a preliminary ruling

- 21 As the two questions posed by the referring court are connected, it is appropriate to examine them together.
- 22 As a preliminary point, it must be noted that contracts concerning the provision of rescue services to the public, awarded by the Passau municipal association, are concluded in the form of the so-called 'concession model'. That procurement model can be distinguished from the 'tender' model, which is a method of awarding a public service contract (see, to that effect, Case C-160/08 *Commission v Germany* [2010] ECR I-0000, paragraph 131), by the fact that, under the concession model, remuneration does not come from the contracting authority but from the sums collected from the users of the service by a central settlement office. The usage fees applicable to the service are agreed between the social security institution and the service provider selected by the Passau municipal authority.
- 23 In that regard, it must be recalled at the outset that the question whether an operation is to be classified as a 'service concession' or a 'public service contract' must be considered exclusively in the light of European Union law (see, inter alia, Case C-382/05 *Commission v Italy* [2007] ECR I-6657, paragraph 31, and Case C-196/08 *Acoset* [2009] ECR I-9913, paragraph 38).
- 24 It follows from a comparison of the definitions of a public service contract and a service concession provided, respectively, by Article 1(2)(a) and (d) and by Article 1(4) of Directive 2004/18, that the difference between a public service contract and a service concession lies in the consideration for the provision of services. A service contract involves consideration which, although it is not the only consideration, is paid directly by the contracting authority to the service provider (see, to that effect, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 39, and *Commission v Italy*, paragraphs 33 and 40), while, for a service concession, the consideration for the provision of services consists in the right to exploit the service, either alone, or together with payment (see, to that effect, Case C-206/08 *Eurawasser* [2009] ECR I-8377, paragraph 51).

- 25 In the case of a contract for the supply of services, the fact that the supplier is not remunerated directly by the contracting authority, but is entitled to collect payment from third parties, meets the requirement of consideration laid down in Article 1(4) of Directive 2004/18 (see *Eurawasser*, paragraph 57).
- 26 While the method of remuneration is, therefore, one of the determining factors for the classification of a service concession, it also follows from the case-law that the service concession implies that the service supplier takes the risk of operating the services in question and that the absence of a transfer to the service provider of the risk connected with operating the service shows that the transaction concerned is a public service contract and not a service concession (*Eurawasser*, paragraphs 59 and 68, and the case-law cited).
- 27 In the main proceedings, it is apparent from the order for reference that the provider of the rescue services also does not receive remuneration from the contracting authority which awarded the contract in question but from the usage fees which it is entitled to obtain, under the Bavarian law, from the social security institutions from which the insured persons received rescue services or even from the privately-insured or non-insured persons who received such services.
- 28 The fact that the amount of the usage fees is not determined unilaterally by the provider of the rescue services, but by agreement with the social security institutions which themselves have the status of a contracting authority (see, to that effect, Case C-300/07 *Hans & Christophorus Oymanns* [2009] ECR I-4779, paragraphs 40 to 59), and that those fees are not paid directly by the users of those services to the selected provider but through a central settlement office which is in charge of collecting and remitting those fees, by regular payments on account, does not affect that finding. The fact remains that all the remuneration obtained by the provider of the services comes from persons other than the contracting authority which awarded it the contract.
- 29 In a case such as that in the main proceedings, in order to find that there is a service concession within the meaning of Article 1(4) of Directive 2004/18, it is still necessary to establish whether the agreed method of remuneration takes the form of the right of the service provider to exploit the service and entails that it takes the risk of operating the service in question. While that risk may, at the outset, be very limited, it is necessary for classification as a service concession that the contracting authority transfer to the concession holder all or, at least, a significant share of the risk which it faces (see, to that effect, *Eurawasser*, paragraphs 77 and 80).
- 30 In the main proceedings, the Passau municipal authority conferred on the selected providers, over a number of years, the complete technical, administrative and financial implementation of the rescue services, for which it was responsible, in accordance with Article 4(1) of the Bavarian law.
- 31 The service providers selected are thus responsible for carrying out the rescue service, in accordance with the conditions laid down in the contract and in the Bavarian law, in the administrative district of Passau municipal authority.
- 32 Stadler contests the claim that, by that transaction, the Passau municipal authority also transferred a risk of operating the services in question to the selected service providers.

- 33 In that regard, it must be noted that, where the remuneration of the provider comes exclusively from a third party, the transfer by the contracting authority of a ‘very limited’ operating risk will suffice in order for a service concession to be found (see *Eurawasser*, paragraph 77).
- 34 It is not unusual that certain sectors of activity, in particular sectors involving public service utilities, such as those at issue in the main proceedings, are subject to rules which may have the effect of limiting the financial risks entailed. It must in particular remain open to the contracting authorities, acting in all good faith, to ensure the supply of services by way of a concession, if they consider that to be the best method of ensuring the public service in question, even if the risk linked to such an operation is very limited (*Eurawasser*, paragraphs 72 and 74).
- 35 In such sectors, the contracting authority has no influence on the detailed rules of public law governing the service, and thus on the level of the risk to transfer, and it would not, moreover, be reasonable to expect a public authority granting a concession to create conditions which were more competitive and involved greater financial risk than those which, on account of the rules governing the sector in question, exist in that sector (see *Eurawasser*, paragraphs 75 and 76).
- 36 It must also be stated that it is not for the Court of Justice to classify specifically the transactions at issue in the main proceedings. The Court’s role is confined to providing the national court with an interpretation of European Union law which will be useful for the decision which it has to take in the dispute before it (see *Parking Brixen*, paragraph 32). The specific classification of the contract falls within the jurisdiction of the national court which must determine whether the established facts satisfy the general criteria laid down by the Court.
- 37 In that regard, it must be stated that the risk of the economic operation of the service must be understood as the risk of exposure to the vagaries of the market (see, to that effect, *Eurawasser*, paragraphs 66 and 67), which may consist in the risk of competition from other operators, the risk that supply of the services will not match demand, the risk that those liable will be unable to pay for the services provided, the risk that the costs of operating the services will not fully be met by revenue or for example also the risk of liability for harm or damage resulting from an inadequacy of the service (see, to that effect, Case C-234/03 *Contse and Others* [2005] ECR I-9315, paragraph 22, and *Hans & Christophorus Oymanns*, paragraph 74).
- 38 By contrast, risks such as those linked to bad management or errors of judgment by the economic operator are not decisive for the purposes of classification as a public service contract or a service concession, since those risks are inherent in every contract, whether it be a public service contract or a service concession.
- 39 In the case in the main proceedings, it must be observed, first, that the usage fees are not determined unilaterally by the provider of the rescue services but by agreement with the social security institutions on the basis of negotiations which must take place annually. Those negotiations, the results of which cannot fully be foreseen, involve the risk that the provider of the services must face constraints imposed throughout the duration of the contract. Those constraints may result inter alia from the need to make compromises during the negotiations or from the arbitration proceedings regarding the level of the usage fees.

- 40 Considering that – as stated by the referring court itself – the social security institutions with which the service provider is obliged to hold negotiations attach importance, with regard to their legal obligations, to fixing the usage fees at the lowest possible level, that service provider also runs the risk that those fees will not suffice to cover all operating expenses.
- 41 The service provider cannot guard against such eventualities by ceasing its activity since, first, it would not recoup the investments made by it and, second, it may face legal consequences as a result of its decision to terminate the contract early. In any case, an undertaking specialising in rescue services has only limited flexibility on the transport market.
- 42 Second, it is apparent from the Bavarian law that it does not guarantee full coverage of the operator's costs.
- 43 If the operator's actual costs exceed, in a given period, the estimated costs which serve as a basis for calculation of the usage fees, that operator may face a deficit and would have to ensure pre-financing of those costs from its own resources. It is a fact that the demand for rescue services can fluctuate.
- 44 In addition, if a difference arises between the actual costs and the estimated costs recognised by the social security institutions, the result of the rendering of accounts will be dealt with only at the next negotiations, which does not oblige the social security institutions to make good a possible deficit in the course of the following year and thus does not offer a guarantee of full compensation.
- 45 It should be added that if the costs are provided for in a budget, it is not possible for the undertaking to carry forward a surplus or deficit to the next financial year.
- 46 Third, the service provider selected is exposed, to a certain degree, to the risk of default by those liable for the usage fees. While a large majority of users of the services are insured by social security institutions, a not insignificant number of users is not insured or is privately insured. While the central settlement office is responsible for the technical recovery of their debts, it is not liable for the debts of non-insured or privately-insured persons and does not guarantee actual payment by those persons of usage fees. According to information provided to the Court, that central office does not enjoy the powers of a public authority.
- 47 Finally, it must be noted that, according to the statements of the referring court, the Bavarian law does not exclude the possibility that several operators may provide their services in the same area. Thus, in the main proceedings, Passau municipal authority concluded contracts with two service providers.
- 48 The answer to the questions posed must therefore be that, where the economic operator selected is fully remunerated by persons other than the contracting authority which awarded the contract concerning rescue services, where it runs an operating risk, albeit a very limited one, by reason inter alia of the fact that the amount of the usage fees in question depends on the result of annual negotiations with third parties, and where it is not assured full coverage of the costs incurred in managing its activities in compliance with the principles laid down by national law, that contract must be classified as a 'service concession' within the meaning of Article 1(4) of Directive 2004/18.
- 49 It should be added that while, as European Union law now stands, service concession contracts are not governed by any of the directives by which the European Union legislature has

regulated the field of public procurement, the public authorities concluding them are bound to comply with the fundamental rules of the Treaty on the Functioning of the European Union, including Articles 49 TFEU and 56 TFEU, and with the consequent obligation of transparency, where – that being a matter for the referring court to determine – the contract concerned has a certain transnational dimension (see, to that effect, Case C-91/08 *Wall* [2010] ECR I-0000, paragraphs 33 and 34, and case-law cited).

Costs

- 50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 1(2)(d) and (4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that, where the economic operator selected is fully remunerated by persons other than the contracting authority which awarded the contract concerning rescue services, where it runs an operating risk, albeit a very limited one, by reason inter alia of the fact that the amount of the usage fees in question depends on the result of annual negotiations with third parties, and where it is not assured full coverage of the costs incurred in managing its activities in compliance with the principles laid down by national law, that contract must be classified as a ‘service concession’ within the meaning of Article 1(4) of that directive.

JUDGMENT OF THE COURT (Third Chamber)

25 March 2010 (*)

(Procedures for the award of public works contracts – Public works contracts – Concept – Sale by a public body of land on which the purchaser intends subsequently to carry out works – Works corresponding to a municipal authority’s urban-planning objectives)

In Case C-451/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberlandesgericht Düsseldorf (Germany), made by decision of 2 October 2008, received at the Court on 16 October 2008, in the proceedings

Helmut Müller GmbH

v

Bundesanstalt für Immobilienaufgaben,

intervening parties:

Gut Spascher Sand Immobilien GmbH,

municipality of Wildeshausen,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Second Chamber, acting for the President of the Third Chamber, P. Lindh, A. Rosas, A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: P. Mengozzi,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 23 September 2009,

after considering the observations submitted on behalf of:

- Helmut Müller GmbH, by O. Grübbel, Rechtsanwalt,
- The Bundesanstalt für Immobilienaufgaben, by S. Hertwig, Rechtsanwalt,
- the municipality of Wildeshausen, by J. Lauenroth, Rechtsanwalt,
- the German Government, by M. Lumma and J. Möller, acting as Agents,

- the French Government, by G. de Bergues and J.-S. Pilczer, acting as Agents,
- the Italian Government, by G. Fiengo, avvocato dello Stato,
- the Netherlands Government, by C. Wissels and Y. de Vries, acting as Agents,
- the Austrian Government, by E. Riedl and M. Fruhmann, acting as Agents,
- the Commission of the European Communities, by G. Wilms and C. Zadra, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2009,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of the concept of ‘public works contracts’ within the meaning of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).
- 2 The reference has been made in the context of proceedings between Helmut Müller GmbH (‘Helmut Müller’) and the Bundesanstalt für Immobilienaufgaben (the federal agency responsible for managing public property; ‘the Bundesanstalt’) concerning the sale by the latter of land on which the purchaser was subsequently to carry out works corresponding to the urban-planning objectives of a local authority, in the present case the municipality of Wildeshausen.

Legal framework

European Union legislation

- 3 Under recital 2 in the preamble to Directive 2004/18:

‘The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the [EC] Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.’
- 4 Article 1(2) and (3) of the directive provides as follows:

- ‘2. (a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.
- (b) “Public works contracts” are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A “work” means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

...

3. “Public works concession” is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.’

5 Article 16(a) of Directive 2004/18 states:

‘This Directive shall not apply to public service contracts for:

- (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; ...’

National legislation

6 Paragraph 10(1) of the Building Code (Baugesetzbuch) of 23 September 2004 (BGBl. 2004 I, p. 2414; ‘the BauGB’) provides:

‘The municipality shall adopt the development plan by means of a by-law.’

7 Paragraph 12 of the BauGB provides as follows:

‘1. The municipality may decide, by means of a building plan for the works, on the admissibility of a project where, on the basis of a plan drawn up in agreement with the municipality for the execution of the works and for the supply of utilities (works and utilities plan), the contractor is ready and able to execute the works and, before the decision under Paragraph 10(1), undertakes to execute them within a prescribed period and to bear the planning costs and the costs relating to the supply of utilities in full or in part (contract to execute works) ...

...

3. (a) Where, by determining a zone for construction of the works or by other means, a building plan for the works lays down ... a building use ... , it must ... be provided, with regard to the specified uses, that the only projects which are authorised are those which the contractor undertook to execute in the contract for execution of the works ...

...’

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

- 8 The Bundesanstalt was owner of a property known as the 'Wittekind barracks', occupying an area of just under 24 hectares in Wildeshausen, Germany.
- 9 In October 2005, Wildeshausen town council decided, with a view to returning the land concerned – which covers approximately 3% of developed and non-developed areas of the town – to civilian use, to undertake feasibility studies for an urban planning project.
- 10 In October 2006, the Bundesanstalt indicated in statements made on the internet and in the press that it intended to sell Wittekind barracks.
- 11 On 2 November 2006, Helmut Müller, a property development company, offered to buy the land for EUR 4 million, subject, however, to the condition that an urban development plan be drawn up on the basis of its project for use of the land.
- 12 Wittekind barracks were closed at the beginning of 2007.
- 13 In January 2007 the Bundesanstalt launched a call for tenders with a view to selling the property, in its condition at the time, as quickly as possible.
- 14 On 9 January 2007, Helmut Müller submitted a tender offer of EUR 400 000, which it increased to EUR 1 million on 15 January 2007.
- 15 Another property development company, Gut Spascher Sand Immobilien GmbH ('GSSI'), which was at that time in the process of being set up, submitted a tender offer of EUR 2.5 million.
- 16 Two other tender offers were submitted.
- 17 According to an experts' report produced by the Bundesanstalt before the national court, the value of the land concerned, on 1 May 2007, was EUR 2.33 million.
- 18 The order for reference indicates that the tenderers' plans were submitted to and discussed with the Wildeshausen municipal authorities, in the presence of the Bundesanstalt.
- 19 In the meantime, the Bundesanstalt had assessed the plans submitted by Helmut Müller and GSSI and expressed a preference for GSSI's project on urban-development grounds, taking the view that it would make Wildeshausen more attractive as a town. It informed the municipal authorities accordingly.
- 20 It was then agreed that the property should not be sold until after Wildeshausen town council had approved the project. The Bundesanstalt confirmed that it would respect the town council's decision.
- 21 As is further apparent from the order for reference, Wildeshausen town council decided in favour of GSSI's project and, on 24 May 2007, decided inter alia as follows:

'Wildeshausen town council is prepared to examine the project submitted by Mr R. [GSSI's managing director] and to embark on the procedure of drawing up a corresponding building plan for the area ...

There is no statutory right to obtain a (possibly project-related) building plan.

It is unlawful [for the municipality of Wildeshausen] to give binding undertakings on building use or to restrict its discretion (which is, furthermore, subject to legal constraints) before appropriate urban planning procedures have been concluded.

The abovementioned decisions are therefore in no way binding with respect to any land-use plan of [the municipality of Wildeshausen].

The contractor and the other persons involved in the project are liable in respect of the risks associated with planning and other costs.'

- 22 Immediately after that decision of 24 May 2007, Wildeshausen town council revoked its decision of October 2005 to undertake preliminary urban planning studies.
- 23 By notarial deed of 6 June 2007, the Bundesanstalt, with the concurrence of the municipality of Wildeshausen, sold Wittekind barracks to GSSI. It informed Helmut Müller of that sale on 7 June 2007. In January 2008, GSSI was entered in the land register as owner of the property. By notarial deed of 15 May 2008, the Bundesanstalt and GSSI confirmed the sales contract of 6 June 2007.
- 24 Helmut Müller brought an action before the Vergabekammer (body with jurisdiction at first instance in public procurement cases), arguing that public procurement rules had not been followed even though the sale of the barracks was subject to public procurement law. Helmut Müller claimed that the sales contract was void because it, Helmut Müller, had not been kept properly informed in its capacity as potential purchaser of the land.
- 25 The Vergabekammer dismissed the action as inadmissible on the ground, essentially, that GSSI had not been awarded a works contract.
- 26 Helmut Müller appealed against that decision to the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), claiming that, in the light of the circumstances, GSSI was to be regarded as being about to obtain a works contract in the form of a works concession. According to Helmut Müller, the relevant decisions had been taken jointly by the Bundesanstalt and the municipality of Wildeshausen.
- 27 The Oberlandesgericht Düsseldorf is inclined to agree with that argument. It takes the view that, at some point in the relatively near future – which cannot yet be determined with precision – the municipality of Wildeshausen will exercise its discretion and draw up a building plan for the works in accordance with Paragraph 12 of the BauGB and award GSSI a contract for execution of works within the meaning of that paragraph, and thus a public works contract.
- 28 Since the municipality of Wildeshausen is not permitted to pay any remuneration, the Oberlandesgericht Düsseldorf is of the opinion that that public works contract ought to be awarded in the legal form of a public works concession, and that GSSI should bear the economic risk inherent in that transaction. The Oberlandesgericht Düsseldorf also regards the transfer of ownership of the land and the award of a public works contract as forming a whole from the point of view of public procurement law. The steps taken by the Bundesanstalt and by the municipality of Wildeshausen merely occurred at different times.

- 29 The Oberlandesgericht Düsseldorf adds that it has adopted the same point of view in other cases before it, in particular in its judgment of 13 June 2007 concerning the airport in Ahlhorn (Germany). Its analysis has not, however, met with unanimous approval; German case-law is predominantly at odds with its interpretation. In addition, according to the order for reference, the German Federal Government was about to amend German public-procurement legislation in a manner which runs counter to the position advocated by the Oberlandesgericht.
- 30 The draft legislation mentioned by the Oberlandesgericht sought to clarify the definition of the concept of ‘public works contracts’ in Paragraph 99(3) of the Law against restraints on competition (Gesetz gegen Wettbewerbsbeschränkungen) of 15 July 2005 (BGBl. 2005 I, p. 2114) as follows (the proposed amendments being shown in italics):
- ‘Works contracts are contracts relating to either the execution, or both the design and execution, *for the contracting authority*, of works or of a work which is the outcome of building or civil engineering works and is intended itself to fulfil an economic or technical function, or of a work *which is of immediate economic benefit to the contracting authority* and is carried out by third parties in accordance with the requirements specified by that authority.’
- 31 Paragraph 99 was also to be extended by insertion of a new subparagraph 6, containing the following definition of a public works concession:
- ‘A works concession is a contract relating to the execution of a works contract in which the consideration for the works does not consist in payment but in the right to exploit the building concerned for a fixed period or, as the case may be, in that right together with payment.’
- 32 Shortly after the present reference for a preliminary ruling had been made, amendments in those terms were introduced by the Law on the modernisation of public procurement law (Gesetz zur Modernisierung des Vergaberechts) of 20 April 2009 (BGBl. 2009 I, p. 790).
- 33 In those circumstances, the Oberlandesgericht Düsseldorf decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘1. Is it a requirement, in order for there to be a public works contract under Article 1(2)(b) of ... Directive [2004/18] ..., that the works be physically carried out for the public contracting authority and bring it an immediate economic benefit?
 2. In so far as, according to the definition of a public works contract in Article 1(2)(b) of Directive [2004/18], the element of procurement is indispensable, is procurement to be regarded as having taken place, in accordance with the second variant of the provision, if the intended works for the public contracting authority fulfil a particular public purpose (for example, the development of part of a town) and the public contracting authority has the legal right under the contract to ensure that the public purpose is achieved and that the necessary works will be available?
 3. Does the concept of a public works contract in accordance with the first and second variants of Article 1(2)(b) of Directive [2004/18] require that the contractor be directly or indirectly obliged to provide the works? If so, must there be a legally enforceable obligation?
 4. Does the concept of a public works contract in accordance with the third variant of Article 1(2)(b) of Directive [2004/18] require that the contractor be obliged to carry out works, or that works form the subject-matter of the contract?

5. Do contracts by which, through the requirements specified by the public contracting authority, it is intended to ensure that the works to be carried out for a particular public purpose be available, and by which (by contractual stipulation) the contracting body is given the legal power to ensure (in its own indirect interest) the availability of the works for the public purpose, fall within the third variant of Article 1(2)(b) of Directive [2004/18]?
6. Is the concept of “requirements specified by the contracting authority” in Article 1(2)(b) of Directive [2004/18] fulfilled if the works are to be carried out in accordance with plans examined and approved by the public contracting authority?
7. Must there be held to be no public works concession under Article 1(3) of Directive [2004/18] if the concessionaire is, or will become, the owner of the land on which the works are to be carried out, or the concession is granted for an indeterminate period?
8. Does Directive [2004/18] – with the legal consequence of an obligation on the public contracting authority to invite tenders – apply if a sale of land by a third party and the award of a public works contract take place at different times and on the conclusion of the land sale the public works contract has not yet been awarded, but at the last-mentioned time there was, on the part of the public authority, the intention to award such a contract?
9. Are separate but related transactions concerning a sale of land and [the award of] a public works contract to be regarded from the point of view of the law on the awarding of contracts as a unity, if at the time the land sale contract was entered into the award of a public works contract was intended and the participants deliberately created a close connection between the contracts from a substantive – and possibly also temporal – point of view (see Case C-29/04 *Commission v Austria* [2005] ECR I-9705)?

Questions referred for a preliminary ruling

Preliminary observations

- 34 In most of the language versions of Directive 2004/18, there are three variants to the concept of ‘public works contracts’ provided for in Article 1(2)(b) of the directive. The first consists in the execution, which may be accompanied by the design, of building works falling within one of the categories listed in Annex I to the directive. The second concerns the execution, which may be accompanied by the design, of a work. The third variant is the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority.
- 35 A ‘work’, within the meaning of that provision, is defined as the ‘outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function’.
- 36 While the majority of the language versions use the term ‘work’ for both the second and the third variants, the German version uses two different terms, that is to say, ‘Bauwerk’ (work) for the second variant and ‘Bauleistung’ (building activity) for the third.
- 37 In addition, the German version of Article 1(2)(b) is the only one which provides that the activity referred to in the third variant must be realised not only ‘by whatever means’ but also ‘by third parties’ (‘durch Dritte’).

38 It is settled case-law that the wording used in one language version of a provision of European Union law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement for uniform application of European Union law. Where there is divergence between the various language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see Case C-372/88 *Cricket St Thomas* [1990] ECR I-1345, paragraphs 18 and 19; Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 16; and Case C-239/07 *Sabatauskas and Others* [2008] ECR I-7523, paragraphs 38 and 39).

39 The questions submitted by the referring court must be answered in the light of those considerations.

First and second questions

40 By its first two questions, which it is appropriate to consider together, the referring court asks, in essence, whether the concept of ‘public works contracts’, within the meaning of Article 1(2)(b) of Directive 2004/18, requires that the works which are the subject of the contract be physically carried out for the contracting authority in its immediate economic interest or whether it is sufficient if the works fulfil a public purpose, such as the development of part of a town.

41 It should be noted at the outset that the sale to an undertaking, by a public authority, of undeveloped land or land which has already been built upon does not constitute a public works contract within the meaning of Article 1(2)(b) of Directive 2004/18. First, such a contract requires that the public authority assume the position of purchaser and not seller. Second, the objective of such a contract must be the execution of works.

42 The provisions of Article 16(a) of Directive 2004/18 confirm that analysis.

43 Consequently, a sale, such as the sale in the main proceedings of Wittekind barracks by the Bundesanstalt to GSSI, cannot of itself constitute a public works contract within the meaning Article 1(2)(b) of Directive 2004/18.

44 Those questions submitted by the referring court do not, however, refer to that seller-purchaser relationship, but are directed rather at the relationship between the municipality of Wildeshausen and GSSI, that is to say, to the relationship between the public authority with town-planning powers and the purchaser of Wittekind barracks. The referring court wishes to know whether that relationship may constitute a public works contract within the meaning of that provision.

45 In that regard, it should be pointed out that, under Article 1(2)(a) of Directive 2004/18, ‘public contracts’ are contracts for pecuniary interest concluded in writing.

46 The concept of a contract is essential for the purpose of defining the scope of Directive 2004/18. As stated in recital 2 in the preamble to that directive, its purpose is to apply the rules of European Union law to the award of contracts concluded on behalf of the State, regional or local authorities and other bodies governed by public law entities. The directive does not refer to other types of activities for which public authorities are responsible.

- 47 In addition, only a contract concluded for pecuniary interest may constitute a public contract coming within the scope of Directive 2004/18.
- 48 The pecuniary nature of the contract means that the contracting authority which has concluded a public works contract receives a service pursuant to that contract in return for consideration. That service consists in the realisation of works from which the contracting authority intends to benefit (see Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 77, and Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 45).
- 49 Such a service, by its nature and in view of the scheme and objectives of Directive 2004/18, must be of direct economic benefit to the contracting authority.
- 50 That economic benefit is clearly established where it is provided that the public authority is to become owner of the works or work which is the subject of the contract.
- 51 Such an economic benefit may also be held to exist where it is provided that the contracting authority is to hold a legal right over the use of the works which are the subject of the contract, in order that they can be made available to the public (see, to that effect, *Ordine degli Architetti and Others*, paragraphs 67, 71 and 77).
- 52 The economic benefit may also lie in the economic advantages which the contracting authority may derive from the future use or transfer of the work, in the fact that it contributed financially to the realisation of the work, or in the assumption of the risks were the work to be an economic failure (see, to that effect, *Auroux and Others*, paragraphs 13, 17, 18 and 45).
- 53 The Court has already held that an agreement by which a first contracting authority entrusts a second contracting authority with the execution of a work may constitute a public works contract, regardless of whether or not it is anticipated that the first contracting authority is, or will become, the owner of all or part of that work (*Auroux and Others*, paragraph 47).
- 54 It follows from the foregoing that the concept of ‘public works contracts’ within the meaning of Article 1(2)(b) of Directive 2004/18 requires that the works which are the subject of the contract be carried out for the contracting authority’s immediate economic benefit; it is not, however, necessary that the service should take the form of the acquisition of a material or physical object.
- 55 The question arises as to whether those conditions are satisfied where the purpose of the intended works is to fulfil an objective in the public interest, the achievement of which is incumbent on the contracting authority, such as the development or coherent planning of part of an urban district.
- 56 In the Member States of the European Union, the execution of building projects, at least those of a certain size, is normally subject to prior authorisation by the public authority having urban-planning powers. That authority must assess, in the exercise of its regulatory powers, whether the execution of the works is in the public interest.
- 57 However, it is not the purpose of the mere exercise of urban-planning powers, intended to give effect to the public interest, to obtain a contractual service or immediate economic benefit for the contracting authority, as is required under Article 1(2)(a) of Directive 2004/18.

58 Consequently, the answer to the first and second questions is that the concept of ‘public works contracts’, within the meaning of Article 1(2)(b) of Directive 2004/18, does not require that the works which are the subject of the contract be materially or physically carried out for the contracting authority, provided that they are carried out for that authority’s immediate economic benefit. The latter condition is not satisfied through the exercise by that contracting authority of regulatory urban-planning powers.

Third and fourth questions

59 By its third and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether the concept of ‘public works contracts’, within the meaning of Article 1(2)(b) of Directive 2004/18, requires that the contractor be under a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation be legally enforceable.

60 As has been pointed out in paragraphs 45 and 47 of the present judgment, Article 1(2)(a) of Directive 2004/18 defines a public works contract as a contract for pecuniary interest. That concept is based on the premise that the contractor undertakes to carry out the service which is the subject of the contract in return for consideration. By concluding a public works contract, the contractor therefore undertakes to carry out, or to have carried out, the works which form the subject of that contract.

61 It is irrelevant whether the contractor carries out the works itself or uses subcontractors for that purpose (see, to that effect, *Ordine degli Architetti and Others*, paragraph 90, and *Auroux and Others*, paragraph 44).

62 Since the obligations under the contract are legally binding, their execution must be legally enforceable. In the absence of rules provided for under European Union law, and in accordance with the principle of procedural autonomy, the detailed rules governing implementation of those obligations are a matter for national law.

63 Consequently, the answer to the third and fourth questions is that the concept of ‘public works contracts’, within the meaning of Article 1(2)(b) of Directive 2004/18, requires that the contractor assume a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation be legally enforceable in accordance with the procedural rules laid down by national law.

Fifth and sixth questions

64 By its fifth and sixth questions, which it is appropriate to examine together, the referring court asks, in essence, whether the ‘requirements specified by the public contracting authority’, within the meaning of Article 1(2)(b) of Directive 2004/18, may consist either in the contracting authority’s exercise of the power to ensure that the work to be carried out addresses a public interest or in the exercise of the power which it is recognised as having to examine and approve building plans.

65 Those questions arise from the fact that, in the case in the main proceedings, the presumed contracting authority, that is to say, the municipality of Wildeshausen, did not draw up a list of requirements relating to work to be carried out on the land occupied by Wittekind barracks. According to the order for reference, that municipality merely decided that it was minded to

examine the project presented by GSSI and to embark on the procedure of drawing up a corresponding building plan.

- 66 However, the third variant set out in Article 1(2) (b) of Directive 2004/18 provides that the objective of public works contracts is the realisation of a 'work corresponding to the requirements specified by the contracting authority'.
- 67 In order for it to be possible to establish that a contracting authority has specified its requirements within the meaning of that provision, the authority must have taken measures to define the type of the work or, at the very least, have had a decisive influence on its design.
- 68 The mere fact that a public authority, in the exercise of its urban-planning powers, examines certain building plans presented to it, or takes a decision applying its powers in that sphere, does not satisfy the obligation that there be 'requirements specified by the contracting authority', within the meaning of that provision.
- 69 The answer to the fifth and sixth questions is, therefore, that the 'requirements specified by the contracting authority', within the meaning of the third variant set out in Article 1(2)(b) of Directive 2004/18, cannot consist in the mere fact that a public authority examines certain building plans submitted to it or takes a decision in the exercise of its regulatory urban-planning powers.

Seventh question

- 70 By its seventh question, the referring court asks, in essence, whether a public works concession, within the meaning of Article 1(3) of Directive 2004/18, is excluded in the case where the sole economic operator to which the concession can be granted already owns the land on which the work is to be carried out, or where the concession was granted for an indeterminate period.
- 71 Under Article 1(3) of Directive 2004/18, a public works concession 'is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment'.
- 72 In order for a contracting authority to be able to transfer to the other contracting party the right to exploit a work within the terms of that provision, that contracting authority must be in a position to exploit that work.
- 73 That will normally not be the case where the only basis for the right of exploitation is the right of ownership of the economic operator concerned.
- 74 The owner of land has the right to exploit that land in compliance with the applicable statutory rules. As long as an economic operator enjoys the right to exploit the land which he owns, it is in principle impossible for a public authority to grant a concession relating to that exploitation.
- 75 It should, in addition, be pointed out that the essential characteristic of the concession is that it is the concessionaire himself who bears the main, or at least the substantial, operating risk (see to that effect, with regard to concessions relating to public services, Case C-206/08 *Eurawasser* [2009] ECR I-0000, paragraphs 59 and 77).

- 76 The Commission of the European Communities submits that that risk may lie in the concessionaire's uncertainty as to whether the urban-planning service of the local authority concerned will, or will not, approve its plans.
- 77 That argument cannot be accepted.
- 78 In the type of scenario referred to by the Commission, the risk would be linked to the contracting authority's regulatory powers in respect of urban planning and not to the contractual relationship arising from the concession. Consequently, the risk is not linked to exploitation.
- 79 In any event, with regard to the duration of concessions, there are serious grounds, including the need to guarantee competition, for holding the grant of concessions of unlimited duration to be contrary to the European Union legal order, as stated by the Advocate General in points 96 and 97 of his Opinion (see, to the same effect, Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 73).
- 80 Consequently, the answer to the seventh question is that, in circumstances such as those of the case in the main proceedings, there is no public works concession within the meaning of Article 1(3) of Directive 2004/18.

Eighth and ninth questions

- 81 The eighth and ninth questions submitted by the referring court should be examined together. By its eighth question, the referring court asks, in essence, whether the provisions of Directive 2004/18 apply to a situation in which one public authority sells land to an undertaking, even though another public authority intends to award a works contract in respect of that land without yet having formally decided to award that contract. The ninth question concerns the possibility of regarding as a unity, from a legal point of view, the sale of the land and the subsequent award of a works contract in respect of that land.
- 82 In that regard, it is prudent not to exclude from the outset the application of Directive 2004/18 to a two-phase award procedure in the form of the sale of land which will subsequently form the subject of a works contract, by considering those transactions as a unity.
- 83 However, there is nothing in the circumstances of the case in the main proceedings to confirm that the prerequisites for such an application of that directive exist.
- 84 As submitted by the French Government in its written observations, the parties to the main proceedings did not assume any legally binding contractual obligations.
- 85 First, the municipality of Wildeshausen and GSSI did not assume any obligations of such a nature.
- 86 Second, GSSI did not give any undertaking to carry out the plans for the economic development of the land which it had purchased.
- 87 Finally, there is no evidence in the notarial deeds of sale to indicate that the award of a public works contract was imminent.

- 88 The intentions revealed by the documents in the case-file do not constitute binding obligations and cannot in any way satisfy the requirement of a written contract which is inherent in the very concept of a public contract set out in Article 1(2)(a) of Directive 2004/18.
- 89 The answer to the eighth and ninth questions is therefore that, in circumstances such as those of the case in the main proceedings, the provisions of Directive 2004/18 do not apply to a situation in which one public authority sells land to an undertaking, even though another public authority intends to award a works contract in respect of that land but has not yet formally decided to award that contract.

Costs

- 90 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

- 1. The concept of ‘public works contracts’, within the meaning of Article 1(2)(b) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, does not require that the works which are the subject of the contract be materially or physically carried out for the contracting authority, provided that they are carried out for that authority’s immediate economic benefit. The latter condition is not satisfied by the exercise by that contracting authority of regulatory urban-planning powers.**
- 2. The concept of ‘public works contracts’, within the meaning of Article 1(2)(b) of Directive 2004/18, requires that the contractor assume a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation be legally enforceable in accordance with the procedural rules laid down by national law.**
- 3. The ‘requirements specified by the contracting authority’, within the meaning of the third variant set out in Article 1(2)(b) of Directive 2004/18, cannot consist in the mere fact that a public authority examines certain building plans submitted to it or takes a decision in the exercise of its regulatory urban-planning powers.**
- 4. In circumstances such as those of the case in the main proceedings, there is no public works concession within the meaning of Article 1(3) of Directive 2004/18.**
- 5. In circumstances such as those of the case in the main proceedings, the provisions of Directive 2004/18 do not apply to a situation in which one public authority sells land to an undertaking, even though another public authority intends to award a works contract in respect of that land but has not yet formally decided to award that contract.**

C-300/07 Hans and Christophorus Oymanns

JUDGMENT OF THE COURT (Fourth Chamber)

11 June 2009 (*)

(Directive 2004/18/EC – Public supply contracts and public service contracts – Statutory sickness insurance funds – Bodies governed by public law – Contracting authorities – Invitation to tender – Manufacture and supply of orthopaedic footwear individually tailored to patients' needs – Detailed advice provided to patients)

In Case C-300/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberlandesgericht Düsseldorf (Germany), made by decision of 23 May 2007, received at the Court on 27 June 2007, in the proceedings

Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik,

v

AOK Rheinland/Hamburg,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, Presidents of Chamber, T. von Danwitz, R. Silva de Lapuerta, E. Juhász (Rapporteur) and G. Arestis, Judges,

Advocate General: J. Mazák,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 19 June 2008,

after considering the observations submitted on behalf of:

- Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik, by H. Glahs, and U. Karpenstein, Rechtsanwälte,
- AOK Rheinland/Hamburg, by A. Neun, Rechtsanwalt,
- the Commission of the European Communities, by G. Wilms and D. Kukovec, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2008,

gives the following

Judgment

- 1 This reference for a preliminary ruling relates to the interpretation of Article 1(2)(c) and (d), Article 1(4), Article 1(5) and the first and second alternatives of letter (c) of the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).
- 2 The reference has been made in the course of proceedings between Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik and AOK Rheinland/Hamburg relating to, first, whether the German statutory sickness insurance funds constitute contracting authorities for the purposes of the application of the rules in Directive 2004/18, secondly, whether the supply of orthopaedic shoes, made and tailored individually in accordance with the patient's needs by specialist shoe manufacturers under an agreement with the statutory sickness insurance fund, together with detailed advice given to the patients before and after such supply is to be regarded as a supply contract or a service contract and, thirdly, if the supply of orthopaedic shoes is to be regarded as a service, whether, in the present case, it is to be regarded as a 'service concession' or a 'framework agreement' within the meaning of the provisions of Directive 2004/18.

Legal context

Community rules

- 3 Article 1 of Directive 2004/18, entitled 'Definitions', provides:

'...

2. (a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

...

- (c) "Public supply contracts" are public contracts other than those referred to in (b) having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products.

...

- (d) "Public service contracts" are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

A public contract having as its object both products and services within the meaning of Annex II shall be considered to be a "public service contract" if the value of the services in question exceeds that of the products covered by the contract.

A public contract having as its object services within the meaning of Annex II and including activities within the meaning of Annex I that are only incidental to the principal object of the contract shall be considered to be a public service contract.

4. "Service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.
5. A "framework agreement" is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

...'

4 Article 1(9) of Directive 2004/18 provides as follows:

"Contracting authorities" means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

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.

Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III. Member States shall periodically notify the Commission of any changes to their lists of bodies and categories of bodies.'

5 Chapter III of Annex III to the directive, entitled 'Germany', paragraph 1, 'Categories', point 1.1 'Authorities', fourth indent, mentions 'Sozialversicherungen (Krankenkassen, Unfall- und Rentenversicherungsträger)/[social security institutions: health, accident and pension insurance funds]'

6 Article 21 of the directive provides:

'Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).'

7 The subject of Annex II B, Category 25, is 'Health and social services'.

8 In accordance with Article 22 of Directive 2004/18:

‘Contracts which have as their object services listed both in Annex II A and in Annex II B shall be awarded in accordance with Articles 23 to 55 where the value of the services listed in Annex II A is greater than the value of the services listed in Annex II B. In other cases, contracts shall be awarded in accordance with Article 23 and Article 35(4).’

9 According to Article 32(2) of the Directive:

‘For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive ...’

10 Article 79 of the Directive, entitled ‘Amendments’ provides as follows:

‘In accordance with the procedure referred to in Article 77(2), the Commission may amend:

...

(d) the lists of bodies and categories of bodies governed by public law in Annex III, when, on the basis of the notifications from the Member States, these prove necessary;

...’

11 Finally, Article 1(4) of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12) provides:

‘Contracts for the supply of consumer goods to be manufactured or produced shall also be deemed contracts of sale for the purpose of this Directive.’

National legislation

12 The following summary of the relevant national rules is taken from the files lodged with the Court in the present proceedings and, in particular, the order for reference.

13 The public health system in Germany and the organisation and financing of statutory sickness insurance funds are governed by Books Four and Five (‘SGB IV’ and ‘SGB V’, respectively) of the Social Code (Sozialgesetzbuch). The task which the legislature has given to the statutory sickness insurance funds is defined as follows in Paragraph 1(1) of SGB V:

‘As a community founded on the basis of the principle of solidarity, the task of the sickness insurance scheme is to maintain, restore or improve the state of health of the insured.’

14 It can be seen from Paragraph 4(1) of SGB V that the statutory sickness insurance funds are corporations governed by public law and have legal personality as well as a right of self-management. They were created pursuant to Paragraphs 1 and 3 of SGB V. According to the order for reference the vast majority of the population in Germany (around 90%) is compulsorily insured by law with a statutory sickness insurance fund. While persons insured under the compulsory scheme may select the particular statutory sickness insurance fund with which they wish to be insured, they may not choose between a public and a private sickness insurance fund.

15 The rules on the financing of statutory sickness insurance funds are contained in Paragraphs 20 to 28 of SGB IV and Paragraphs 3, and 220 et seq. of SGB V. That financing is provided by way

of compulsory contributions from insured persons, direct payments from the Federal State and compensatory payments from the financial compensation system between statutory funds and from the risk structure compensation mechanism between them.

- 16 According to the order for reference, the contributions paid by those who are compulsorily insured and by their employers constitute the major part of the financing of the statutory insurance funds. The amount of contributions depends solely on the income of the insured, that is to say, his capacity to contribute. Other factors, such as age, previous illnesses or the number of co-insured persons, are irrelevant. In practice, the insured's part of the contributions is withheld from his salary by his employer and paid to the statutory sickness insurance fund along with the employer's part of the contributions. Those are public law obligations and contributions are compulsorily recovered on the basis of the provisions of public law.
- 17 The contribution rate is set, not by the State, but by the statutory sickness insurance funds. As is provided in the relevant rules, these funds have to calculate the contributions in such a way as to cover, when combined with other resources, the expenses stipulated by law and to guarantee that the means of operating and statutory reserves are available. The setting of the contribution rate requires the approval of each fund's supervisory authority. According to the order for reference, the amount of the contributions is, to some extent, laid down by law, because it must be set in such a way that the revenue accrued is no lower and no higher than expenditure. Since, under the German sickness insurance scheme, the vast majority of the benefits to be provided are laid down by law, the amount of expenditure to a great extent cannot be directly influenced by the statutory sickness insurance fund in question.
- 18 In order to maintain the contribution rate for insured persons at the same level, Paragraphs 266 to 268 of SGB V provide for annual compensatory payments between all the statutory sickness insurance funds resulting from the risk structure compensation mechanism. According to the national court's observations, there is a mutual solidarity obligation between the funds, with each being entitled to compensation or being required to provide compensation up to a certain amount.
- 19 According to Paragraph 4(1) of SGB V, the statutory sickness insurance funds have self-management powers but are subject to State supervision. According to the order for reference, that supervision is not limited to a mere review of legality after the event.
- 20 Certain measures adopted by the statutory sickness insurance funds, such as amendments to the statutes of the sickness insurance funds, setting the contribution rates, building and property transactions and the acquisition of software, require an authorisation by the supervisory authorities, as can be seen from Paragraphs 195(1), 220(2) and 241 of SGB V. The supervisory authorities must carry out, at least every five years, a commercial, accounting and operational management review of the statutory sickness insurance funds under their control. That supervision, which covers, inter alia, the economic efficiency of the activity of the fund in question, may be more frequent (Paragraph 69(2) and 88(1) of SGB IV and Paragraph 274(1) of SGB V). In the framework of that supervision, Paragraph 88(2) of SGB IV provides that the funds are required to transmit all necessary documents and information to the supervisory authorities. In addition, according to Paragraphs 37 and 89(3) of SGB IV, if the self-management organs of the funds refuse to perform the tasks they are required to carry out, those tasks will be taken over by the supervisory authority itself.

- 21 Finally, the provisional budget of each statutory sickness insurance fund must be submitted to the competent supervisory authority in good time (Paragraph 70(5) of SGB IV) and the latter may merge unviable funds with other funds or close them (Paragraph 146a, subparagraph 3 of the first sentence of Paragraph 153, Paragraph 156, subparagraph 3 of the first sentence of Paragraph 163, second sentence of Paragraph 167, and Paragraph 170 of SGB V).
- 22 Given that, in the context of the system at issue, the insured has a right as against the statutory sickness insurance fund, not to reimbursement of costs, but to free access to the corresponding services (Paragraph 2(2) of SGB V), in accordance with the principle of benefits in kind, the sickness insurance funds are encouraged to conclude with different suppliers provision schemes which are multi-sectoral or interdisciplinary. These ‘integrated provision schemes’, provided for in Paragraphs 140a to 140e of SGB V, are concluded between the statutory sickness insurance funds and different suppliers eligible to provide treatment to the insured. They define the remuneration for different formulae of the integrated provision scheme which are intended to pay for the totality of benefits that the insured can call on in the context of the scheme. It is the statutory sickness insurance fund that is party to the integrated provision scheme contract and is to pay the remuneration of the provider. The participation of those insured in the different formulae of the scheme is optional, but once the insured opts for such a formula, he is required to call on the services of the provider with whom the relevant sickness insurance fund has concluded such a contract.
- 23 During the procedure before the Court, two judgments of the Bundesverfassungsgericht were also mentioned in connection with the mission of the sickness insurance funds in Germany.
- 24 In its order of 9 June 2004 (2 BvR 1248/03 and 2 BvR 1249/03), the Bundesverfassungsgericht held:
- ‘Social law is one the most important instruments of the State’s social policy. In the social State order established by the Constitution (Grundgesetz), protection in the case of illness is one of the fundamental tasks of the State. The legislature has performed that task by ensuring the protection of the major part of the population by the introduction of statutory sickness insurance, a compulsory, public law, insurance scheme, and by making detailed rules for the implementation of that protection. The principal task of the sickness insurance funds under the statutory scheme is the implementation of detailed social legislation enacted to perform that fundamental task of the State.’
- 25 Finally, in its order of 31 January 2008 (1 BvR 2156/02), the Bundesverfassungsgericht held that the sickness insurance funds are bodies governed by public law integrated into the State and which, in fact, carry out, indirectly, missions of public administration.

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

- 26 By public notice published in June 2006 in a specialised periodical, AOK Rheinland/Hamburg, a statutory sickness insurance fund, invited orthopaedic footwear makers to submit tenders for the manufacture and supply of footwear for the integrated provision scheme within the meaning of Paragraph 140a et seq. of SGB V for the period from 1 September 2006 to 31 December 2006. The services to be provided were classified according to cost into different groups for which the tenderer had to enter prices.
- 27 The quantity of shoes to be supplied was not fixed. It was provided that patients suffering from diabetic foot syndrome holding a sickness insurance card and an appropriate medical

prescription were to contact the orthopaedic footwear makers directly. The footwear maker's task was to manufacture and check individually tailored orthopaedic footwear, whilst detailed advice had to be given prior to, and after, supply of the footwear. Apart from contributions by patients, payments were to be made by the statutory sickness insurance fund.

- 28 Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik, an orthopaedic footwear company, submitted a tender and, two days later, lodged complaints relating to infringements of Community and national procurement law. Those complaints were rejected by the statutory sickness insurance fund on the ground that the rules of procurement law were not applicable in the present case. Since the footwear company's action against that decision was dismissed at first instance, the company appealed to the Procurement Division of the Oberlandesgericht Düsseldorf.
- 29 The national court observes that it is disputed in German legal literature and case-law whether, despite being mentioned in Annex III to Directive 2004/18, statutory sickness insurance funds are to be regarded as 'bodies governed by public law', and therefore, as 'contracting authorities', within the meaning of the directive. It therefore set out the problem it has with the different conditions laid down in the second subparagraph of Article 1(9) of that directive.
- 30 The national court considers that the conditions laid down in points (a) and (b) of that provision, are fulfilled inasmuch as the statutory sickness insurance funds are legal persons governed by public law, established for the specific purpose of maintaining, restoring or improving the health of the insured, that is to say, meeting needs in the general interest. In addition, those needs are not of an industrial or commercial character since the statutory sickness insurance funds do not operate commercially and provide their services on a non-profit-making basis.
- 31 The discussion should therefore deal with the conditions set out in letter (c) of the second subparagraph of Article 1(9) of Directive 2004/18.
- 32 With regard to the first of those conditions, namely that such bodies should be financed, for the most part, by the State, the national court refers to the characteristics of the national system in question, as set out in paragraphs 13 to 18 of the present judgment.
- 33 With regard to the condition concerning management supervision by the public authorities, the national court refers to the relevant aspects of the system, as set out in paragraphs 19 and 20 of the present judgment.
- 34 If it is concluded that the statutory sickness insurance funds are contracting authorities, a second question arises, namely whether the contract at issue is a supply contract or a service contract. The national court observes that the second indent of Article 1(2)(d) of Directive 2004/18 lays down the value of the services or products in question as the criterion for making that assessment. On the basis of that criterion, the national court considers it essential to know what place manufacture of the shoes at issue in the main proceedings occupies in the whole service, which covers the purchase of materials and the manufacture as well as the advice and information provided to patients.
- 35 If the individualised manufacture of the footwear at issue were to be regarded as part of the supply, the national court considers that the value of the supply of the footwear would be higher than the value of the services. If, on the other hand, the value of the supply consisted only in the raw materials, the value of the services would be greater than the value of the

supply. It points out that Article 1(4) of Directive 1999/44, which deems ‘contracts for the supply of consumer goods to be manufactured or produced’ to be contracts of sale, seems to favour the first approach irrespective of whether they relate to standardised items or items individually tailored to the specific order, namely non-fungible goods. However, it may possibly be inferred from the case-law of the Court that qualitative aspects also play a role (Case C-220/05 *Auroux* [2007] ECR I-385, paragraph 46). In that connection, it must be borne in mind that the advice to be given to patients is not limited to the selection and use of the product.

- 36 The national court regards that distinction as important since the classification of the contract at issue in the main proceedings as a supply contract means that the provisions of Directive 2004/18 are fully applicable.
- 37 If the contract at issue in the main proceedings is not to be regarded as a supply contract, the national court asks whether that contract is to be regarded as a service contract or a service concession. In the latter case, it is clear from Article 17 thereof that Directive 2004/18 is not applicable. The court before which proceedings were brought at first instance considered that that possibility is precluded by the fact that the statutory sickness insurance fund, and not the patient, is responsible for paying the provider. However, the court making the reference considers that the criterion of who bears the operating risk must also be taken into account. It must be borne in mind, on the one hand, that because the statutory sickness insurance fund, and not the patient, is liable to pay the provider, the latter is relieved of the risk connected with debt collection and debtor insolvency. On the other hand, however, the provider bears the risk that patients will not avail themselves of its products and services. That is the factor which distinguishes this case from a normal framework contract. In the view of the court making the reference, the crucial point for the purpose of classifying the contract at issue in the main proceedings as a service concession is the fact that the provider does not have to set up and maintain any costly structures, such as the construction of premises, and the cost of personnel or equipment, which would have to be amortised later by means of ‘the right to exploit for payment its own service’ (Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, point 30).
- 38 Finally, the national court points out that if the contract at issue in the main proceedings is regarded as a service contract, that would result, by reason of its character as a health service under Article 21 and Annex II B, Category 25, of Directive 2004/18, in the application only of Article 23 and Article 35(4) of the directive and an infringement of those provisions is not at issue in the present case. However, such a classification would result in certain provisions of national law being applicable, provisions which employ the same concept of ‘service contract’ and on the basis of which the applicant in the main proceedings would be partly successful.
- 39 Having regard to the foregoing considerations, the Oberlandesgericht Düsseldorf decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:
- ‘1. (a) Is the requirement of “financing by the State” as referred to in the first alternative of letter (c) of the second subparagraph of Article 1(9) of [Directive 2004/18] to be interpreted as including a situation where the State prescribes membership of a sickness insurance fund and the duty to pay contributions – whose amount is dependent on income – to the relevant sickness insurance fund, which sets the contribution rate, but the sickness insurance funds are linked to one another by a system of solidarity-based financing described in greater detail in the grounds hereof and the satisfaction of the liabilities of each individual sickness insurance fund is guaranteed?’

- (b) Is the requirement referred to in the second alternative of letter (c) of the second subparagraph of Article 1(9) [of Directive 2004/18] that the body be “subject to management supervision by those bodies” to be interpreted to the effect that State legal supervision which concerns current or future transactions – with other possible means of State intervention described in the grounds hereof – is sufficient to satisfy that requirement?
2. If the first question – in part (a) or (b) – is answered in the affirmative, are letters (c) and (d) of Article 1(2) of [Directive 2004/18] to be interpreted as meaning that the provision of goods which are individually manufactured and tailored, in terms of their form, to meet the needs of the particular customer, and on whose use the individual customer is to be advised, are to be classified as “supply contracts” or as “service contracts”? Is only the value of the particular services to be taken into consideration?
3. If the provision referred to in the second question is to be or could be classified as a “service”, is Article 1(4) of [Directive 2004/18] – as distinct from a “framework agreement” within the meaning of Article 1(5) of the directive – to be interpreted as meaning that a “service concession” also includes the award of a contract in the form where:
- the decision on whether and in what cases the contractor is awarded specific contracts is taken not by the contracting authority, but by third parties,
 - the contractor is paid by the contracting authority because by law only that authority is liable to pay remuneration and is required to provide the service to third parties, and
 - the contractor does not have to provide, or offer as available, services of any kind prior to their use by the third parties?’

The questions referred to the Court

The first question

- 40 By its first question, the national court asks, essentially, whether statutory sickness insurance funds, such as those at issue in the main proceedings, having regard to their characteristics set out in the order for reference, should be regarded as contracting authorities for the purposes of the application of the provisions of Directive 2004/18.
- 41 In order to answer that question, an underlying preliminary question, which is apparent from the grounds for the reference for a preliminary ruling and the problem set out therein by the national court, must first be considered, namely, whether the fact that the statutory sickness insurance funds at issue in the main proceedings are expressly mentioned in Annex III to Directive 2004/18 is sufficient for them to be regarded, on that ground alone, as bodies governed by public law and therefore, as contracting authorities.
- 42 The applicant in the main proceedings and the Commission of the European Communities argue that the mere inclusion of a body in Annex III to Directive 2004/18 is a sufficient condition for considering that body to be governed by public law. Inclusion in the list raises an irrebuttable presumption that the body may be so classified, which makes any additional consideration of the nature and characteristics of the body at issue superfluous.

- 43 That argument cannot be accepted.
- 44 It can be seen from letter (b) of the first paragraph of Article 234 EC, that a national court may, at any time, request the Court to rule on the validity of an act of the institutions of the European Community if it considers that a decision by the Court on the question is necessary to enable it to give judgment.
- 45 In that regard, it should be pointed out that the Community rules at issue, namely Directive 2004/18, contain both substantive rules, such as those in the second subparagraph of Article 1(9) of that Directive, which lays down the conditions which a body must fulfil if it is to be regarded as a contracting authority within the meaning of the Directive, and measures implementing those substantive rules, such as the inclusion in Annex III to the same directive of a non-exhaustive list of public bodies deemed to fulfil those conditions. In such a context, the Community judicature, when a reasoned request to that effect is referred to by a national court, must make sure that the Community measure in question is internally consistent by verifying whether the inclusion of a given body in the said list constitutes a correct application of the substantive criteria laid down in the abovementioned provision. The Court's intervention in that regard is a requirement of legal certainty, which is a general principle of Community law.
- 46 In the present case, the national court raises, although not expressly, a question concerning the validity of the inclusion in the list in Annex III of Directive 2004/18 of the statutory sickness insurance fund at issue in the main proceedings. It refers to differences between the case-law and legal literature in Germany on the question whether such inclusion constitutes a sufficient and exclusive condition for the purpose of classifying such funds as bodies governed by public law and even makes clear its own doubts in that regard. For those reasons, it frames its first question in terms of the substantive conditions laid down in letter (c) of the second subparagraph of Article 1(9) of Directive 2004/18.
- 47 Consequently, the national court wishes to ask the Court for a ruling on the validity of the inclusion of the body at issue in the main proceedings in Annex III to Directive 2004/18 in the light of the substantive conditions laid down in that provision.
- 48 In order to answer that question, it must be noted that, according to the settled case-law of the Court, the three conditions laid down in letters (a), (b) and (c) of the second subparagraph of Article 1(9) of Directive 2004/18 which must be fulfilled if a body is to be regarded as governed by public law are cumulative (Case C-393/06 *Ing. Aigner* [2008] ECR I-2339, paragraph 36 and the case-law cited therein).
- 49 As is clear from the order for reference, the conditions laid down in letters (a) and (b) of the second subparagraph of Article 1(9) of Directive 2004/18 are fulfilled in the present case. The statutory sickness insurance funds at issue are legal persons governed by public law, they were established for the specific purpose of meeting needs relating to public health, which are needs in the general interest, and those needs do not have an industrial or commercial character inasmuch as the benefits are provided on a non-profit-making basis. It remains to be considered, therefore, whether at least one of the alternative conditions laid down in the three alternatives set out in letter (c) of the second subparagraph of Article 1(9) has been fulfilled in the present case and, first, the condition concerning their being financed, for the most part, by the State.

- 50 It must be recalled first with regard to that condition that, as is apparent from the national system in question and from the orders of the Bundesverfassungsgericht cited in paragraphs 24 and 25 of the present judgment, the protection of public health is a fundamental task of the State and the statutory public insurance funds are integrated into the State and, in fact, perform indirectly missions of public administration.
- 51 Furthermore, in accordance with the Court's case-law, the first alternative in letter (c) of second subparagraph of Article 1(9) of Directive 2004/18 contains no details as to the procedures for delivering the financing to which that provision relates. Thus, in particular, there is no requirement that the activity of the bodies in question should be directly financed by the State or by another public body failing which the condition attaching to that point is not satisfied. A method of indirect financing is therefore sufficient (see, to that effect, Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173, paragraphs 34 and 49).
- 52 It must first be observed, that the statutory sickness insurance funds at issue in the main proceedings are financed, in accordance with the relevant national rules, by contributions from members, including the contributions paid on their behalf by their employers, by direct payments from the Federal authorities and by compensatory payments between the funds resulting from the risk structure compensation mechanism between them. The sickness funds in question are financed, for the most part, by compulsory contributions from members.
- 53 Secondly, it is also apparent from the order for reference that the members' contributions are paid without any specific consideration in return within the meaning of the Court's case-law (see, to that effect, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraphs 23 to 25). No contractual consideration is linked to those payments, since neither the liability to pay contributions nor their amount is the result of any agreement between the statutory sickness insurance funds and their members, since membership of the funds, and payment of contributions, are both required by law (see, to that effect, *Bayerischer Rundfunk and Others*, cited above, paragraph 45). In addition, the amount of contributions is based solely on the capacity to contribute of each member and other factors, such as the age of the insured person, his state of health or the number of co-insured persons are irrelevant in that regard.
- 54 Thirdly, the national court points out that, unlike the licence fee at issue in *Bayerischer Rundfunk and Others*, the contribution rate is fixed in the present case not by the public authorities but by the statutory sickness insurance funds themselves. However, it points out, correctly, that the funds have a very limited discretion in that regard inasmuch as their mission is to provide the benefits laid down in the social security legislation. Since the benefits, and the expenditure connected with them, are imposed by law and the funds perform their functions on a non-profit-making basis, the contribution rate must be set in such a way that the revenue accrued is no lower and no higher than expenditure.
- 55 Fourthly, it must be pointed out that the setting of the contribution rate by the statutory sickness insurance funds requires, in any event, the approval of the public body which supervises each fund. Thus, the amount of the contributions is, as the national court put it, to some extent, laid down by law. Finally, with regard to the funds' other sources of revenue, the direct payments by the federal authorities, although of a smaller amount, are unquestionably direct financing by the State.
- 56 Lastly, with regard to the arrangements for the collection of contributions, it is clear from the order for reference that, in practice, the insured person's part of the contributions is withheld from his salary and paid by his employer to the relevant statutory sickness insurance fund,

along with the employer's part of the contributions. Contributions are therefore collected without any possibility of intervention on the part of the insured person. The national court points out in that regard that contributions are compulsorily recovered on the basis of the provisions of public law.

- 57 It must therefore be considered, as the Court held in paragraph 48 of *Bayerischer Rundfunk and Others*, that financing of a statutory sickness insurance scheme such as that at issue in the main proceedings, which is brought into being by a measure of the State, is, in practice, guaranteed by the public authorities and is secured by methods of collection which fall under the provisions of public law, satisfies the condition of being financed, for the most part, by the State for the purposes of the application of the Community rules on the awarding of public contracts.
- 58 In view of that conclusion and having regard to the alternative nature of the conditions laid down in letter (c) of the second subparagraph of Article 1(9) of Directive 2004/18, there is no need to consider whether the condition concerning supervision of the management of the statutory sickness insurance funds by the public authorities is fulfilled in the present case.
- 59 The answer to be given to the first question referred is therefore that the first alternative of letter (c) of the second subparagraph of Article 1(9) of Directive 2004/18 must be interpreted as meaning that there is financing, for the most part, by the State when the activities of statutory sickness insurance funds are chiefly financed by contributions payable by members, which are imposed, calculated and collected according to rules of public law such as those in the main proceedings. Such sickness insurance funds are to be regarded as bodies governed by public law and therefore as contracting authorities for the purposes of the application of the rules in that directive.

The second question

- 60 By this question, the national court asks essentially what criterion must be applied in order to determine whether a mixed public contract both for the supply of goods and for the provision of services must be regarded as a supply contract or a service contract and whether the criterion to be applied in that regard is solely the value of the various parts which make up the mixed contract at issue. It is apparent from the order for reference, however, that the national court also asks whether, in the case of the supply of products which are manufactured and tailored individually according to the needs of each customer and on the use of which each customer receives individual advice, the manufacture of those products must be classified in the 'supply' part or the 'services' part of the contract for the purposes of calculating the value of each part thereof.
- 61 In order to answer that question, it must first be noted that when a contract concerns both the supply of products and the provision of services, the second indent of Article 1(2)(d) of Directive 2004/18 contains a specific rule fixing a criterion for classifying contracts, so that the contract can be regarded as either a contract for products or a contract for services, namely, the respective value of the products and services covered by the contract. That criterion is quantitative in nature, that is to say, it refers to the consideration due by way of payment for the 'products' part and the 'services' part of the contract in question.
- 62 On the other hand, in the case of a public contract for the provision of services and the carrying out of works, the third indent of Article 1(2)(d) of Directive 2004/18 employs another criterion for classification, namely, the principal object of the contract in question. That criterion was

applied in *Auroux and Others* (paragraphs 37 and 46), which concerned, precisely, a contract for works and services.

- 63 It does not appear either from the applicable Community rules or from the relevant case-law of the Court that that criterion must also be taken into account in the case of a mixed contract concerning products and services.
- 64 It must also be stated that, in accordance with the definition of the concept of 'public supply contracts' contained in the first indent of Article 1(2)(c) of Directive 2004/18, that concept covers transactions such as, for example, the purchase or rental of 'products', without being more specific and without making a distinction according to whether the product in question was manufactured in a standardised manner or in an individualised manner, that is to say, in accordance with the actual preferences and needs of the customer. Consequently, the concept of 'product' to which that provision makes general reference also includes the manufacturing process, irrespective of whether the product under consideration is supplied to consumers ready-made or after being manufactured in accordance with consumers' requirements.
- 65 That approach is confirmed by Article 1(4) of Directive 1999/44, which classifies as 'contracts of sale', in general terms and without distinction, 'contracts for the supply of consumer goods to be manufactured or produced'.
- 66 The answer to be given to the second question referred is therefore that when a mixed public contract concerns both products and services, the criterion to be applied in order to determine whether the contract in question is a supply contract or a service contract is the respective value of the products and services covered by the contract. Where the products supplied are individually manufactured and tailored to the needs of each customer and where each customer must receive individual advice on the use of the products, the manufacture of those products must be classified in the 'supply' part of the said contract for the purposes of calculating the value of each part thereof.

The third question

- 67 The third question must be understood as asking, essentially, whether, if the provision of services is regarded as being more important than the supply of products in the contract at issue in the main proceedings and having regard to the characteristics set out in the order for reference, the conclusion of a contract between a statutory sickness insurance fund and a manufacturer of orthopaedic shoes is to be regarded as a 'service concession' within the meaning of Article 1(4) of Directive 2004/18 or a 'framework agreement' within the meaning of Article 1(5) of that directive.
- 68 In accordance with the definition contained in Article 1(4) of Directive 2004/18, a service concession is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.
- 69 For its part, a framework agreement is defined in Article 1(5) of Directive 2004/18 as an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

- 70 It is apparent from those definitions that the concepts considered have fairly similar characteristics, with the effect that it is not easy to draw a clear distinction between them in advance. The legal classification of a contract therefore depends on the specific factors which distinguish the particular case.
- 71 In any event, it flows from the abovementioned definition of a service concession that such a concession is distinguished by a situation in which a right to operate a particular service is transferred by the contracting authority to the concessionaire and that the latter enjoys, in the framework of the contract which has been concluded, a certain economic freedom to determine the conditions under which that right is exercised since, in parallel, the concessionary is, to a large extent, exposed to the risks involved in the operation of the service. On the other hand, the distinguishing characteristic of a framework agreement is that the activity of the trader who has concluded the agreement is restricted in the sense that all contracts concluded by that trader during a given period must comply with the conditions laid down in the agreement.
- 72 That distinguishing factor is confirmed by the Court's case-law, according to which a service concession exists where the agreed method of remuneration consists in the right of the service provider to exploit for payment his own service and means that he assumes the risk connected with operating the services in question (Case C-382/05 *Commission v Italy* [2007] ECR I-6657, paragraph 34 and the case-law cited therein).
- 73 In the present case, the contract at issue in the main proceedings is an 'integrated provision scheme', provided for in Paragraphs 140a to 140e of SGB V, concluded between a statutory sickness insurance fund and a trader. According to that contract, the trader undertakes the obligation to serve the insured persons who come to him. At the same time, the prices for the different formulae are fixed in the contract, as is its duration. The quantities of the various services are not fixed, but a provision on that point is not required by the concept of service concession. The statutory sickness insurance fund alone pays the remuneration of the provider. It seems therefore that the conditions under which the trader carries on its activity are laid down in the contract at issue in the main proceedings, with the effect that the trader in question does not enjoy the degree of economic freedom which would distinguish a concession nor is it exposed to a significant risk connected with the services it provides.
- 74 It could certainly be remarked that the trader in such a case is exposed to a certain risk inasmuch as insured persons may not avail themselves of its products and services. However, that risk is limited. The trader is spared the risk connected with recovery of payment and the insolvency of the other party to the individual contract since, in law, the statutory sickness insurance fund alone is responsible for paying the trader. In addition, although the trader must be sufficiently equipped to provide its services, it does not have to incur considerable advance expenditure before an individual contract with an insured person is concluded. Finally, the number of insured persons suffering from diabetic foot syndrome, who are likely to seek out the trader in question, is known in advance, with the result that a reasonable forecast can be made as to the number of customers.
- 75 Consequently, the trader in the present case does not bear the principal burden of the risk connected with the carrying on of the activities in question, which is the factor which distinguishes the situation of a concessionaire in the context of a service concession.
- 76 The answer to be given to the third question referred is therefore that, if the provision of services is regarded as being more important than the supply of products in the contract in

question, an agreement such as the one at issue in the main proceedings, concluded between a statutory sickness insurance fund and a trader, in which payment for the various types of service to be provided by the trader and the duration of the agreement are determined, with the trader undertaking an obligation to implement the agreement in regard to insured persons who ask him to do so and the abovementioned fund alone paying that trader for its services, must be regarded as a framework agreement within the meaning of Article 1(5) of Directive 2004/18.

Costs

- 77 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

- 1. The first alternative of letter (c) of the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that there is financing, for the most part, by the State when the activities of statutory sickness insurance funds are chiefly financed by contributions payable by members, which are imposed, calculated and collected according to rules of public law such as those in the main proceedings. Such sickness insurance funds are to be regarded as bodies governed by public law and therefore as contracting authorities for the purposes of the application the rules in that directive.**
- 2. When a mixed public contract concerns both products and services, the criterion to be applied in order to determine whether the contract in question is a supply contract or a service contract is the respective value of the products and services covered by the contract. Where the products supplied are individually manufactured and tailored to the needs of each customer and where each customer must receive individual advice on the use of the products, the manufacture of those products must be classified in the 'supply' part of the said contract for the purposes of calculating the value of each part thereof.**
- 3. If the provision of services is regarded as being more important than the supply of products in the contract in question, an agreement such as the one at issue in the main proceedings, concluded between a statutory sickness insurance fund and a trader, in which payment for the various types of service to be provided by the trader and the duration of the agreement are determined, with the trader undertaking an obligation to implement the agreement in regard to insured persons who ask him to do so and the abovementioned fund alone paying that trader for its services, must be regarded as a framework agreement within the meaning of Article 1(5) of Directive 2004/18.**

JUDGMENT OF THE COURT (Fourth Chamber)

10 April 2008 (*)

(Public contracts – Directives 2004/17/EC and 2004/18/EC – Contracting entity pursuing activities falling in part within the field of application of Directive 2004/17/EC and in part within that of Directive 2004/18/EC – Body governed by public law – Contracting authority)

In Case C-393/06,

REFERENCE for a preliminary ruling under Article 234 EC, from the Vergabekontrollsenat des Landes Wien (Austria), made by decision of 17 August 2006, received at the Court on 22 September 2006, in the proceedings

Ing. Aigner, Wasser-Wärme-Umwelt GmbH

v

Fernwärme Wien GmbH,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arestis, E. Juhász (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 11 October 2007,

after considering the observations submitted on behalf of:

- Ing. Aigner, Wasser-Wärme-Umwelt GmbH, by S. Sieghartsleitner and M. Pichlmair, Rechtsanwälte,
- Fernwärme Wien GmbH, by P. Madl, Rechtsanwalt,
- the Hungarian Government, by J. Fazekas, acting as Agent,
- the Austrian Government, by M. Fruhmann and C. Mayr, acting as Agents,
- the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,
- the Swedish Government, by A. Falk, acting as Agent,

- the Commission of the European Communities, by X. Lewis, acting as Agent, assisted by M. Núñez-Müller, Rechtsanwalt,

after hearing the Opinion of the Advocate General at the sitting on 22 November 2007,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).
- 2 The reference was made in the course of proceedings between Ing. Aigner, Wasser-Wärme-Umwelt GmbH ('Ing. Aigner') and Fernwärme Wien GmbH ('Fernwärme Wien') concerning the regularity of a public procurement procedure instituted by the latter.

Legal context

Community legislation

- 3 Directive 2004/17 coordinates the procurement procedures in specific sectors, that is to say, those of water, energy, transport and postal services. It follows and repealed 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), which concerned the same subject-matter.
- 4 The particular characteristics of the sectors covered by Directive 2004/17 are highlighted in the third recital in the preamble thereto, which states that it is necessary to coordinate procurement procedures in these sectors because of the closed nature of the markets in which the contracting entities concerned operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned.
- 5 The second section of Article 2(1)(a) of Directive 2004/17 and the second section of Article 1(9) of Directive 2004/18 provide that 'contracting authorities', inter alia, are 'bodies governed by public law', that is to say

'... any body:

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

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 In accordance with Article 2(1)(b) of Directive 2004/17:

‘For the purposes of this Directive,

...

(b) a “public undertaking” is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.’

7 Article 2(2) of that directive provides:

‘This Directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;

(b) which, when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 3 to 7, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.’

8 Articles 3 to 7 of Directive 2004/17 list the sectors to which the Directive applies. These are gas, heat and electricity (Article 3), water (Article 4), transport services (Article 5), postal services (Article 6) and exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as ports and airports (Article 7).

9 Article 3(1) of that directive provides:

‘As far as gas and heat are concerned, this Directive shall apply to the following activities:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat; or

(b) the supply of gas or heat to such networks.’

10 Article 9 of that directive states as follows:

‘1. A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.

However, the choice between awarding a single contract and awarding a number of separate contracts may not be made with the objective of excluding it from the scope of this Directive or, where applicable, Directive 2004/18/EC.

2. If one of the activities for which the contract is intended is subject to this Directive and the other to the abovementioned Directive 2004/18/EC and if it is objectively impossible to

determine for which activity the contract is principally intended, the contract shall be awarded in accordance with the abovementioned Directive 2004/18/EC.

...'

- 11 Article 20(1) of that directive, under the heading 'Contracts awarded for purposes other than the pursuit of an activity covered or for the pursuit of such an activity in a third country', provides:

'This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 3 to 7 or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Community.'

- 12 Finally, Article 30 of Directive 2004/17, under the heading 'Procedure for establishing whether a given activity is directly exposed to competition', provides:

'1. Contracts intended to enable an activity mentioned in Articles 3 to 7 to be carried out shall not be subject to this Directive if, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted.

2. For the purposes of paragraph 1, the question of whether an activity is directly exposed to competition shall be decided on the basis of criteria that are in conformity with the Treaty provisions on competition, such as the characteristics of the goods or services concerned, the existence of alternative goods or services, the prices and the actual or potential presence of more than one supplier of the goods or services in question.

...'

- 13 Title II, Chapter II, Section 3 of Directive 2004/18 lists the contracts which are outside the scope of that directive. These include contracts in the water, energy, transport and postal services sectors. Article 12, dealing with those contracts, provides:

'This Directive shall not apply to public contracts which, under Directive 2004/17/EC, are awarded by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of that Directive and are awarded for the pursuit of those activities, ...

...'

- 14 The abovementioned Community legislation was transposed into Austrian law by the Federal law on the award of public procurement contracts (Bundesvergabegesetz) 2006.

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

- 15 Fernwärme Wien was established by constituent instrument of 22 January 1969 for the purpose of supplying district heating to homes, public institutions, offices, undertakings etc. in the City of Vienna. For that purpose it uses energy produced by the disposal of waste rather than energy from non-renewable sources.

- 16 Fernwärme Wien, which has legal personality, is wholly owned by the City of Vienna, which appoints and removes managers and the members of the company's supervisory board and

gives them a discharge from responsibility. In addition, through the Kontrollamt der Stadt Wien (Monitoring Office of the City of Vienna), the city is also authorised to monitor the economic and financial management of the company.

- 17 In parallel to its district heating activities, Fernwärme Wien is engaged in the general planning of refrigeration plants for large real estate projects. In carrying out that activity it competes with other undertakings.
- 18 On 1 March 2006, Fernwärme Wien instituted a public procurement tendering procedure for the installation of refrigeration plants in a future commercial office complex in Vienna, stating that the Austrian legislation relating to public procurement did not apply to the contract in question. Ing. Aigner participated in this procedure by submitting a tender. Having been informed, on 18 May 2006, that its offer would no longer be considered because of negative references, it challenged that decision before the referring court, submitting that the Community rules on public procurement should be applied.
- 19 The national court notes that the activities of Fernwärme Wien with regard to the operation of a fixed district heating network fall indisputably within the scope of Directive 2004/17. However, its activities with regard to the refrigeration plants do not fall within the field of application of that directive. It therefore asks whether the latter activities are also covered by the provisions of that directive by application, *mutatis mutandis*, of the principles laid down in Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraphs 25 and 26, an approach commonly referred to in legal literature as the ‘contagion theory’. In accordance with the interpretation given by the referring court of that judgment, where one activity carried out by a body falls within the scope of the public procurement directives, all the other activities carried out by that body, irrespective of their possible industrial or commercial character, are also covered by those directives.
- 20 If the judgment in *Mannesmann Anlagenbau Austria and Others* refers only to contracting authorities and, more specifically, the concept of ‘bodies governed by public law’, in the sense that, where a body meets needs in the general interest, not having an industrial or commercial character, it must be considered a ‘body governed by public law’ within the meaning of the Community rules, irrespective of whether it carries out, in parallel, other activities of a different nature, the referring court asks whether Fernwärme Wien constitutes a body governed by public law, that is to say a contracting authority, within the meaning of Directives 2004/17 and 2004/18.
- 21 Finally, the referring court asks whether, when a body carries out activities not having an industrial or commercial character and, in parallel, activities in competitive conditions, whether it is possible to distinguish the latter activities and not to include them in the scope of the Community rules on public procurement, it is possible to establish a separation between those two types of activities and, accordingly, the absence of economic interference between them. In that regard, the referring court refers to point 68 of the Opinion of Advocate General Jacobs of 21 April 2005 in the case which gave rise, following the withdrawal of the reference for a preliminary ruling, to the order for removal from the register of 23 March 2006 (Case C-174/03 *Impresa Portuale di Cagliari*, not published in the ECR), where it is proposed that the principle arising from the judgment in *Mannesmann Anlagenbau Austria and Others* be tempered in that manner.

- 22 Having regard to the foregoing, the Vergabekontrollsenat des Landes Wien (Public Procurement Review Chamber of the Province of Vienna) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘1. Must Directive 2004/17 ... be interpreted as meaning that a contracting entity which pursues one of the sectoral activities referred to in Article 3 of that directive also falls within the scope of that directive in relation to an activity pursued in parallel under competitive conditions?
 2. In the event that this is the case only in respect of contracting authorities: must an undertaking such as [Fernwärme Wien] be characterised as a body governed by public law within the meaning of Directive 2004/17 or Directive 2004/18 ... if it provides district heating in a given area without any real competition, or must the market for domestic heating, which also includes energy sources such as gas, oil, coal etc., be taken into account?
 3. Must an activity pursued under competitive conditions by a company which also pursues activities of a non industrial or non commercial nature be included within the scope of Directive 2004/17 or Directive 2004/18 if, through effective precautions such as separate balance sheets and accounts, cross financing of the activities pursued under competitive conditions can be excluded?’

The questions referred for a preliminary ruling

The first question

- 23 By this question, the referring court asks whether a contracting entity within the meaning of Directive 2004/17, which carries on activities in one of the sectors listed in Articles 3 to 7 of that directive, is required to apply the procedure laid down in that directive for the award of contracts to the activities carried out by that entity in parallel, under competitive conditions, in sectors not governed by those provisions.
- 24 In order to answer that question, it must be noted that Directives 2004/17 and 2004/18 have noteworthy differences with regard both to the entities subject to the rules laid down in those respective directives and to their nature and scope.
- 25 With regard, firstly, to the entities to which the rules of those directives apply, it should be noted that, unlike Directive 2004/18 which, by virtue of the first subparagraph of Article 1(9) thereof, applies to ‘contracting authorities’, Directive 2004/17 refers, in Article 2 thereof, to ‘contracting entities’. It is apparent from Article 2(2)(a) and (b) that Directive 2004/17 applies not only to contracting entities which are ‘contracting authorities’, but also to those which are ‘public undertakings’ or undertakings which operate on the basis of ‘special or exclusive rights granted by a competent authority of a Member State’, in so far as all those entities pursue one of the activities listed in Articles 3 to 7 thereof.
- 26 Secondly, it follows from Articles 2 to 7 of Directive 2004/17 that the coordination for which it provides does not extend to all spheres of economic activity, but relates to specifically defined sectors, which, moreover, is confirmed by the fact that that directive is commonly referred to as the ‘sectoral directive’. However, the scope of Directive 2004/18 includes almost all sectors of economic life, thus justifying its being commonly known as the ‘general directive’.

- 27 In such circumstances, it must be stated at this early stage that the general scope of Directive 2004/18 and the restricted scope of Directive 2004/17 require the provisions of the latter to be interpreted narrowly.
- 28 The boundaries between the fields of application of those two directives are also drawn by explicit provisions. Thus, Article 20(1) of Directive 2004/17 provides that the latter does not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 3 to 7 thereof. The equivalent of that provision in Directive 2004/18 is the first paragraph of Article 12, which provides that that directive does not apply to public contracts which are awarded by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of Directive 2004/17.
- 29 Thus, the field of application of Directive 2004/17 is strictly circumscribed, which does not permit the procedures laid down therein to be extended beyond that field of application.
- 30 Consequently, the abovementioned provisions leave no room for application, in the context of Directive 2004/17, of the approach known as ‘contagion theory’ which was developed following the judgment in *Mannesmann Anlagenbau Austria and Others*. That judgment was given by the Court in the context of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), that is to say in an area which at present falls within the ambit of Directive 2004/18.
- 31 Accordingly, as rightly observed by, inter alia, the Hungarian, Austrian and Finnish Governments and by the Commission of the European Communities, only those contracts awarded by an entity which is a ‘contracting entity’ within the meaning of Directive 2004/17, in connection with and for the exercise of activities in the sectors listed in Articles 3 to 7 of that directive, fall within the field of application thereof.
- 32 Moreover, that is the conclusion which emerges also from Joined Cases C-462/03 and C-463/03 *Strabag and Kostmann* [2005] ECR I-5397, paragraph 37). In that judgment, the Court held that, if a contract does not concern the exercise of one of the activities governed by the sectoral directive, it will be governed by the rules laid down in the directives concerning the award of public supply, works or service contracts, as applicable.
- 33 Having regard to the foregoing, the answer to the first question must be that a contracting entity, within the meaning of Directive 2004/17, is required to apply the procedure laid down in that directive only for the award of contracts which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of that directive.

The second question

- 34 By its second question, the referring court asks whether an entity such as Fernwärme Wien is to be regarded as a body governed by public law within the meaning of Directive 2004/17 or of Directive 2004/18.
- 35 In that regard, it should be borne in mind that, as is apparent from paragraph 5 of this judgment, the provisions of the second subparagraph of Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18 contain identical definitions of the concept of ‘body governed by public law’.

- 36 It is clear from those provisions that a ‘body governed by public law’ is any body which, firstly, was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, secondly, has legal personality and, thirdly, is 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. In accordance with the case-law of the Court, those three conditions are cumulative (Case C-237/99 *Commission v France* [2001] ECR I-939, paragraph 40, and the case-law cited).
- 37 Furthermore, since the aim of the directives in relation to awarding public contracts is to avoid, *inter alia*, the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones, the concept of a ‘body governed by public law’ must be interpreted in functional terms (Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-0000, paragraphs 36 and 37, and the case-law cited).
- 38 In the present case, it is common ground that the latter two criteria established by the rules set out in paragraph 36 of the present judgment are fulfilled, given that Fernwärme Wien has legal personality and that the City of Vienna wholly owns the share capital of that entity and monitors its economic and financial management. It remains to be considered whether the entity was established specifically to meet needs in the general interest, not having an industrial or commercial character.
- 39 With regard, firstly, to the purpose of the establishment of the entity in question and the nature of the needs met, it is appropriate to note that, as is apparent from the documents before the Court, Fernwärme Wien was established specifically for the purpose of supplying district heating to homes, public institutions, offices, undertakings etc. in the City of Vienna by means of the use of energy produced by the destruction of waste. At the hearing before the Court, it was stated that, at present, that heating system serves approximately 250 000 homes, numerous offices and industrial plants and, in practice, all public buildings. To provide heating for an urban area by means of an environmentally-friendly process constitutes an aim which is undeniably in the general interest. It cannot, therefore, be disputed that Fernwärme Wien was established specifically to meet needs in the general interest.
- 40 In that regard, it is immaterial that such needs are also met or can be met by private undertakings. It is important that they should be needs which, for reasons in the general interest, the State or a regional authority generally chooses to meet itself or over which it wishes to retain a decisive influence (see, to that effect, Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraphs 44, 47, 51 and 53, and Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605, paragraphs 37, 38 and 41).
- 41 Secondly, in order to ascertain whether the needs met by the entity in question in the main proceedings have a character other than industrial or commercial, account must be taken of all the relevant law and facts such as the circumstances prevailing at the time when the body concerned was established and the conditions under which it exercises its activity. In that regard, it is important to check, *inter alia*, whether the body in question carries on its activities in a situation of competition (Case C-18/01 *Korhonen* [2003] ECR I-5321, paragraphs 48 and 49).

- 42 As stated in paragraph 39 of the present judgment, Fernwärme Wien was established specifically for the purpose of supplying district heating in the City of Vienna. It is common ground that the pursuit of profit did not underlie its establishment. While it is not impossible that those activities may generate profits distributed in the form of dividends to shareholders of the entity, the making of such profits can never constitute its principal aim (see, to that effect, *Korhonen*, paragraph 54).
- 43 With regard, subsequently, to the relevant economic environment or, in other words, the relevant market which must be considered in order to ascertain whether the entity in question is exercising its activities in competitive conditions, account must be taken, as the Advocate General proposes in points 53 and 54 of his Opinion, having regard to the functional interpretation of the concept of a 'body governed by public law', of the sector for which Fernwärme Wien was created, that is to say the supply of district heating by means of the use of energy produced by the burning of waste.
- 44 It is clear from the order for reference that Fernwärme Wien enjoys a virtual monopoly in that sector, since the two other undertakings operating in that sector are of negligible size and accordingly cannot constitute true competitors. Furthermore, there is a considerable degree of autonomy in this sector, since it would be very difficult to replace the district heating system by another form of energy, since this would require large-scale conversion work. Finally, the City of Vienna attaches a particular importance to this heating system, not least for reasons of environmental considerations. Thus, having regard to the pressure of public opinion, it would not permit it to be withdrawn, even if that system were to operate at a loss.
- 45 Having regard to the various indications provided by the referring court and as the Advocate General observes in point 57 of his Opinion, Fernwärme Wien is currently the only undertaking capable of meeting such needs in the general interest in the sector under consideration, so that it might choose to be guided by considerations other than economic ones in the award of its contracts.
- 46 In the judgments in *BFI Holding* (paragraph 49) and *Agorà and Excelsior* (paragraph 38), the Court held that the existence of significant competition may be an indication in support of the conclusion that there is no need in the general interest, not having an industrial or commercial character. In the circumstances of the case in the main proceedings, it is clear from the reference for the preliminary ruling that the criterion requiring the existence of significant competition is far from fulfilled.
- 47 It must be borne in mind that it is immaterial whether, in addition to its duty to meet needs in the general interest, an entity is free to carry out other profit-making activities, provided that it continues to attend to the needs which it is specifically required to meet. The proportion of profit-making activities actually pursued by that entity as part of its activities as a whole is also irrelevant for its classification as a body governed by public law (see, to that effect, *Mannesmann Anlagenbau Austria and Others*, paragraph 25; *Korhonen*, paragraphs 57 and 58; and Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 56).
- 48 In the light of the foregoing considerations, the answer to the second question must be that an entity such as Fernwärme Wien is to be regarded as a body governed by public law within the meaning of the second subparagraph of Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18.

The third question

- 49 By its third question, the referring court asks whether all contracts awarded by an entity which is a body governed by public law, within the meaning of Directive 2004/17 or Directive 2004/18, are to be subject to the rules of one or the other of those directives if, through effective precautions, a clear separation is possible between the activities carried out by that body to accomplish its task of meeting needs in the general interest and the activities which it carries out in competitive conditions, so that cross financing between the two types of activities can be excluded.
- 50 It should be borne in mind in that regard that the problem underlying that question was examined by the Court for the first time in the case which gave rise to the judgment in *Mannesmann Anlagenbau Austria and Others* relating to the interpretation of Directive 93/37 on public works contracts, and that the Court came to the conclusion, in paragraph 35 of that judgment, that all contracts, of whatever nature, entered into by a contracting authority were to be subject to the rules of that directive.
- 51 The Court reiterated that position, with regard to public service contracts, in the judgments in *BFI Holding* (paragraphs 55 and 56) and *Korhonen* (paragraphs 57 and 58) and, with regard to public supply contracts, in the judgment in *Adolf Truley* (paragraph 56). That position also applies to Directive 2004/18, which represents a recasting of the provisions of all the preceding directives on the award of public contracts which it follows (see, to that effect, *Bayerischer Rundfunk*, paragraph 30).
- 52 That conclusion is inescapable also in respect of entities which use an accounting system intended to make a clear internal separation between the activities carried out by them to accomplish their task of meeting needs in the general interest and activities which they carry out in competitive conditions.
- 53 As the Advocate General points out in points 64 and 65 of his Opinion, there must be serious doubts that, in reality, it is possible to establish such a separation between the different activities of one entity consisting of a single legal person which has a single system of assets and property and whose administrative and management decisions are taken in unitary fashion, even ignoring the many other practical obstacles with regard to reviewing before and after the event the total separation between the different spheres of activity of the entity concerned and the classification of the activity in question as belonging to a particular sphere.
- 54 Thus, having regard to the reasons of legal certainty, transparency and predictability which govern the implementation of procedures for all public procurement, the case-law of the Court set out in paragraphs 50 and 51 of the present judgment must be followed.
- 55 Nevertheless, as is apparent from paragraph 49 of the present judgment, the question posed by the referring court at the same time relates to Directives 2004/17 and 2004/18.
- 56 In that regard, it should be noted that, in the context of the examination of the second question referred for a preliminary ruling, it was held that an entity such as Fernwärme Wien is to be regarded as a body governed by public law within the meaning of Directive 2004/17 or of Directive 2004/18. Furthermore, in examining the first question referred for a preliminary ruling, the Court concluded that a contracting entity, within the meaning of Directive 2004/17, is required to apply the procedure laid down in that directive only for the award of contracts which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 thereof.

- 57 It is appropriate to state that, in accordance with the case-law of the Court, contracts awarded in the sphere of one of the activities expressly listed in Articles 3 to 7 of Directive 2004/17 and contracts which, although different in nature and thus capable normally, as such, of falling within the scope of Directive 2004/18, are used in the exercise of activities defined in Directive 2004/17 fall within the scope of the latter directive (see, to that effect, *Strabag and Kostmann*, paragraphs 41 and 42).
- 58 Consequently, the contracts awarded by an entity such as Fernwärme Wien are covered by the procedures laid down in Directive 2004/17 since they are connected with an activity which it carries out in the sectors listed in Articles 3 to 7 thereof. However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in Directive 2004/18.
- 59 The answer to the third question must therefore be that all contracts awarded by an entity which is a body governed by public law, within the meaning of Directive 2004/17 or Directive 2004/18, which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of Directive 2004/17 must be subject to the procedures laid down in that directive. However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in Directive 2004/18. Each of these two directives applies without distinction between the activities carried out by that entity to accomplish its task of meeting needs in the general interest and activities which it carries out under competitive conditions, and even where there is an accounting system intended to make a clear internal separation between those activities in order to avoid cross-financing between those sectors.

Costs

- 60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

- 1. A contracting entity, within the meaning of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors is required to apply the procedure laid down in that directive only for the award of contracts which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of that directive.**
- 2. An entity such as Fernwärme Wien GmbH is to be regarded as a body governed by public law within the meaning of the second subparagraph of Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.**
- 3. All contracts awarded by an entity which is a body governed by public law, within the meaning of Directive 2004/17 or Directive 2004/18, which relate to activities carried**

out by that entity in one or more of the sectors listed in Articles 3 to 7 of Directive 2004/17 must be subject to the procedures laid down in that directive. However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in Directive 2004/18. Each of these two directives applies without distinction between the activities carried out by that entity to accomplish its task of meeting needs in the general interest and activities which it carries out under competitive conditions, and even where there is an accounting system intended to make a clear internal separation between those activities in order to avoid cross financing between those sectors.

JUDGMENT OF THE COURT (Second Chamber)

19 April 2007 (*)

(Reference for a preliminary ruling – Admissibility – Article 86(1) EC – No independent effect – Factors permitting material which enables the Court to give a useful answer to the questions referred – Directives 92/50/EEC, 93/36/EEC and 93/37/EEC – National legislation enabling a public undertaking to perform operations on the direct instructions of the public authorities without being subject to the general rules for the award of public procurement contracts – Internal management structure – Conditions – The public authority must exercise over a distinct entity a control similar to that which it exercises over its own departments – The distinct entity must carry out the essential part of its activities with the public authority or authorities which control it)

In Case C-295/05,

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

Asociación Nacional de Empresas Forestales (Asemfo)

v

Transformación Agraria SA (Tragsa),

Administración del Estado,

THE COURT (Second Chamber),

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

Advocate General: L.A. Geelhoed,

Registrar: H. von Holstein, Deputy Registrar,

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

after considering the observations submitted on behalf of:

- the Asociación Nacional de Empresas Forestales (Asemfo), by D.P. Thomas de Carranza y Méndez de Vigo, procuradora, and R. Vázquez del Rey Villanueva, abogado,
- Transformación Agraria SA (Tragsa), by S. Ortiz Vaamonde and I. Pereña Pinedo, abogados,
- the Spanish Government, by F. Díez Moreno, acting as Agent,

- the Lithuanian Government, by D. Kriauciūnas, acting as Agent,
- the Commission of the European Communities, by X. Lewis and F. Castillo de la Torre, acting as Agents,

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

gives the following

Judgment

- 1 The reference for a preliminary ruling concerns the question whether, having regard to Article 86(1) EC, a Member State may confer on a public undertaking a legal regime enabling it to carry out operations without being subject to Council Directives 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), and whether those directives preclude such a regime.
- 2 That reference was made in the course of proceedings between the Asociación Nacional de Empresas Forestales (National Association of Forestry Undertakings, ‘Asemfo’) and the Administración del Estado (State Administration) over a complaint about the legal regime of Transformación Agraria SA (‘Tragsa’).

Legal background

Relevant provisions of Community law

- 3 Article 1 of Directive 92/50 stated:

‘For the purposes of this Directive:

 - (a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority ...
 - ...
 - (b) contracting authorities shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

...’
- 4 Article 1 of Directive 93/36 provided:

‘For the purposes of this Directive:

 - (a) “public supply contracts” are contracts for pecuniary interest concluded in writing involving the purchase, lease rental or hire purchase, with or without option to buy, of

products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations;

- (b) “contracting authorities” shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

...’

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

‘For the purpose of this Directive:

- (a) “public works contracts” are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;
- (b) “contracting authorities” shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

...’

The relevant provisions of national law

Legislation on public procurement

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

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

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

...’

7 Article 194 of Law 13/1995 provides:

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

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

...'

The body of rules governing Tragsa

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

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

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

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

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

3. Tragsa's objects are:

(a) The carrying out of all types of actions, works and supplies of services in respect of agriculture, stock-rearing, forestry, rural development, conservation and protection of nature and the environment, of aquaculture and fisheries, as well as the actions necessary for the improvement of the use and of the management of natural resources, in particular, the carrying out of works of conservation and enrichment of the historic Spanish patrimony in the countryside ... ;

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

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

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

- (e) the manufacture and marketing of moveable goods of the same character;
- (f) the prevention of and campaign against plant and animal disasters and diseases and against forest fires and the performance of works and tasks of emergency technical support;
- (g) the financing of the construction or exploitation of agricultural and environmental infrastructures and of equipment for rural populations as well as the formation of companies and participation in companies already formed with purposes corresponding to the social objects of the undertaking;
- (h) the execution, at the request of third parties, of actions, works, technical assistance, advice and supplies of rural, agricultural, forestry and environmental services within and outside the national territory, directly or through its subsidiaries.

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

...

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

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

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

- 11 Decreto Real 371/1999 of 5 March 1999 laying down the rules governing Tragsa (BOE No 64 of 16 March 1999, p. 10605, 'Royal Decree 371/1999') specifies the legal, financial and administrative rules governing that company and subsidiaries in their relations with the public authorities in respect of administrative action in or outside national territory, in their capacity as an instrument and technical service of those administrations.
- 12 Under Article 2 of Royal Decree 371/1999, Tragsa's entire share capital is to be held by persons governed by public law.
- 13 Article 3 of Royal Decree 371/1999, entitled 'Legal status', provides:

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

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

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

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

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

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

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

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

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

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

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

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

...

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

...'

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

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

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

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

...'

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

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

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

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

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

- 20 Asemfo appealed to the Audiencia Nacional (National High Court) which, in its turn, by a judgment of 26 September 2001, upheld the judgment at first instance.
- 21 Asemfo appealed on a point of law against that judgment to the Tribunal Supremo (Supreme Court) arguing that Tragsa, as a public undertaking, could not be treated as a service of the Administration, which would enable it to derogate from the rules of public procurement, and that the company's legal status, as defined in Article 88 of Ley 66/1997, could not be compatible with Community law.
- 22 Having held that Tragsa is an 'instrument' of the Administration and that it confines itself to carrying out the instructions of the public authorities, without being able to refuse them or fix the price of its activities, the Tribunal Supremo has harboured doubts as regards the compatibility of Tragsa's legal status with Community law in the light of the Court's case-law on the application to public undertakings of the provisions of Community law relating to public procurement and free competition.
- 23 In addition, while recalling that, in Case C-349/97 *Spain v Commission* [2003] ECR I-3851, the Court held, in respect of Tragsa, that it must be regarded as a means by which the Administration acts directly, the referring court states that, in the case which is now before it, there are factual circumstances which were not considered in that judgment, such as the strong public participation on the agricultural works market, which causes it significant disruption, even if Tragsa's activities are, in law, unconnected to the market, inasmuch as from a legal point of view it is the Administration which acts.
- 24 Those were the circumstances in which the Tribunal Supremo decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) Does Article 86(1) EC permit a Member State of the European Union to grant *ex lege* to a public undertaking a legal status which allows it to execute public works without being subject to the general rules on the award of public contracts by tender, where there are no special circumstances of urgency or public interest, both below and above the financial threshold laid down by the European Directives in this regard?
- (2) Is such a legal regime compatible with the provisions of Council Directives 93/36/EEC and 93/37/EEC and European Parliament and Council Directive 97/52/EC of 13 October 1997 [(OJ 1997 L 328, p. 1)] and Commission Directive 2001/78 [EC of 13 September 2001 (OJ 2001 L 285, p. 1)] amending the three previous directives – legislation recently recast by European Parliament and Council Directive 2004/18/EC of 31 March 2004 [on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)]?
- (3) Are the statements contained in the judgment ... in *Spain v Commission* applicable in any event to Tragsa and its subsidiaries, in the light of the rest of the case-law of the Court regarding public procurement and in view of the fact that the Administration entrusts to Tragsa a large number of works which are not subject to the rules governing free competition, and that this situation might cause considerable distortion of the relevant market?'

The questions referred for a preliminary ruling

Admissibility

- 25 Tragsa, the Spanish Government and the Commission of the European Communities challenge the Court's jurisdiction to give a preliminary ruling on the reference and, relying on several arguments, cast doubt on the admissibility of the questions referred by the national court.
- 26 First of all, those questions relate only to the evaluation of national measures and, therefore, they do not come within the jurisdiction of the Court,
- 27 Next, those questions are hypothetical inasmuch as they seek an answer to problems which are not relevant or germane to the outcome of the main proceedings. If the only relevant plea in law invoked by Asemfo were a breach of the rules concerning public procurement, such a breach cannot, by itself, found an allegation that Tragsa abuses a dominant position on the market. In addition, it does not seem that the Court could be persuaded to interpret the directives relating to public procurement for the purposes of national proceedings intended to establish whether that company has abused an allegedly dominant position.
- 28 Finally, the order of reference contains no information relating to the relevant market or to Tragsa's allegedly dominant position upon it. Nor does it contain any detailed argument on the applicability of Article 86 EC and offers no comment on its application in conjunction with Article 82 EC.
- 29 It is appropriate in the first place to recall that, according to settled case-law, even though it is true that it is not for the Court to rule on the compatibility of national rules with the provisions of Community law in proceedings brought under Article 234 EC since the interpretation of such rules is a matter for the national courts, the Court does have jurisdiction to supply the latter with all the guidance as to the interpretation of Community law necessary to enable them to rule on the compatibility of such rules with the provisions of Community law (Case C-506/04 *Wilson* [2006] ECR I-0000, paragraphs 34 and 35, and the case-law there cited).
- 30 Secondly, under equally settled case-law, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where questions submitted by national courts concern the interpretation of a provision of Community law, the Court of Justice is bound, in principle, to give a ruling (see, in particular, Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, paragraph 27, and Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-0000, paragraphs 16 and 17, and the case-law there cited).
- 31 Thirdly, it is settled case-law that a reference from a national court may be refused only if it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-0000, paragraph 17, and the case-law there cited).
- 32 Furthermore, the Court has also held that the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (Case

C-205/05 *Nemec* [2006] ECR I-0000, paragraph 25, and *Confederación Española de Empresarios de Estaciones de Servicio*, paragraph 26, and the case-law there cited).

- 33 In that regard, according to the case-law of the Court, it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and on the link it establishes between those provisions and the national legislation applicable to the dispute (*Nemec*, paragraph 26, and Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-0000, paragraph 38).
- 34 In the case in the main proceedings, while it is admittedly true that the Court cannot itself rule on the compatibility of Tragsa's legal status with Community law, there is nothing to prevent it from providing the canons of construction of Community law which will enable the referring court itself to rule on the compatibility of Tragsa's legal status with Community law.
- 35 In those circumstances, it is necessary to examine whether, in the light of the case-law referred to in paragraphs 31 to 33 of the present judgment, the Court has before it the factual and legal material necessary to give a useful answer to the questions submitted to it.
- 36 As regards the second and third questions, it is important to point out that the order of reference sets out, briefly but precisely, the facts which gave rise to the main proceedings and the relevant provisions of the applicable national law.
- 37 Indeed, it is clear from that decision that those proceedings arose following a complaint lodged by Asemfo concerning Tragsa's legal status, since the latter can, according to Asemfo, carry out a large number of operations at the direct demand of the Administration, without compliance with the rules in respect of publicity set out in the directives relating to public procurement. In those proceedings, Asemfo maintains also that Tragsa, being a public undertaking, cannot be entitled, under the pretext of being a technical service of the Administration, to privileged treatment as regards the rules governing public procurement.
- 38 In addition, in connection with the second and third questions, the order of reference sets out, referring to the Court's case-law, first, the reasons for which the national court requests the interpretation of the directives relating to public procurement and, second, the link between the relevant Community legislation and the national legislation applicable to the matter.
- 39 As regards the first question, which concerns the point whether the body of rules governing Tragsa is contrary to Article 86(1) EC, it is appropriate to point out that, according to that article, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States are not to enact or maintain in force any measure contrary to the rules contained in the EC Treaty, in particular to those rules provided for in Articles 12 EC and 81 EC to 89 EC inclusive.
- 40 It follows from the clear terms of Article 86(1) EC that it has no independent effect in the sense that it must be read in conjunction with the relevant rules of the Treaty.
- 41 It follows from the order of reference that the relevant provision referred to by the national court is Article 86(1) EC in conjunction with Article 82 EC.
- 42 In that regard, there is no precise information in the order for reference concerning the existence of a dominant position, its unlawful exploitation by Tragsa or the effect of such a position on trade between the Member States.

- 43 In addition, it seems that, by the first question, the national court refers, in essence, to operations capable of being regarded as public contracts, a premise on which the Court is, in any event, requested to rule in the second question.
- 44 It follows therefore from the foregoing that, in contrast to the second and third questions, the Court does not have before it the factual and legal material necessary to give a useful answer to the first question.
- 45 It follows that, whilst the first question must be declared to be inadmissible, the reference for a preliminary ruling is admissible as regards the two other questions.

Substance

The second question

- 46 By its second question, the referring court asks the Court whether a body of rules such as that governing Tragsa, which enables it to execute operations without being subject to the regime laid down by those directives, is contrary to Directives 93/36 and 93/37.
- 47 At the outset, it must be stated that, notwithstanding the references made by the national court to Directives 97/52, 2001/78 and 2004/18, in view both of the context and of the date of the facts of the dispute in main proceedings and the nature of Tragsa's activities, as described in Article 88(3) of Ley 66/1997, it is appropriate to examine that second question having regard to the rules set forth in the directives relating to public procurement, namely, Directives 92/50, 93/36 and 93/37, which are relevant in this case.
- 48 In that regard, it must be observed that, according to the definitions given in Article 1(a) of each of the Directives mentioned in the preceding paragraph, a public service, supply or works contract assumes the existence of a contract for pecuniary interest in writing between, first, a service provider, a supplier or a contractor and, second, a contracting authority within the meaning of Article 1(b) of those directives.
- 49 In this case it is appropriate to hold, first of all, that, under Article 88(1) and (2) of Ley 66/1997 Tragsa is a State company the share capital of which may also be held by the Autonomous Communities. Article 88(4) and the first subparagraph of Article 3(1) of Royal Decree 371/1999 state that Tragsa is an instrument and a technical service of the General State Administration and of the administration of each of the Autonomous Communities concerned.
- 50 Next, as is clear from Articles 3(2) to (5), and 4(1), (2) and (7) of Royal Decree 371/1999, Tragsa is required to carry out the orders given it by the General State Administration, the Autonomous Communities and the public bodies subject to them, in the areas covered by its company objects, and it is not entitled to fix freely the tariff for its actions.
- 51 Finally, under Article 3(6) of Royal Decree 371/1999, Tragsa's relations with those public bodies, inasmuch as that company is an instrument and a technical service of those bodies, are not contractual, but in every respect internal, dependent and subordinate.
- 52 Asemfo submits that the legal relationship which flows from the orders which Tragsa receives, even though it is formally unilateral, reveals in fact, as is clear from the Court's case-law, an indisputable contractual link with the limited partner. Asemfo refers, in that regard, to Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409. In those circumstances even if

Tragsa seems to act on the instructions of the public authorities, it is, in fact, a party contracting with the Administration, so that the rules for public procurement ought to be applied.

- 53 In that regard, it is appropriate to observe that, in paragraph 205 of the judgment in *Spain v Commission*, the Court held, in a different context from that of the main proceedings, that being an instrument and technical service of the Spanish Administration, Tragsa is required to implement, itself or using its subsidiaries, only work entrusted to it by General Administration of the State, the Autonomous Communities or the public bodies subject to them.
- 54 It must be observed that, if, which it is for the referring court to establish, Tragsa has no choice, either as to the acceptance of a demand made by the competent authorities in question, or as to the tariff for its services, the requirement for the application of the directives concerned relating to the existence of a contract is not met.
- 55 In any event, it is important to recall that, according to the Court's settled case-law, a call for tenders, under the directives relating to public procurement, is not compulsory, even if the contracting party is an entity legally distinct from the contracting authority, where two conditions are met. First, the public authority which is a contracting authority must exercise over the distinct entity in question a control which is similar to that which it exercises over its own departments and, second, that entity must carry out the essential part of its activities with the local authority or authorities which control it (see Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50; Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1 paragraph 49; Case C-84/03 *Commission v Spain* [2005] ECR I-139, paragraph 38; Case C-29/04 *Commission v Austria* [2005] ECR I-9705, paragraph 34; and Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 33).
- 56 Accordingly, it is appropriate to examine whether the two conditions required by the case-law cited in the preceding paragraph are met in Tragsa's case.
- 57 As regards the first condition, relating to the public authority's control, it follows from the Court's case-law that the fact that the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer tends to indicate, generally, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments (*Carbotermo and Consorzio Alisei*, paragraph 37).
- 58 In the case in the main proceedings, it is clear from the case file, but subject to confirmation by the referring court, that 99% of Tragsa's share capital is held by the Spanish State itself and through a holding company and a guarantee fund, and that four Autonomous Communities, each with one share, hold 1% of such capital.
- 59 In that regard, the argument cannot be accepted that that condition is met only for contracts performed at the demand of the Spanish State, excluding those which are the subject of a demand from the Autonomous Communities as regards which Tragsa must be regarded as a third party.
- 60 It appears to follow from Article 88(4) of Ley 66/1997 and Articles 3(2) to (6) and 4(1) and (7) of Royal Decree 371/1999 that Tragsa is required to carry out the orders given it by the public authorities, including the Autonomous Communities. It also seems to follow from that national legislation that, as with the Spanish State, in the context of its activities with those

Communities, as an instrument and technical service, Tragsa is not free to fix the tariff for its actions and that its relationships with them are not contractual.

- 61 It seems therefore that Tragsa cannot be regarded as a third party in relation to the Autonomous Communities which hold a part of its capital.
- 62 As regards the second condition, relating to the fact that the essential part of Tragsa's activities must be carried out with the authority or authorities which own it, it follows from the case-law that, where several authorities control an undertaking, that condition may be met if that undertaking carries out the essential part of its activities, not necessarily with any one of those authorities, but with all of those authorities together (*Carbotermo and Consorzio Alisei*, paragraph 70).
- 63 In the case in the main proceedings, as is clear from the case-file, Tragsa carries out more than 55% of its activities with the Autonomous Communities and nearly 35% with the State. It thus appears that the essential part of its activities is carried out with the public authorities and bodies which control it.
- 64 In those circumstances, but subject to confirmation by the referring court, it must be held that the two conditions required by the case-law cited in paragraph 55 of the present judgment are met in this case.
- 65 It follows from the entirety of the foregoing considerations that the reply to the second question must be that a body of rules such as that governing Tragsa which enables it, as a public undertaking acting as an instrument and technical service of several public authorities, to execute operations without being subject to the regime laid down by those directives, is not contrary to Directives 92/50, 93/36 and 93/37, since first, the public authorities concerned exercise over that undertaking a control similar to that which they exercise over their own departments, and, second, such an undertaking carries out the essential part of its activities with those same authorities.

The third question

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

Costs

- 67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Council Directives 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts and 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts do not preclude a body of rules such as that governing Tragsa, which enable it, as a public undertaking acting as an

instrument and technical service of several public authorities, to execute operations without being subject to the regime laid down by those directives, since, first, the public authorities concerned exercise over that undertaking a control similar to that which they exercise over their own departments, and, second, such an undertaking carries out the essential part of its activities with those same authorities.

JUDGMENT OF THE COURT (Third Chamber)

13 November 2008 (*)

(Public procurement – Tendering procedures – Public service concessions – Concession for the operation of a municipal cable television network – Awarded by a municipality to an inter-municipal cooperative society – Obligation of transparency – Conditions – Whether the control exercised by the concession-granting authority over the concessionaire is similar to that exercised over its own departments)

In Case C-324/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'État (Belgium), made by decision of 3 July 2007, received at the Court on 12 July 2007, in the proceedings

Coditel Brabant SA

v

Commune d'Uccle,

Région de Bruxelles-Capitale,

third party:

Société Intercommunale pour la Diffusion de la Télévision (Brutélé),

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J.N. Cunha Rodrigues (Rapporteur), J. Klučka and A. Arabadjiev, Judges,

Advocate General: V. Trstenjak,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 9 April 2008,

after considering the observations submitted on behalf of:

- Coditel Brabant SA, by F. Tulkens and V. Ost, avocats,
- the Commune d'Uccle, by P. Coenraets, avocat,
- Société Intercommunale pour la Diffusion de la Télévision (Brutélé), by N. Fortemps and J. Bourtembourg, avocats,

- the Belgian Government, by J.C. Halleux, acting as Agent, assisted by B. Staelens, avocat,
- the German Government, by M. Lumma and J. Möller, acting as Agents,
- the Netherlands Government, by C. Wissels and Y. de Vries, acting as Agents,
- the Commission of the European Communities, by B. Stromsky and D. Kukovec, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 June 2008,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 43 EC and 49 EC and of the principles of equal treatment and non-discrimination on grounds of nationality, as well as of the concomitant obligation of transparency.
- 2 The reference was made in the course of proceedings brought by Coditel Brabant SA ('Coditel') against the Commune d'Uccle (Municipality of Uccle; 'the Municipality of Uccle'), the Région de Bruxelles-Capitale and the Société Intercommunale pour la Diffusion de la Télévision (Brutélé) ('Brutélé'), concerning the award by the Municipality of Uccle to an inter-municipal cooperative society of a concession for the management of the municipal cable television network.

Legal context

National law

- 3 Article 1 of the Law of 22 December 1986 on inter-municipal cooperatives (loi relative aux intercommunales) (*Moniteur belge* of 26 June 1987, p. 9909; 'the Law on inter-municipal cooperatives') provides:

'Two or more municipalities may, in accordance with the provisions of this Law, form associations with specific objects in the municipal interest. Those associations shall hereinafter be referred to as inter-municipal cooperatives.'

- 4 Article 3 of the Law provides:

'Inter-municipal cooperatives shall be legal persons governed by public law and shall not have a commercial character, irrespective of their form or object.'

- 5 Article 10 of the Law states:

'Each inter-municipal cooperative shall comprise a general assembly, a governing council and a board of auditors.'

- 6 Under Article 11 of the Law:

‘Irrespective of the proportion of the contributions made by the various parties to the authorised capital, the municipalities shall always hold both the majority of votes and the chairmanship of the various inter-municipal management and control bodies.’

7 Article 12 of the Law on inter-communal municipal cooperatives provides:

‘The representatives of the associated municipalities at the general assembly shall be appointed by the municipal council of each municipality from among the municipal councillors, the mayor and the aldermen.

For each municipality, the voting rights at the general assembly shall correspond to the number of shares held.’

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

8 From 1969 to 1999, the Municipality of Uccle authorised Coditel to install and operate a cable television network in its territory. On 28 October 1999, the municipality decided to purchase the network with effect from 1 January 2000.

9 To that end, the Municipality of Uccle launched a call for tenders – also by decision of 28 October 1999 – with a view to granting the right to operate the network to a concessionaire. Four companies, including Coditel, submitted tenders.

10 On 25 May 2000, the Municipality of Uccle decided against awarding a concession for the operation of its cable television network, opting instead to sell it.

11 A notice of a call for purchase tenders was published in the *Bulletin des adjudications* on 15 September 2000. Five companies, including Coditel, submitted purchase bids. In addition, Brutélé, an inter-municipal cooperative society, submitted to the Municipality of Uccle an offer of affiliation as an associated member instead of a purchase bid.

12 Since it considered that four of the five bids were inadmissible and that the only admissible bid – Coditel’s – was too low, the Municipality of Uccle decided, on 23 November 2000, not to sell the municipal cable television network.

13 Also by decision of 23 November 2000, the Municipality of Uccle decided to become a member of Brutélé, entrusting the latter with the management of its cable television network.

14 The reasons for that decision include, in particular, the following considerations:

‘Whereas Brutélé proposes to the Municipality of Uccle that, upon taking up membership, it should constitute an independent operational sub-section with autonomous power of decision;

Whereas that autonomy relates in particular to:

- the choice of programmes transmitted;
- the subscription and connection charges;
- the investment and works policy;

- the rebates or benefits to be granted to certain categories of person;
- the nature of and terms relating to other services to be provided via the network, and the possibility of entrusting the inter-communal cooperative with projects of interest to the municipality that accord with the objects defined in its statutes, such as the creation of a municipal intranet, a website and the training of staff for that purpose.

Whereas within that framework:

- Brutélé would draw up an income statement and balance sheet for activities on Uccle’s network;
- [the Municipality of] Uccle would have a director on the governing council of Brutélé and three directors on the board of the Brussels operating sector, one appointee on the board of auditors and one as a municipal expert.

Whereas Brutélé undertakes to cover the entire Uccle network and to increase the capacity of the network so that it can offer, within one year at most, if the municipality so wishes, all the following services:

- expansion of the TV range: additional programmes and “the bouquet”;
- pay-per-view programmes;
- internet access;
- voice telephony;
- video surveillance;
- high-speed data transmission;

Whereas the proposed annual fee consists of the following:

- (a) fixed fee equal to 10% of the income from basic subscriptions for cable television (on the basis of 31 000 subscribers and an annual subscription fee of BEF 3 400 (before VAT and royalties): BEF 10 540 000 per year);
- (b) payment of 5% of the turnover of Canal+ and of the bouquet;
- (c) payment of the entire profit on all the services provided.’

15 It is clear from the order for reference that the Municipality of Uccle had to subscribe for 76 shares in Brutélé, in the amount of BEF 200 000 per share. Moreover, the municipality requested, and obtained, from Brutélé the option of withdrawing unilaterally from that inter-municipal cooperative at any time.

16 It is also apparent from the order for reference that Brutélé is an inter-municipal cooperative society whose members are municipalities and an inter-municipal association whose members in turn are solely municipalities. Brutélé is not open to private members. Its governing council consists of representatives of the municipalities (a maximum of three per municipality), who

are appointed by the general assembly, which is itself composed of representatives of the municipalities. The governing council enjoys the widest powers.

- 17 The order for reference further makes clear that the municipalities are divided into two sections, one of which groups together the municipalities in the Brussels region, which may be divided into sub-sectors. Within each sector, there is a sector board consisting of directors appointed by the general assembly, sitting in separate groups representing the holders of shares for each of the sectors, from among candidates proposed by the municipalities. The governing council may delegate to the sector boards its powers with regard to matters affecting the sub-sectors, such as the conditions for the application of charges, the programme of works and investment, the financing thereof, advertising campaigns and problems common to the various sub-sectors within the operational sector. The constitutional bodies under Brutélé's statutes ('the statutory bodies') additionally comprise the general assembly, whose decisions are binding on all members; the Director General; the board of experts, who are municipal officials and equal in number to the directors whom they are tasked with assisting; and the board of auditors. The Director General, the experts and the auditors are appointed by the governing council or the general assembly, as the case may be.
- 18 Furthermore, according to the order for reference, Brutélé carries out the essential part of its activities with its members.
- 19 By application lodged on 22 January 2001, Coditel brought an appeal before the Conseil d'État (Council of State) (Belgium), inter alia, for annulment of the decision of 23 November 2000 whereby the Municipality of Uccle became a member of Brutélé. In that appeal, Coditel took issue with the municipality for joining Brutélé and entrusting it with the management of its cable television network, without comparing the advantages of that arrangement with the advantages of granting another operator a concession for running the network. Coditel claimed that, by proceeding in that manner, the Municipality of Uccle had infringed, inter alia, the principle of non-discrimination and the obligation of transparency enshrined in Community law.
- 20 Brutélé contested that claim, maintaining that it is 'purely' an inter-municipal cooperative whose activities are intended and reserved for the member municipalities and that its statutes allow the Municipality of Uccle, as an operational sub-sector, to exercise immediate and precise control over Brutélé's activities in that sub-sector, identical to the control that that municipality would exercise over its own internal departments.
- 21 The Conseil d'État takes the view that the affiliation of the Municipality of Uccle to Brutélé does not constitute a public service contract but a public service concession for the purposes of Community law. Although the Community public procurement directives do not apply to public service concessions, the principle of non-discrimination on grounds of nationality implies an obligation of transparency in the award of concessions, in accordance with the case-law of the Court of Justice deriving from the judgment in *Case C-324/98 Telaustria and Telefonadress* [2000] ECR I-10745. In order to satisfy the requirements of Community law, the Municipality of Uccle ought, in principle, to have issued a call for competition in order to examine whether the award of the concession for its cable television service to economic operators other than Brutélé constituted a more attractive course of action than that chosen. The Conseil d'État asks whether those requirements of Community law are to be set aside in the light of the judgment in *Case C-107/98 Teckal* [1999] ECR I-8121, according to which those requirements do not apply where the concession-granting public authority exercises control

over the concessionaire and where the concessionaire carries out the essential part of its activities with that authority.

22 In those circumstances, the Conseil d'État decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- '1. May a municipality, without calling for competition, join a cooperative society grouping together exclusively other municipalities and associations of municipalities (a so-called "pure" inter-municipal cooperative) in order to transfer to that cooperative society the management of its cable television network, in the knowledge that the cooperative society carries out the essential part of its activities for and with its own members and that decisions regarding those activities are taken by the governing council and the sector boards within the limits of the delegated powers granted to them by the governing council, those statutory bodies being composed of representatives of the public authorities and the decisions of those bodies being taken in accordance with the vote expressed by the majority of those representatives?
2. Can the control thus exercised over the decisions of the cooperative society, via the statutory bodies, by all the members of the cooperative society – or, in the case of operational sectors or sub-sectors, by some of those members – be regarded as enabling them to exercise over the cooperative society control similar to that exercised over their own departments?
3. For that control to be regarded as similar, must it be exercised individually by each member, or is it sufficient that it be exercised by the majority of the members?'

The questions referred

Questions 1 and 2

- 23 In the light of the connection between them, Questions 1 and 2 should be examined together.
- 24 It is apparent from the referral decision that, by becoming a member of Brutélé, the Municipality of Uccle entrusted it with the management of its cable television network. It is also apparent that Brutélé's remuneration comes not from the municipality but from payments made by the users of that network. That method of remuneration is characteristic of a public service concession (Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 40).
- 25 Public service concession contracts do not fall within the scope of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), which was applicable at the material time. Notwithstanding the fact that such contracts fall outside the scope of that directive, the authorities concluding them are bound to comply with the fundamental rules of the EC Treaty, the principles of equal treatment and non-discrimination on grounds of nationality, and the concomitant obligation of transparency (see, to that effect, *Telaustria and Telefonadress*, paragraphs 60 to 62, and Case C-231/03 *Coname*[2005] ECR I-7287, paragraphs 16 to 19). Without necessarily implying an obligation to launch an invitation to tender, that obligation of transparency requires the concession-granting authority to ensure, for the benefit of any potential concessionaire, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of the procurement procedures to be reviewed (see, to that effect, *Telaustria and Telefonadress*, paragraph 62, and *Coname*, paragraph 21).

- 26 The application of the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as of the general principles of which they are the specific expression, is precluded if the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority or authorities (see, to that effect, *Teckal*, paragraph 50, and *Parking Brixen*, paragraph 62).
- 27 As regards the second of those conditions, the national court stated in the order for reference that Brutélé carries out the essential part of its activities with its members. Accordingly, the scope of the first condition – that the control exercised over the concessionaire by the concession-granting public authority or authorities must be similar to that which the authority exercises over its own departments – remains to be examined.
- 28 In order to determine whether a concession-granting public authority exercises a control similar to that which it exercises over its own departments, it is necessary to take account of all the legislative provisions and relevant circumstances. It must follow from that examination that the concessionaire in question is subject to a control which enables the concession-granting public authority to influence that entity's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions of that entity (see, to that effect, *Parking Brixen*, paragraph 65, and Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 36).
- 29 Of the relevant facts which can be identified from the order for reference, it is appropriate to consider, first, the holding of capital by the concessionaire, secondly, the composition of its decision-making bodies, and thirdly, the extent of the powers conferred on its governing council.
- 30 As regards the first of those facts, it should be borne in mind that, where a private undertaking holds a share of the capital of a concessionaire, this precludes the possibility for a concession-granting public authority to exercise over that concessionaire a control similar to that which it exercises over its own departments (see, to that effect, Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 49).
- 31 On the other hand, the fact that the concession-granting public authority holds, alone or together with other public authorities, all of the share capital in a concessionaire, tends to indicate – generally, but not conclusively – that that contracting authority exercises over that company a control similar to that which it exercises over its own departments (*Carbotermo and Consorzio Alisei*, paragraph 37, and Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 57).
- 32 It is clear from the order for reference that, in the case before the referring court, the concessionaire is an inter-municipal cooperative society whose members are municipalities and an inter-municipal association whose members in turn are solely municipalities, and is not open to private members.
- 33 Secondly, it is clear from the file that Brutélé's governing council consists of representatives of the affiliated municipalities, appointed by the general assembly, which is itself composed of representatives of the affiliated municipalities. In accordance with Article 12 of the Law on inter-municipal cooperatives, the representatives at the general assembly are appointed by the municipal council of each municipality from among the municipal councillors, the mayor and the aldermen.

- 34 The fact that Brutélé's decision-making bodies are composed of representatives of the public authorities which are affiliated to Brutélé shows that those bodies are under the control of the public authorities, which are thus able to exert decisive influence over both Brutélé's strategic objectives and significant decisions.
- 35 Thirdly, it is evident from the file that Brutélé's governing council enjoys the widest powers. In particular, it fixes the charges. It also has the power – but is under no obligation – to delegate to the sector or sub-sector boards the resolution of certain matters particular to those sectors or sub-sectors.
- 36 The question arises as to whether Brutélé has thus become market-oriented and gained a degree of independence which would render tenuous the control exercised by the public authorities affiliated to it.
- 37 In this regard, it should be pointed out that Brutélé does not take the form of a *société par actions*, or a *société anonyme*, either of which is capable of pursuing objectives independently of its shareholders, but of an inter-municipal cooperative society governed by the Law on inter-municipal cooperatives. Moreover, in accordance with Article 3 of that Law, inter-municipal cooperatives are not to have a commercial character.
- 38 It seems to be apparent from that Law, which is supplemented by Brutélé's statutes, that Brutélé's object under its statutes is the pursuit of the municipal interest – that being the *raison d'être* for its creation – and that it does not pursue any interest which is distinct from that of the public authorities affiliated to it.
- 39 Subject to verification of the facts by the referring court, it follows that, despite the extent of the powers conferred on its governing council, Brutélé does not enjoy a degree of independence sufficient to preclude the municipalities which are affiliated to it from exercising over it control similar to that exercised over their own departments.
- 40 Those considerations are all the more applicable where decisions relating to the activities of the inter-municipal cooperative society are taken by the sector or sub-sector boards, within the limits of the delegated powers granted to them by the governing council. Where one or more affiliated municipalities are recognised as constituting a sector or sub-sector of that society's activities, the control which those municipalities may exercise over the matters delegated to the sector or sub-sector boards is even stricter than that which they exercise in conjunction with all the members within the plenary bodies of that society.
- 41 It follows from the foregoing that, subject to verification of the facts by the referring court as regards the degree of independence enjoyed by the inter-municipal cooperative society in question, in circumstances such as those of the case before the referring court, the control exercised, via the statutory bodies, by the public authorities belonging to such an inter-municipal cooperative society over that society's decisions may be regarded as enabling those authorities to exercise over that cooperative society control similar to that exercised over their own departments.
- 42 Accordingly, the answer to Questions 1 and 2 must be that:
- Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality, and the concomitant obligation of transparency, do not preclude a public authority from awarding, without calling for competition, a public service

concession to an inter-municipal cooperative society of which all the members are public authorities, where those public authorities exercise over that cooperative society control similar to that exercised over their own departments and where that society carries out the essential part of its activities with those public authorities;

- Subject to verification of the facts by the referring court as regards the degree of independence enjoyed by the inter-municipal cooperative society in question, in circumstances such as those of the case before the referring court, where decisions regarding the activities of an inter-municipal cooperative society owned exclusively by public authorities are taken by bodies, created under the statutes of that society, which are composed of representatives of the affiliated public authorities, the control exercised over those decisions by the public authorities may be regarded as enabling those authorities to exercise over the cooperative society control similar to that exercised over their own departments.

Question 3

- 43 By Question 3, the national court is essentially asking whether, where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is necessary, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for that control to be exercised individually by each of those public authorities or whether it can be exercised jointly by them, decisions being taken by a majority, as the case may be.
- 44 First, it should be pointed out that, according to the case-law of the Court, where several public authorities control a concessionaire, the condition relating to the essential part of that entity's activities may be met if account is taken of the activities which that entity carries out with all those authorities (see, to that effect, *Carbotermo and Consorzio Alisei*, paragraphs 70 and 71, and *Asemfo*, paragraph 62).
- 45 It would be consistent with the reasoning underlying that case-law to consider that the condition as to the control exercised by the public authorities may also be satisfied if account is taken of the control exercised jointly over the concessionaire by the controlling public authorities.
- 46 According to the case-law, the control exercised over the concessionaire by a concession-granting public authority must be similar to that which the authority exercises over its own departments, but not identical in every respect (see, to that effect, *Parking Brixen*, paragraph 62). The control exercised over the concessionaire must be effective, but it is not essential that it be exercised individually.
- 47 Secondly, where a number of public authorities elect to carry out their public service tasks by having recourse to a municipal concessionaire, it is usually not possible for one of those authorities, unless it has a majority interest in that entity, to exercise decisive control over the decisions of the latter. To require the control exercised by a public authority in such a case to be individual would have the effect of requiring a call for competition in the majority of cases where a public authority seeks to join a grouping composed of other public authorities, such as an inter-municipal cooperative society.

- 48 Such a result, however, would not be consistent with Community rules on public procurement and concession contracts. Indeed, a public authority has the possibility of performing the public interest tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments (*Stadt Halle and RPL Lochau*, paragraph 48).
- 49 That possibility for public authorities to use their own resources to perform the public interest tasks conferred on them may be exercised in cooperation with other public authorities (see, to that effect, *Asemfo*, paragraph 65).
- 50 It must therefore be recognised that, where a number of public authorities own a concessionaire to which they entrust the performance of one of their public service tasks, the control which those public authorities exercise over that entity may be exercised jointly.
- 51 As regards collective decision-making bodies, the procedure which is used for adopting decisions – such as, inter alia, adoption by majority – is of no importance.
- 52 That conclusion is not undermined by *Coname*. Admittedly, the Court considered in that judgment that a 0.97% interest is so small as to preclude a municipality from exercising control over the concessionaire managing a public service (see *Coname*, paragraph 24). However, in that passage of the judgment, the Court was not concerned with the question whether such control could be exercised jointly.
- 53 Furthermore, in a later judgment – namely, *Asemfo*, paragraphs 56 to 61 – the Court recognised that in certain circumstances the condition relating to the control exercised by the public authority could be satisfied where such an authority held only 0.25% of the capital in a public undertaking.
- 54 Consequently, the answer to Question 3 must be that, where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is possible, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for it to be exercised jointly by those authorities, decisions being taken by a majority, as the case may be.

Costs

- 55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

- 1. Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality and the concomitant obligation of transparency do not preclude a public authority from awarding, without calling for competition, a public service concession to an inter-municipal cooperative society of which all the members are public authorities, where those public authorities exercise over that cooperative**

society control similar to that exercised over their own departments and where that society carries out the essential part of its activities with those public authorities.

2. Subject to verification of the facts by the referring court as regards the degree of independence enjoyed by the inter-municipal cooperative society in question, in circumstances such as those of the case before the referring court, where decisions regarding the activities of an inter-municipal cooperative society owned exclusively by public authorities are taken by bodies, created under the statutes of that society, which are composed of representatives of the affiliated public authorities, the control exercised over those decisions by the public authorities may be regarded as enabling those authorities to exercise over the cooperative society control similar to that exercised over their own departments.
3. Where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is possible, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for it to be exercised jointly by those authorities, decisions being taken by a majority, as the case may be.

JUDGMENT OF THE COURT (Third Chamber)

15 October 2009 (*)

(Articles 43 EC, 49 EC and 86 EC – Award of public contracts – Award of water service to a semi-private company – Competitive procedure – Appointment of the private partner responsible for operating the service – Award made without regard to the rules governing the award of public contracts)

In Case C-196/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale della Sicilia (Italy), made by decision of 13 March 2008, received at the Court on 14 May 2008, in the proceedings

Acoset SpA

v

Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa,

Provincia Regionale di Ragusa,

Comune di Acate (RG),

Comune di Chiaramonte Gulfi (RG),

Comune di Comiso (RG),

Comune di Giarratana (RG),

Comune di Ispica (RG),

Comune di Modica (RG),

Comune di Monterosso Almo (RG),

Comune di Pozzallo (RG),

Comune di Ragusa,

Comune di Santa Croce Camerina (RG),

Comune di Scicli (RG),

Comune di Vittoria (RG),

intervening parties:

Saceccav Depurazioni Sacede SpA,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Second Chamber, acting as President of the Third Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 April 2009,

after considering the observations submitted on behalf of:

- Acoset SpA, by A. Scuderi and G. Bonaventura, avvocati,
- Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and others, by N. Gentile, avvocato,
- Comune di Vittoria (RG), by A. Bruno and C. Giurdanella, avvocati,
- the Italian Government, by R. Adam, acting as Agent, and G. Fiengo, avvocato dello Stato,
- the Austrian Government, by M. Fruhmann, acting as Agent,
- the Polish Government, by M. Dowgielewicz, acting as Agent,
- the Commission of the European Communities, by C. Zadra and D. Kukovec, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 June 2009,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 43 EC, 49 EC and 86 EC.
- 2 The reference was made in proceedings between Acoset SpA ('Acoset') and the Conferenza Sindaci e Presidenza Prov. Reg. Ragusa (Conference of Mayors and of the President of the Regional Province of Ragusa, 'the Conferenza') and others concerning the cancellation by the Conferenza of the tendering procedure for the selection of the private minority participant in the semi-public company which was directly awarded the integrated water service ('servizio idrico integrato') for the province of Ragusa.

Legal context

Community legislation

Directive 2004/18

- 3 Article 1 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) provides as follows:

‘ ...

2. (a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

...

- (d) “Public service contracts” are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

...

4. “Service concession” is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

...’

- 4 Article 3 of Directive 2004/18 is worded as follows:

‘Where a contracting authority grants special or exclusive rights to carry out a public service activity to an entity other than such a contracting authority, the act by which that right is granted shall provide that, in respect of the supply contracts which it awards to third parties as part of its activities, the entity concerned must comply with the principle of non-discrimination on the basis of nationality.’

- 5 Article 7 of the directive provides as follows:

‘This Directive shall apply to public contracts ... which have a value exclusive of value added tax (VAT) estimated to be equal to or greater than the following thresholds:

...

- (b) EUR 249 000:

- for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV [“central government authorities”],

...’

6 Commission Regulation (EC) No 2083/2005 of 19 December 2005 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2005 L 333, p. 28) amended Article 7(b) of Directive 2004/18 in the version resulting from Commission Regulation (EC) No 1874/2004 of 28 October 2004 (OJ 2004 L 326, p. 17) by replacing the amount of EUR 236 000 with that of EUR 211 000 for the period from 1 January 2006 to 1 January 2007.

7 In accordance with Article 2 of Commission Regulation (EC) No 1422/2007 of 4 December 2007 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2007 L 317, p. 34), that amount was EUR 206 000 with effect from 1 January 2008.

8 Article 17 of Directive 2004/18 provides as follows:

‘Without prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4).’

9 Article 21 of Directive 2004/18 is worded as follows:

‘Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).’

10 ‘Other services’ fall within category 27 of Annex II B to that directive, with the exception of employment contracts, contracts for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time.

Directive 2004/17

11 Article 1(2) and (3) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) provides as follows:

‘2. ...

(b) “Works contracts” are contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex XII or a work, or the realisation by whatever means of a work corresponding to the requirements specified by the contracting entity. A “work” means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function;

(c) “Supply contracts” are contracts other than those referred to in (b) having as their object the purchase, lease, rental or hire-purchase, with or without the option to buy, of products.

A contract having as its object the supply of products, which also covers, as an incidental matter, siting and installation operations shall be considered to be a “supply contract”;

(d) “Service contracts” are contracts other than works or supply contracts having as their object the provision of services referred to in Annex XVII.

A contract having as its object both products and services within the meaning of Annex XVII shall be considered to be a “service contract” if the value of the services in question exceeds that of the products covered by the contract.

A contract having as its object services within the meaning of Annex XVII and including activities within the meaning of Annex XII that are only incidental to the principal object of the contract shall be considered to be a service contract.

3. (a) A “works concession” is a contract of the same type as a works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in that right together with payment;
- (b) A “service concession” is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.’

12 Article 4 of Directive 2004/17 is worded as follows:

‘1. This Directive shall apply to the following activities:

- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water; or
- (b) the supply of drinking water to such networks.

...’

13 Article 9(1) of Directive 2004/17 provides as follows:

‘A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.

However, the choice between awarding a single contract and awarding a number of separate contracts may not be made with the objective of excluding it from the scope of this Directive or, where applicable, Directive 2004/18/EC.’

14 Article 18 of Directive 2004/17 is worded as follows:

‘This Directive shall not apply to works and service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7, where those concessions are awarded for carrying out those activities.’

National legislation

15 Article 113(5) of Legislative Decree No 267 laying down the consolidated text of the laws on the organisation of local authorities (testo unico delle leggi sull’ordinamento degli enti locali) of 18 August 2000 (Ordinary Supplement to GURI No 227 of 28 September 2000), as amended by Decree-Law No 269 laying down urgent measures to promote development and correct the state of public finances (disposizioni urgenti per favorire lo sviluppo e per la correzione dell’andamento dei conti pubblici) of 30 September 2003 (Ordinary Supplement to GURI No 229 of 2 October 2003) converted into a law, after amendment, by Law No 326 of 24

November 2003 (Ordinary Supplement to GURI No 274 of 25 November 2003) ('Legislative Decree No 267/2000'), provides as follows:

'The service contract [for the provision of local public services by a local authority] shall be awarded in accordance with the rules of the sector and in compliance with the legislation of the European Union, entitlement to provide the service being granted to:

(a) companies with share capital selected by means of public and open tendering procedures;

(b) companies with share capital with mixed public and private ownership in which the private partner has been selected by means of public and open tendering procedures that have ensured compliance with domestic and Community legislation on competition, in accordance with the guidelines issued by the competent authorities in specific measures or circulars;

(c) companies with share capital belonging entirely to the public sector, on condition that the public authority or authorities holding the share capital exercise over the company control comparable to that exercised over their own departments and that the company carries out the essential part of its activities with the controlling public authority or authorities.'

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

- 16 On 10 July 2002, the Provincia Regionale di Ragusa (Regional Province of Ragusa) and the municipal councils of south-east Sicily concluded a cooperation agreement establishing the 'Ambito Territoriale Ottimale' (Optimal Territorial Ambit) ('ATO') Idrico di Ragusa (ATO for water for Ragusa), the local body responsible for Ragusa's integrated water service.
- 17 On 26 March 2004, the Conferenza, the governing body of the ATO, selected as the form of management for the service in question a 'semi- public company with share capital which is predominantly publicly owned', as provided for in Article 113(5)(b) of Legislative Decree No 267/2000.
- 18 On 7 June 2005, the Conferenza approved the draft deeds of incorporation of the company to be formed and of its articles of association as well as the draft contract for the management of the service, Article 1 of which provided that the service was to be entrusted directly and exclusively to the semi-public company that was to be formed (which was to operate the integrated water service).
- 19 Subsequently, a contract notice was published, inter alia, in the *Official Journal of the European Communities* of 8 October 2005 (OJ 2005 S 195) for the selection of the undertaking which would be entrusted, as private minority shareholder, with the operation of the integrated water service and the execution of the works relating to the exclusive management of the service, namely the works referred to, inter alia, in the Three-year operating plan approved by the mayors at their meeting on 15 December 2003.
- 20 Article 1(8) of the tendering rules states that 'the works to be carried out are those provided for in the Three-year operating plan, as amended and/or extended by the bid, and in the subsequent information project provided for in the development plan ...' and 'for the award of the works which are not to be directly carried out by the private participant, recourse must be had to the public and open tendering procedures laid down by law'.

- 21 Three temporary groups of undertakings acting on behalf of their respective parent companies, namely Saceccav Depurazioni Sacede SpA, Acoset and Aqualia SpA, participated in the bidding. The contracting authority excluded Aqualia SpA and admitted the two others to the procedure. The person responsible for the procedure then invited the latter to indicate whether they were still interested. Only Acoset answered in the affirmative.
- 22 It is apparent from the order for reference that, instead of taking formal note of the award and going on to form the semi-public management company in order to launch the service in question and benefit from Community funding, the Conferenza – fearing that the procedure followed might be contrary to Community law and therefore illegal – decided at its meeting on 26 February 2007 to take the steps necessary to cancel the tendering procedure which had concluded with the selection of Acoset. The Technical Operations Secretariat of the ATO accordingly informed Acoset by memorandum of 28 February 2007 of the launch of the cancellation procedure and Acoset made its submissions in that regard by memorandum of 26 March 2007.
- 23 On 2 October 2007, the Conferenza approved the cancellation of the tendering procedure in question and adopted the consortium model as the management model for the integrated water service for Ragusa. By memorandum of 9 October 2007, Acoset was informed that the tendering procedure had been cancelled.
- 24 In its action in the main proceedings against the decision of 2 October 2007 and the other acts which had given rise to it, Acoset seeks recognition of its entitlement to compensation in the form of the award of the contract and to compensation commensurate with the damage suffered as a result of the contested acts. Acoset also seeks the interim suspension of those acts.
- 25 According to Acoset, the direct attribution, under Article 113(5)(b) of Legislative Decree No 267/2000, of the management of local public services to semi-public companies in which the private partner is selected by means of public and open tendering procedures which comply with Community competition rules is compatible with Community law.
- 26 On the other hand, the defendants in the main proceedings are of the view that Community law permits such a direct attribution, without any call for tenders for works and services, only to wholly publicly owned companies which carry out the essential part of their activities with the local authority or authorities which control them and over which those authorities exercise a form of control comparable with that exercised over their own departments. The participation, even a minority participation, of a private undertaking in the capital of a company in which the contracting authority in question also participates in any event precludes the possibility of the contracting authority exercising control over that company which is comparable to that which it exercises over its own departments (see, inter alia, Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1).
- 27 The Tribunale amministrativo regionale della Sicilia considers that the question raised by Acoset as to whether the direct award of the contract in question is compatible with Community law is relevant and that the answer to that question cannot be clearly deduced from the Court's case-law.
- 28 In those circumstances, the Tribunale amministrativo regionale della Sicilia decided to stay the application for suspension of operation in the main proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the model of a semi-public company formed specifically to provide a particular public service of industrial importance and possessing a single corporate purpose, to which that service is awarded directly, the private "industrial" and "operational" participant in the company being selected by means of a public and open procedure, after verification of the financial and technical requirements and of the operating and managerial requirements specific to the service to be performed and the specific services to be provided, consistent with Community law and in particular with the obligations of transparency and free competition referred to in Articles 43 EC, 49 EC and 86 EC?'

Admissibility

- 29 The Austrian Government maintains that the reference for a preliminary ruling should be declared inadmissible on the ground that the order for reference does not provide sufficient information on the legal and factual background to the main proceedings to enable the Court to provide an answer to the question referred that will be of use to the national court. In particular, no information is provided on the specific details of the service or services in question, the content of the invitation to tender, the award procedure or some of the concepts referred to in the question.
- 30 It should be recalled that the information that must be provided to the Court in the context of a reference for a preliminary ruling does not serve only to enable the Court to provide answers which will be of use to the national court; it must also enable the governments of the Member States, and other interested parties, to submit observations in accordance with Article 23 of the Statute of the Court of Justice. For those purposes, according to settled case-law, it is necessary, first, that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. Second, the referring court must set out the precise reasons why it was unsure as to the interpretation to be given to Community law and why it considered it necessary to refer questions to the Court for a preliminary ruling. In consequence, it is essential that the referring court provide at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute in the main proceedings (see, inter alia, Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 34).
- 31 The order for reference of the Tribunale amministrativo regionale della Sicilia satisfies those requirements.
- 32 The referring court refers to the applicable provisions of national legislation and the order for reference contains a description of the facts which, albeit succinct, is sufficient to enable the Court to give a ruling. Moreover, that court sets out the reasons which led it to consider that it was necessary to make a reference for a preliminary ruling to the Court, since the order for reference contains a detailed description of the opposing views held by the parties to the main proceedings concerning the interpretation to be given to the provisions of Community law which form the subject-matter of the question referred and makes it clear that it is the view of that court that the answer to that question cannot be clearly deduced from the Court's case-law.

- 33 In addition, the Conferenza objects that, since the procedure for the selection of the private participant in question in the main proceedings was annulled, Acoset has no legal interest in bringing proceedings in order to obtain an answer to the question referred.
- 34 It is sufficient to point out, in that connection, that Article 234 EC established direct cooperation between the Court of Justice and the courts and tribunals of the Member States by way of a procedure which is completely independent of any initiative of the parties, who are simply invited to be heard in the course of the procedure in relation to questions which the national court alone can initiate (see, to that effect, *inter alia*, Case 44/65 *Singer*[1965] ECR 965).
- 35 Accordingly, it is necessary to examine the question referred by the Tribunale amministrativo regionale della Sicilia.

The question referred for a preliminary ruling

- 36 By its question, the referring court asks, in essence, whether Articles 43 EC, 49 EC and 86 EC preclude the direct award of a public service which entails the prior execution of certain works, such as the service at issue in the main proceedings, to a semi-public company formed specifically for the purpose of providing that service and possessing a single corporate purpose, the private participant in the company being selected by means of a public and open procedure, after verification of the financial, technical, operational and management requirements specific to the service to be performed and of the characteristics of the tender with regard to the particular services to be provided.
- 37 It should be noted, first, that the direct award of a local public service for the integrated management of water, such as that at issue in the main proceedings, may fall, depending on the specific details of the consideration for that service, within the definition of ‘public service contracts’ or ‘service concession’ within the meaning of Article 1(2)(d) and Article 1(4) of Directive 2004/18 respectively or, as the case may be, Article 1(2)(d) and Article 1(3)(b) respectively of Directive 2004/17, Article 4(1)(a) of which provides that that directive is to apply to the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water or the supply of drinking water to such networks.
- 38 The question whether such an operation is to be classed as a ‘service concession’ or a ‘public service contract’ must be considered exclusively in the light of Community law (see, *inter alia*, Case C-382/05 *Commission v Italy*[2007] ECR I-6657, paragraph 31).
- 39 The difference between a service contract and a service concession lies in the consideration for the provision of services (see, *inter alia*, Case C-206/08 *WAZV Gotha* [2009] ECR I-0000, paragraph 51). A public service contract within the meaning of Directives 2004/18 and 2004/17 involves consideration which is paid directly by the contracting authority to the service provider (see, *inter alia*, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 39). A service concession is present where the agreed method of remuneration consists in the right to exploit the service and the provider takes the risk of operating the services in question (see, *inter alia*, the judgment of 13 November 2008 in Case C-437/07 *Commission v Italy*, paragraphs 29 and 31, and *WAZV Gotha*, paragraphs 59 and 68).

- 40 The Tribunale amministrativo regionale della Sicilia refers to a semi-public company to be formed as the 'concessionaire' (*affidataria in concessione*) for the management of the integrated water service. The documents before the Court show that the operation was intended to last 30 years.
- 41 Similarly, the Italian Government maintains that what is clearly in issue is the award of a public service by means of a 30-year concession, for which the principal consideration was the possibility of claiming from users the water tariff referred to in the tendering procedure as the consideration for the service provided.
- 42 The Court will therefore proceed on the assumption that what is at issue is a concession.
- 43 The Court has recognised the existence of a services concession, inter alia, in cases in which the service provider's remuneration came from payments made by users of a public car park, a public transport system and a cable television network (see *Parking Brixen*, paragraph 40; Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 16; and Case C-324/07 *Coditel Brabant* [2008] ECR I-0000, paragraph 24).
- 44 Article 17 of Directive 2004/18 provides that, without prejudice to the application of Article 3 thereof, the directive is not to apply to service concessions. Similarly, Article 18 of Directive 2004/17 provides that the directive is not to apply to service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7 of the directive, where those concessions are awarded for carrying out those activities.
- 45 Moreover, it is not disputed that the execution of the works connected with the exclusive management of the integrated water service at issue in the main proceedings is incidental to the main object of the concession in question, which is to provide that service, so that the latter cannot be characterised as a 'public works concession' (see to that effect, inter alia, Case C-331/92 *Gestión Hotelera Internacional* [1994] ECR I-1329, paragraphs 26 to 28, and Article 9(1) of Directive 2004/17).
- 46 Notwithstanding the fact that public service concession contracts are excluded from the scope of Directives 2004/18 and 2004/17, the public authorities concluding them are, none the less, bound to comply with the fundamental rules of the EC Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular (see, inter alia, *ANAV*, paragraph 18).
- 47 The provisions of the Treaty which are specifically applicable to public service concessions include, in particular, Article 43 EC and Article 49 EC (see, inter alia, *ANAV*, paragraph 19).
- 48 Besides the principle of non-discrimination on the ground of nationality, the principle of equal treatment as between tenderers is also to be applied to public service concessions, even in the absence of discrimination on grounds of nationality (see, inter alia, *ANAV*, paragraph 20).
- 49 The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with. That authority's obligation of transparency consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and a review of the impartiality of the procurement procedures (see, inter alia, *ANAV*, paragraph 21).

- 50 Furthermore, it follows from Article 86(1) EC that the Member States must not maintain in force national legislation which permits the award of public service concessions without their being put out to competition, since such an award infringes Article 43 EC or 49 EC or the principles of equal treatment, non-discrimination and transparency (see, inter alia, *ANAV*, paragraph 23).
- 51 However, the application of the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as the general principles of which they are the specific expression, is excluded if the control exercised over the concessionaire by the concession-granting public authority is comparable to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority (see, inter alia, *ANAV*, paragraph 24). In such a case, an invitation to tender is not mandatory, even if the other party to the contract is an entity that is legally distinct from the contracting authority (see, inter alia, Case C-573/07 *Sea* [2009] ECR I-0000, paragraph 36).
- 52 That case-law is relevant for the interpretation of Directives 2004/18 and 2004/17 as well as Articles 43 EC and 49 EC and also of the general principles of which the latter are the specific expression (see, inter alia, *Sea*, paragraph 37).
- 53 Where a private undertaking has a holding, even a minority holding, in the capital of a company in which the contracting authority in question also has a holding, it is impossible for that contracting authority to exercise over that company control comparable to that which it exercises over its own departments (see, inter alia, *Sea*, paragraph 46).
- 54 That is the case with the concession at issue in the main proceedings, since the private participant was required to subscribe 49% of the share capital in the semi-public company which was to award the concession in question.
- 55 In those circumstances, it is necessary to determine more specifically whether the award of the public service in question to the semi-public company without any specific invitation to competitive tendering is compatible with Community law in as much as the tendering procedure for the selection of the private participant responsible for the integrated management of the water service has been conducted in a manner compatible with Articles 43 EC and 49 EC and with the principles of equal treatment and non-discrimination on the ground of nationality, as well as the concomitant obligation of transparency.
- 56 It is apparent from case-law that the award of a public contract to a semi-public company without a call for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment, in that such a procedure would offer a private undertaking with a capital holding in that company an advantage over its competitors (*Stadt Halle and RPL Lochau*, paragraph 51, and Case C-29/04 *Commission v Austria* [2005] ECR I-9705, paragraph 48).
- 57 Furthermore, as stated at paragraph 2.1 of the Commission Interpretative Communication on the application of Community Law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPPs) (OJ 2008 C 91, p. 4), the fact that a private entity and a contracting entity cooperate within a semi-private entity cannot serve as justification for the contracting entity not having to comply with the legal provisions on concessions when assigning concessions to that private entity or to the respective semi-private entity.

- 58 However, as the Advocate General stated at point 85 of his Opinion, it is difficult to reconcile the use of a double competitive tendering procedure with the aim of reducing procedural formalities which underlies institutionalised public-private partnerships, such as that at issue in the main proceedings, whose establishment involves the use of the same procedure both to select the private economic participant and to award concessions to the public-private entity to be formed for that sole purpose.
- 59 While the absence of a competitive tendering procedure in connection with the award of services would appear to be irreconcilable with Articles 43 EC and 49 EC and with the principles of equal treatment and non-discrimination, that situation may be rectified by selecting the private participant in accordance with the requirements set out at paragraphs 46 to 49 above and choosing appropriate criteria for the selection of the private participant, since the tenderers must provide evidence not only of their capacity to become a shareholder but, primarily, of their technical capacity to provide the service and the economic and other advantages which their tender brings.
- 60 In so far as the criteria for the selection of the private participant are based not only on its capital contribution but also the participant's technical capacity and the characteristics of its tender with regard to the particular services to be provided and, as in the case in the main proceedings, the participant is entrusted with the operation of the service in question and thus with the management of the service, the selection of the concessionaire can be regarded as an indirect result of the selection of that participant which was made at the conclusion of a procedure conducted in accordance with the principles of Community law, so that a second competitive tendering procedure for the selection of the concessionaire is unnecessary.
- 61 The use in such a situation of a double procedure for, first, the selection of the private participant in the semi-private company and, second, the award of the concession to that company, would be liable to deter private entities and public authorities from forming institutionalised public-private partnerships, such as that in question in the main proceedings, on account of the length of time involved in implementing such procedures and the legal uncertainty attaching to the award of the concession to the previously selected private participant.
- 62 It should be noted that a company with share capital with mixed public and private ownership, such as that in question in the main proceedings, must retain the same corporate purpose throughout the duration of concession and it will be necessary, if there is any material amendment to the contract, to launch a new competitive tendering procedure (see, to that effect, Case C-454/06 *presstext Nachrichtenagentur* [2008] ECR I-4401, paragraph 34).
- 63 In the light of the foregoing considerations, the answer to the question referred is that Articles 43 EC, 49 EC and 86 EC do not preclude the direct award of a public service which entails the prior execution of certain works, such as that at issue in the main proceedings, to a semi-public company formed specifically for the purpose of providing that service and possessing a single corporate purpose, the private participant in the company being selected by means of a public and open procedure after verification of the financial, technical, operational and management requirements specific to the service to be performed and of the characteristics of the tender with regard to the service to be delivered, provided that the tendering procedure in question is consistent with the principles of free competition, transparency and equal treatment laid down by the Treaty with regard to concessions.

Costs

- 64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Articles 43 EC, 49 EC and 86 EC do not preclude the direct award of a public service which entails the prior execution of certain works, such as that at issue in the main proceedings, to a semi-public company formed specifically for the purpose of providing that service and possessing a single corporate purpose, the private participant in the company being selected by means of a public and open procedure after verification of the financial, technical, operational and management requirements specific to the service to be performed and of the characteristics of the tender with regard to the service to be delivered, provided that the tendering procedure in question is consistent with the principles of free competition, transparency and equal treatment laid down by the EC Treaty with regard to concessions.

C-159/11 Ordine degli Ingegneri della Provincia di Lecce and Others

JUDGMENT OF THE COURT (Grand Chamber)

19 December 2012 (*)

(Public contracts – Directive 2004/18/EC – Article 1(2)(a) and (d) – Services – Study and evaluation of the seismic vulnerability of hospital structures – Contract concluded between two public entities, one of which is a university – Public entity capable of being classified as an economic operator – Contract for pecuniary interest – Consideration not exceeding the costs incurred)

In Case C-159/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 9 November 2010, received at the Court on 1 April 2011, in the proceedings

Azienda Sanitaria Locale di Lecce,

Università del Salento

v

Ordine degli Ingegneri della Provincia di Lecce and Others,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, vice-President, A. Tizzano, M. Ilešič, L. Bay Larsen, J. Malenovský, Presidents of Chambers, U. Lõhmus, J.-C. Bonichot, A. Arabadjiev, C. Toader, J.-J. Kasel, M. Safjan and D. Šváby (Rapporteur), Judges,

Advocate General: V. Trstenjak,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 27 March 2012,

after considering the observations submitted on behalf of:

- the Azienda Sanitaria Locale di Lecce, by M. de Stasio and V. Pappalepore, avvocati,
- the Università del Salento, by E. Sticchi Damiani and S. Sticchi Damiani, avvocati,
- the Consiglio Nazionale degli Ingegneri, by P. Quinto, avvocato,
- the Associazione delle Organizzazioni di Ingegneri, di Architettura e di Consultazione Tecnico Economica (OICE) and others, by A. Clarizia and P. Clarizia, avvocati,

- the Consiglio Nazionale degli Architetti, Pianificatori, Paesaggisti e Conservatori (CNAPPC), by F. Sciaudone, M. Sanino, R. Sciaudone and A. Neri, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by C. Colelli, avvocato dello Stato,
- the Czech Government, by M. Smolek and J. Vlášil, acting as Agents,
- the Polish Government, by M. Szpunar and M. Laszuk, acting as Agents,
- the Swedish Government, by K. Petkovska, S. Johannesson and A. Falk, acting as Agents,
- the European Commission, by E. Kružíková and C. Zadra, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 May 2012,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 1(2)(a) and (d), Article 2 and Article 28 of, and of Categories 8 and 12 in Annex II A to, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, p. 114), as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007 (OJ 2007 L 317, p. 34; ‘Directive 2004/18’).
- 2 The reference has been made in proceedings between the Azienda Sanitaria Locale di Lecce (Local Health Authority of Lecce; ‘ASL’) and the Università del Salento (University of Salento; ‘the University’), on the one hand, and the Ordine degli Ingegneri della Provincia di Lecce (Order of Architects of the Province of Lecce) and others, on the other hand, concerning the consultancy contract concluded between the ASL and the University (‘the consultancy contract’) and relating to the study and the evaluation of the seismic vulnerability of hospital structures in the province of Lecce.

Legal context

European Union law

- 3 Pursuant to recital 2 in the preamble to Directive 2004/18:

‘The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other entities governed by public law is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such

contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition ...'

4 Article 1 of Directive 2004/18 provides:

'...

(2) (a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

...

(d) "Public service contracts" are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

...

(8) The terms "contractor", "supplier" and "service provider" mean any natural or legal person or public entity or group of such persons and/or entities which offers on the market, respectively, the execution of works and/or a work, products or services.

The term "economic operator" shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

...

(9) "Contracting authorities" means the State, regional or local authorities, entities governed by public law, associations formed by one or several of such authorities or one or several of such entities governed by public law.

...'

5 Under Article 2 of Directive 2004/18, '[c]ontracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way'.

6 Pursuant to Article 7(b) of Directive 2004/18, the directive applies inter alia to public service contracts awarded by contracting authorities other than the central governmental authorities listed in Annex IV to that directive, in so far as they are contracts which are not excluded in accordance with the exceptions referred to in that article and their value exclusive of value-added tax (VAT) is equal to or greater than EUR 206 000.

7 According to Article 9(1) and (2) of that directive, the calculation of the estimated value of a public contract is based on the total amount payable, net of VAT, as estimated by the contracting authority at the moment at which the contract notice is sent or, as the case may be, at the moment at which the contract awarding procedure commences.

8 Article 20 of Directive 2004/18 provides that contracts which have as their object services listed in Annex II A thereto are to be awarded in accordance with Articles 23 to 55 of the directive, and Article 28 of the directive states that '[i]n awarding their public contracts, contracting authorities are to apply the national procedures adjusted for the purposes of th[at] Directive'.

9 Annex II A to Directive 2004/18 contains inter alia the following categories of services:

- Category 8, concerning research and development services, except research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting authority;
- Category 12, concerning architectural services, engineering services and integrated engineering services, urban planning and landscape engineering services, related scientific and technical consulting services and technical testing and analysis services.

National law

10 Under Article 15(1) of Law No 241 of 7 August 1990 introducing new rules governing administrative procedure and relating to the right of access to administrative documents (nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi, GURI No 192 of 18 August 1990, p. 7), ‘public administrative authorities may at any time enter into agreements among themselves with a view to laying down rules governing cooperation in activities of common interest’.

11 Article 66 of the Decree of the President of the Republic No 382 of 11 July 1980 on the reorganisation of University education, concerning training and organisational and teaching methodology reforms (riordinamento della docenza universitaria, relativa fascia di formazione nonché sperimentazione organizzativa e didattica, standard supplement to GURI No 209 of 31 July 1980), provides:

‘Provided that the performance of their academic function of dissemination of knowledge is not thereby impaired, universities may carry out research and consultancy activities under contracts and agreements with public and private entities. The carrying out of those contracts and agreements shall, as a rule, be entrusted to [university] departments or, where such departments are not in place, to institutes or university clinics, or to individual full-time teachers.

The proceeds from the performance of the contracts and agreements referred to in the preceding paragraph shall be allocated in accordance with rules approved by the university’s governing council on the basis of rules ... laid down by the Ministry of Education.

The teaching and non-teaching staff cooperating in the provision of those services may be rewarded up to an annual sum not exceeding 30% of total remuneration. In each case, the sum so paid to staff may not exceed 50% of the overall proceeds from those services.

The rules referred to in the second paragraph shall determine the amount to be allocated for general expenditure incurred by the university and the criteria for the allocation to the staff of the sum referred to in the third paragraph. The remainder of the revenue shall be allocated to the purchase of teaching and research materials and to operating costs of departments, institutes or clinics which have carried out such contracts or agreements.

The expenditure incurred by the university in carrying out those services shall in any case be deducted beforehand from the proceeds of each service as allocated in accordance with the rules set out in the second paragraph.

The proceeds derived from the activities referred to in the preceding paragraph shall constitute revenue in the budget of the university.'

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

- 12 By decision of 7 October 2009, the Director-General of the ASL approved the specification for the university to carry out a study and evaluation of the seismic vulnerability of hospital structures in the Province of Lecce, in the light of the recent national legislation in relation to the safety of structures, in particular, of strategic buildings (hereafter, respectively, 'the specification' and 'the study').
- 13 In accordance with the specification, that study contains, in respect of each building concerned, the three following parts:
- identification of the structural typology of the materials used for construction and the methods of calculation adopted; brief verification of the state of affairs in the light of the project documentation made available;
 - verification of the soundness of the structure; brief analysis of the overall seismic resistance of the building; where appropriate, on-site analysis of structural elements or subsystems that are significant for the purposes of identifying overall seismic resistance; and
 - compilation of the results referred to in the previous indent, and drafting of technical data sheets on structural diagnosis; in particular: reports on the structural typology observed, on the materials and on the state of conservation of the structure, with particular reference to the aspects having a major effect on structural reactions in relation to the seismic risk of the site of the works; drawing up of technical data sheets for the classification of the seismic vulnerability of the hospitals; technical reports on the structural elements or subsystems identified as critical in relation to the verification of seismic vulnerability; preliminary suggestions and a brief description of works which may be needed to bring the buildings up to standard or to improve them, with regard to their seismic resistance, with particular reference to the advantages and limitations, in technical and economic terms, of the various possible technologies.
- 14 The consultancy contract of 22 October 2009 relating to the study project stipulates inter alia as follows:
- the maximum duration of that contract is laid down as sixteen months;
 - the study project is to be entrusted to the technical constructions group, which may enlist the aid of highly qualified external collaborators;
 - that project is to be carried out in the framework of close cooperation between the working groups set up by the ASL and by the University, in order to obtain the objectives set out in the third part of that project;
 - academic responsibility is to be assigned to two persons appointed, respectively, by each party;

- ownership of all results produced by the experimental work is to lie with the ASL, which however undertakes to make express mention of the University Department in the event of publication of the results in a technical or academic context; the University has the right to use those results for publications or academic communications with ASL's approval;
 - ASL is to pay the University an amount of EUR 200 000 exclusive of VAT for all the services, payable in four instalments. In the event, however, of early termination of the contract, the University is entitled to an amount dependent on the volume of work performed which corresponds to the expenditure incurred and the costs relating to the legal obligations assumed in the context of the implementation of the study project.
- 15 According to the file submitted to the Court, that sum of EUR 200 000 can be broken down as follows:
- acquisition and use of technical equipment: EUR 20 000;
 - costs of staff missions: EUR 10 000;
 - staff costs: EUR 144 000;
 - general expenditure: EUR 26 000.
- 16 It is also apparent that the staff costs of EUR 143 999.58, rounded up to EUR 144 000, correspond to the following estimates:
- activation of three research grants of one year's duration: EUR 57 037.98;
 - cost of an associate professor for 180 hours in 2009 (hourly cost of EUR 45.81) and for 641 hours in 2010 (hourly cost of EUR 48.93): EUR 39 609.93;
 - cost of a senior researcher for 170 hours in 2009 (hourly cost EUR 25.91) and for 573 hours in 2010 (hourly cost EUR 32.23 euros): EUR 22 936.95;
 - cost of a non-senior researcher for 170 hours in 2009 (hourly cost EUR 20.50) and for 584 hours in 2010 (hourly cost EUR 26.48): EUR 18 949.32;
 - cost of a laboratory technician for 70 hours in 2009 (hourly cost EUR 20.48) and for 190 hours in 2010 (hourly cost EUR 21.22): EUR 5 465.40.
- 17 Various orders and professional associations and undertakings appealed against the decision approving the specification and against any preparatory measures related to or resulting from them before the Tribunale amministrativo regionale per la Puglia, sede di Lecce (Regional Administrative Court of Puglia, seat at Lecce), alleging inter alia the infringement of national and European Union public procurement legislation. By its judgment, that court upheld those appeals, considering that the study project constituted a contract for the provision of engineering services within the meaning of the Italian legislation.
- 18 In the appeals brought by them against that judgment, the ASL and the University argue in essence that, in accordance with Italian law, the consultancy contract constitutes a cooperation agreement between public administrations in respect of activities of general interest. The

participation for pecuniary interest – but for remuneration limited to the costs incurred – of the University in such a contract falls under its institutional activities. There is in addition reliance on the fact that the study project is conferred on research bodies and the fact that it relates to research to be conducted by means of experiments and analyses to be carried out outside any standardised methodology or procedure codified or established in academic literature. The lawfulness of such cooperation agreements between public authorities under European Union law results from the case-law of the Court.

- 19 The referring court explains that the agreements between public authorities provided for in Article 15 of Law No 241 of 7 August 1990 aim to coordinate the action of various administrative bodies each of which pursues a particular public interest, and constitute a form of cooperation the function of which is to make management of public services as effective and economical as possible. Such an agreement may be concluded where a public institution intends to confer, in return for a pecuniary interest, the provision of a service on another public body and where that service falls within the tasks of the authority, in accordance with the institutional objectives of the entities which are parties to the agreement.
- 20 The Consiglio di Stato nevertheless raises the question whether the conclusion of an agreement between public authorities is not contrary to the principle of free competition where one of the authorities concerned can be regarded as an economic operator, a classification which encompasses any public body proposing services on the market, regardless of whether it has a primarily profit-making objective, whether it is structured as an undertaking or whether it has a continuous presence on the market. The referring court refers, in that regard, to Case C-305/08 *CoNISMa* [2009] ECR I-12129. From that perspective, provided that the University has the capacity to take part in a procurement procedure, the contracts concluded with it by contracting authorities fall within the scope of European Union public procurement rules where they relate, as in the case in the main proceedings, to research services which do not appear to be incompatible with the services mentioned in categories 8 and 12 of Annex II A to Directive 2004/18.
- 21 In those circumstances, the Consiglio di Stato decided to stay the proceedings and to refer to the Court the following question:

‘Does [Directive 2004/18] and, in particular, Article 1(2)(a) and (d), Article 2 and Article 28 of that directive and Categories 8 and 12 in Annex II[A] thereto, preclude national legislation which permits written agreements to be entered into between two contracting authorities for the study of the seismic vulnerability of hospital structures and its evaluation in the light of national regulations on the safety of structures and in particular of strategic buildings, for a consideration not exceeding the costs incurred in the performance of the service, where the authority responsible for performance may act as an economic operator?’

The question referred for a preliminary ruling

- 22 By its question, the referring court asks, in essence, whether Directive 2004/18 must be interpreted as precluding national legislation which permits the conclusion, without an invitation to tender, of a contract by which two public entities set up between them a form of cooperation such as that at issue in the main proceedings.
- 23 As a preliminary point, it should be noted that the application of Directive 2004/18 to a public contract is subject to the condition that the estimated value thereof reaches the threshold laid down in Article 7(b) of that directive, taking into consideration the usual value on the market of

the works, supplies or services to which that public contract relates. Otherwise, the fundamental rules and the general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency apply, provided that the contract concerned has a certain cross-border interest in the light, inter alia, of its value and the place where it is carried out (see, to that effect, inter alia, Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565, paragraphs 20, 21 and 31 and the case-law cited).

- 24 However, the fact that the contract at issue in the main proceedings is capable of falling, as the case may be, either under Directive 2004/18 or the fundamental rules and general principles of the FEU Treaty does not affect the answer to be given to the question posed. The criteria laid down in the case-law of the Court in order to determine whether an invitation to tender is mandatory or not are relevant both with regard to the interpretation of that directive and with regard to the interpretation of those rules and principles of the FEU Treaty (see, to that effect, Case C-573/07 *Sea* [2009] ECR I-8127, paragraphs 35 to 37).
- 25 That having been stated, it should be pointed out that, in accordance with Article 1(2) of Directive 2004/18, a contract for pecuniary interest concluded in writing between an economic operator and a contracting authority and having as its object the provision of services referred to in Annex II A to that directive, is a public contract.
- 26 In that regard, first, it is immaterial whether that operator is itself a contracting authority (see, to that effect, Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 51). It is also immaterial whether the body concerned is primarily profit-making, whether it is structured as an undertaking or whether it has a continuous presence on the market (see, to that effect, *CoNISMa*, paragraphs 30 and 45).
- 27 Thus, with regard to entities such as public universities, the Court has held that such entities are, in principle, entitled to take part in a tendering procedure for the award of a public service contract. However, the Member States may regulate the activities of those entities and inter alia authorise or not authorise them to operate on the market, taking into account their objectives as an institution and those laid down in their statutes. None the less, if and to the extent that such entities are entitled to offer certain services on the market, they may not be prevented from participating in a tendering procedure for the services concerned (see, to that effect, *CoNISMa*, paragraphs 45, 48, 49 and 51). In the present case, the referring court stated that Article 66, first paragraph, of the Decree of the President of the Republic No 382 of 11 July 1980 on the reorganisation of University education, concerning training and organisational and teaching methodology reforms, expressly authorises public universities to supply research and consultancy services to public or private entities provided that that activity does not impair their educational role.
- 28 Second, activities such as those which are the subject-matter of the contract at issue in the main proceedings – notwithstanding the fact, referred to by the referring court, that they are capable of coming under academic research – fall, according to the actual nature of those activities, either within the framework of research and development services covered by Annex II A, category 8, of Directive 2004/18 or within the framework of engineering services and related scientific and technical consulting services covered by category 12 of that annex.
- 29 Third, as stated by the Advocate General in paragraphs 32 and 34 of her Opinion, and as is clear from the usual and ordinary meaning of the phrase ‘pecuniary interest’, a contract cannot fall

outside the concept of public contract merely because the remuneration remains limited to reimbursement of the expenditure incurred to provide the agreed service.

- 30 Subject to the checks which are for the referring court to carry out, the contract at issue in the main proceedings does appear to have all the characteristics referred to in paragraphs 26 to 29 of this judgment.
- 31 It follows however from the case-law of the Court that two types of contracts entered into by a public entity do not fall within the scope of European Union public procurement law.
- 32 The first type of contracts are those concluded by a public entity with a person who is legally distinct from that entity where, at the same time, that entity exercises over the person concerned a control which is similar to that which it exercises over its own departments and where that person carries out the essential part of its activities with the entity or entities which control it (see, to that effect, *Teckal*, paragraph 50).
- 33 It is however common ground that that exception is not applicable in a context such as that at issue in the main proceedings, because it is apparent from the order for reference that the ASL does not exercise any control over the University.
- 34 The second type of contracts are those which establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out (see, to that effect, Case C-480/06 *Commission v Germany* [2009] ECR I-4747, paragraph 37).
- 35 In those circumstances, European Union rules on public procurement are not applicable in so far as, in addition, such contracts are concluded exclusively by public entities, without the participation of a private party, no private provider of services is placed in a position of advantage vis-à-vis competitors and implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest (see, to that effect, *Commission v Germany*, paragraphs 44 and 47).
- 36 While, as stated by the referring court, a contract such as that at issue in the main proceedings appears to satisfy some of the criteria referred to in the two preceding paragraphs of this judgment, such a contract can however fall outside the scope of European Union public procurement rules only if it fulfils all those criteria.
- 37 In that regard, it appears to follow from the information in the order for reference, first, that that contract contains a series of substantive aspects a significant or even major part of which corresponds to activities usually carried out by engineers and architects and which, even though they have an academic foundation, do not however constitute academic research. Consequently, contrary to the holding of the Court in paragraph 37 of *Commission v Germany*, the public task which is the subject-matter of the cooperation between the public entities established by the abovementioned contract does not appear to ensure the implementation of a public task which the ASL and the University both have to perform.
- 38 Second, the contract at issue in the main proceedings may bring about an advantage for private undertakings if the highly qualified external collaborators to whom it permits the University to have recourse for the carrying out of certain services include private service providers.
- 39 It is however for the referring court to carry out all the necessary checks in that regard.

- 40 The answer to the question referred is therefore that European Union public procurement law precludes national legislation which authorises the conclusion, without an invitation to tender, of a contract by which public entities establish cooperation among each other where – this being for the referring court to establish – the purpose of such a contract is not to ensure that a public task that those entities all have to perform is carried out, where that contract is not governed solely by considerations and requirements relating to the pursuit of objectives in the public interest or where it is such as to place a private provider of services in a position of advantage vis-à-vis his competitors.

Costs

- 41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

European Union public procurement law precludes national legislation which authorises the conclusion, without an invitation to tender, of a contract by which public entities establish cooperation among each other where – this being for the referring court to establish – the purpose of such a contract is not to ensure that a public task that those entities all have to perform is carried out, where that contract is not governed solely by considerations and requirements relating to the pursuit of objectives in the public interest or where it is such as to place a private provider of services in a position of advantage vis-à-vis his competitors.

C-465/11 Forposta and ABC Direct Contact

JUDGMENT OF THE COURT (Third Chamber)

13 December 2012 (*)

(Directive 2004/18/EC – Article 45(2), first subparagraph, point (d) – Directive 2004/17/EC – Articles 53(3) and 54(4) – Public procurement – Postal services sector – Exclusion criteria in relation to the procedure for the award of a contract – Grave professional misconduct – Protection of the public interest – Maintenance of fair competition)

In Case C-465/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Krajowa Izba Odwoławcza (Poland), made by decision of 30 August 2011, received at the Court on 9 September 2011, in the proceedings

Forposta SA,

ABC Direct Contact sp. z o.o.

v

Poczta Polska SA,

THE COURT (Third Chamber),

composed of K. Lenaerts, acting as President of the Third Chamber, E. Juhász (Rapporteur), G. Arestis, J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Mazák,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 26 September 2012,

after considering the observations submitted on behalf of:

- Forposta SA and ABC Direct Contact sp. z o.o., by P. Gruszczyński and A. Starczewska-Galos, radcy prawni,
- Poczta Polska SA, by P. Burzyński and H. Kornacki, radcy prawni,
- the Polish Government, by M. Szpunar and B. Majczyna and by M. Laszuk and E. Gromnicka, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,

– the European Commission, by K. Herrmann and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This reference for a preliminary ruling relates to the interpretation of point (d) of the first subparagraph of Article 45(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), read in conjunction with Articles 53(3) and 54(4) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).
- 2 This reference has been made in the course of proceedings between, on the one hand, Forposta SA, formerly Praxis sp. z o.o., and ABC Direct Contact sp. z o.o. and, on the other, Poczta Polska SA ('Poczta Polska') concerning a decision of Poczta Polska to exclude Forposta SA and ABC Direct Contact sp. z o.o from the procedure for the award of a contract, for which the Poczta Polska issued a call for tender.

Legal context

European Union law

- 3 Section 2 of Chapter VII of Directive 2004/18, dealing with the 'Criteria for qualitative selection', contains Article 45, entitled 'Personal situation of the candidate or tenderer'. Paragraph 1 of that article sets out the criteria leading to the automatic exclusion of the candidate or tenderer from a contract, while paragraph 2 of the same article sets out the criteria which may lead to such exclusion. That latter paragraph reads as follows:

'Any economic operator may be excluded from participation in a contract where that economic operator:

- (a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;
- (b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;
- (c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct;
- (d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

- (e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;
- (f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;
- (g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.'

- 4 Section 1 of Chapter VII of Directive 2004/17 is entitled 'Qualification and qualitative selection'. Article 53, which is part of that section, provides, under the heading 'Qualification systems':

'1. Contracting entities which so wish may establish and operate a system of qualification of economic operators.

Contracting entities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification.

...

3. The criteria and rules for qualification referred to in paragraph 2 may include the exclusion criteria listed in Article 45 of Directive 2004/18/EC on the terms and conditions set out therein.

Where the contracting entity is a contracting authority within the meaning of Article 2(1)(a), those criteria and rules shall include the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC.

...'

- 5 Article 54 of Directive 2004/17, which is part of Section 1 and is entitled 'Criteria for qualitative selection', states in paragraphs 1 and 4:

'1. Contracting entities which establish selection criteria in an open procedure shall do so in accordance with objective rules and criteria which are available to interested economic operators.

...

4. The criteria set out in paragraphs 1 and 2 may include the exclusion criteria listed in Article 45 of Directive 2004/18/EC on the terms and conditions set out therein.

Where the contracting entity is a contracting authority within the meaning of Article 2(1)(a), the criteria and rules referred to in paragraphs 1 and 2 of this Article shall include the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC.'

Polish law

6 The law of 29 January 2004 on public procurement (Dz. U. No 113, item 759, ‘the Law on public procurement’) lays down the principles and procedures for the award of public contracts and specifies the competent authorities. The amending law of 25 February 2011 (Dz. U. No 87, item 484), which came into force on 11 May 2011, inserted subparagraph (1a) under Article 24(1) of the Law on public procurement. That provision, as amended, reads as follows:

‘1. The following shall be excluded from procedures for the award of public contracts:

...

(1a) economic operators with which the contracting authority concerned annulled, terminated, or renounced a public contract owing to circumstances for which the economic operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract’s value;

...’

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

7 Poczta Polska, a company belonging to the Polish Treasury, active in the postal services sector, is a contracting authority within the meaning of Directive 2004/17. Poczta Polska conducted an open procedure for the award of a public contract for ‘the delivery of postal packages, foreign and domestic, priority postal packages, cash-on-delivery items, and postal packages subject to special conditions’. According to the findings of fact in the reference for a preliminary ruling, the value of that contract exceeds the threshold above which European Union (‘EU’) public procurement rules are applicable.

8 Poczta Polska considered that the tenders made by Forposta SA and ABC Direct Contact sp. z o.o. were viewed as the most favourable in relation to certain tender lots and invited them to enter into a contract. That decision was not challenged by any of the participants to the procedure. However, on 21 July 2011, which was the deadline for the conclusion of the contract, Poczta Polska cancelled the tendering procedure on the grounds that the economic operators which had made the selected tenders were subject to compulsory exclusion from the procedure under Article 24(1)(1a) of the Law on public procurement.

9 The two companies concerned appealed that decision to the Krajowa Izba Odwoławcza (the Polish Public Procurement Office), claiming that that national provision was contrary to point (d) of the first subparagraph of Article 45(2) of Directive 2004/18. Specifically, in their view, the scope of the conditions laid down in that national provision was much broader than the condition laid down in EU law, which provides for only ‘grave professional misconduct’ as a ground for exclusion: such professional misconduct had not been committed in the case in the main proceedings.

10 The referring court observes that, at the time of the adoption of Article 24(1)(1a) of the Law on public procurement, the national legislature stated that it was based on point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 and that court expresses doubts about whether that national provision conforms with the provision of EU law on which it is based, doubts which it regards as justified in light of the following considerations.

- 11 In the first place, the ground for exclusion laid down in that provision in Directive 2004/18 is grave professional misconduct, a concept which, in legal terms, refers more to the breach of principles relating to ethics, dignity and professional conscientiousness. Such a breach gives rise to professional liability on the part of the person who committed it through, inter alia, the opening of disciplinary proceedings by the competent professional bodies. Accordingly, it is those bodies or courts which would decide whether there has been grave professional misconduct and not the contracting authority, as provided for in the national provision at issue.
- 12 In the second place, the concept of circumstances ‘for which that operator is responsible’, reproduced in Article 24(1)(1a), of the Law on public procurement, is significantly broader than the concept of grave misconduct ‘committed by the operator’, set out in point (d) of the first subparagraph of Article 45(2) of Directive 2004/18, and, therefore, it ought not to be used in provisions which are intended to impose a sanction.
- 13 In the third place, given that point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 requires that misconduct be grave, it is doubtful that the non-performance of 5% of a contract’s value could be qualified as grave misconduct. The referring court points out, in this regard, that when the conditions laid down in the national provision at issue in the main proceedings are fulfilled, the contracting authority is obliged to exclude the economic operator concerned and it cannot take into consideration that operator’s individual situation, which could result in a breach of the principle of proportionality.
- 14 The referring court notes, lastly, that, according to the case-law of the Court of Justice (Case C-213/07 *Michaniki* [2008] ECR I-9999 and Case C-376/08 *Serrantoni and Consorzio stabile edili* [2009] ECR I-12169), Directive 2004/18 does not preclude a Member State from providing grounds for exclusion other than those provided in Article 45(2) therein, and which are not based on objective considerations of the professional qualities of economic operators, to the extent that they are proportionate to the objective pursued. However, in accordance with the case-law of the Court (Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 and Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565), EU law precludes national rules which provide for the automatic exclusion of an operator from participation in a procedure for the award of a contract or the automatic rejection of tenders, and the application of measures which are disproportionate to the aim pursued. Not only does the national provision at issue apply automatically but, in addition, it goes beyond what is necessary to attain the aim of protecting the public interest, namely to eliminate contractors that are genuinely unreliable.
- 15 In the light of those considerations, the Krajowa Izba Odwoławcza decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
- ‘1. Can Article 45(2), [first subparagraph], point (d) of Directive 2004/18 ..., which states that any economic operator may be excluded from participation in a contract where that economic operator ... has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate, in conjunction with Articles 53(3) and 54(4) of Directive 2004/17 ..., be interpreted as meaning that it is possible to regard as grave professional misconduct a situation in which the contracting authority concerned annulled, terminated or renounced a public contract with the economic operator concerned owing to circumstances for which that operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract’s value?’

- 2 If Question 1 is answered in the negative – if a Member State is able to introduce grounds, other than those listed in Article 45 of Directive 2004/18 ..., for excluding economic operators from participation in a procedure for the award of a public contract, which it considers to be essential for the protection of the public interest, the legitimate interests of the contracting authorities and the maintenance of fair competition between economic operators, is it possible to consider as consistent with that directive and the Treaty on the Functioning of the European Union a situation involving the exclusion of economic operators with which the contracting authority concerned annulled, terminated or renounced a public contract owing to circumstances for which that economic operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract's value?'

The questions referred for a preliminary ruling

The jurisdiction of the Court

- 16 Poczta Polska claims that the Krajowa Izba Odwoławcza is not a court or tribunal within the meaning of Article 267 TFEU, given that it exercises both a judicial role and an advisory one.
- 17 On this point, it must be borne in mind that, according to settled case-law of the Court of Justice, in order to determine whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23, and Case C-443/09 *Grillo Star* [2012] ECR I-0000, paragraph 20 and case-law cited).
- 18 In the present case, it must be noted that, as is apparent from the documents before the Court, the Krajowa Izba Odwoławcza, which is a body established by the Law on public procurement, has been granted exclusive jurisdiction to hear and determine at first instance disputes between economic operators and competent authorities, and whose operation is governed by Articles 172 to 198 of that law, does constitute a court or tribunal, within the meaning of 267 TFEU, in the exercise of its jurisdiction in relation to those provisions, as is the case in the main proceedings. The fact that that body may be invested, by virtue of other provisions, with an advisory role is devoid of consequence in that regard.

Admissibility

- 19 The Polish Government submits that the reference for a preliminary ruling is inadmissible because it is hypothetical and because it aims, in essence, to determine whether national legislation at issue in the main principles is compatible with the provisions of Directive 2004/18, and not to obtain an interpretation of EU law in order to give guidance to the subject-matter of the dispute, which must be decided on the basis of national law. However, it is not for the Court of Justice, in proceedings for a preliminary ruling, to assess the compatibility of national law with EU law or interpret provisions of national law.
- 20 In that regard, it should be noted, first of all, that the referring court did not request the Court of Justice to assess the compatibility of the national legislation with EU law or to interpret that legislation. It merely requests the interpretation of EU public procurement rules for the

purpose of assessing whether it is necessary to disapply, in the main proceedings, Article 24(1)(1a) of the Law of public procurement. Second, it must be noted that the questions referred are relevant for resolving that dispute, since Poczta Polska cancelled the tendering process of the contract at issue on the grounds that the economic operators which had put forward the tenders chosen were subject to compulsory exclusion from the procedure under that national provision.

- 21 In those circumstances, the reference for a preliminary ruling is admissible and the questions referred must be answered.

The first question

- 22 By that question, the referring court asks, in essence, whether point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 is to be interpreted as precluding national legislation which provides that a situation of grave professional misconduct, which leads to the automatic exclusion of the economic operator at issue from a procedure for the award of a public contract in progress, arises where the contracting authority concerned has annulled, terminated or renounced a previous public contract with that same economic operator owing to circumstances for which that operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract's value.

- 23 In the light of the observations submitted by the Polish Government at the hearing before the Court, according to which a case such as that in the main proceedings, concerning the *rationae materiae* of Directive 2004/17, should be assessed under that directive alone, it should be pointed out that, according to the findings of the referring court, the national legislature itself indicated that, when it adopted Article 24(1)(1a) of the Law on public procurement, on the basis of which the companies concerned were excluded from the procedure for the award of a contract, it did so on the basis of point (d) of the first subparagraph of Article 45(2) of Directive 2004/18. Moreover Articles 53(3) and 54(4) of Directive 2004/17 explicitly refer to Article 45 of Directive 2004/18.

- 24 It is therefore evident that the Republic of Poland made use of the option provided in those provisions of Directive 2004/17 and incorporated, into its domestic legislation, the ground for exclusion provided for in point (d) of the first subparagraph of Article 45(2) of Directive 2004/18.

- 25 It must be noted that point (d) of the first subparagraph of Article 45(2) of Directive 2004/18, unlike the provisions relating to the grounds for exclusion in points (a), (b), (e) and (f) of the same subparagraph, does not refer to national legislation or rules, but that the second subparagraph of Article 45(2) provides that Member States shall specify, in accordance with their national law and having regard for EU law, its implementing conditions.

- 26 Consequently, the concepts of 'professional' 'grave' 'misconduct', in point (d) of the first subparagraph of Article 45(2) can be specified and explained in national law, provided that it has regard for EU law.

- 27 It must be observed, as the Polish Government rightly pointed out, that the concept of 'professional misconduct' covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the violations of ethical standards in the strict

sense of the profession to which that operator belongs, which are established by the disciplinary body of that profession or by a judgment which has the force of *res judicata*.

- 28 Indeed, point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 allows the contracting authorities to prove professional misconduct by any demonstrable means. In addition, unlike point (c) of that subparagraph, a judgment which has the force of *res judicata* is not required in order to prove professional misconduct, within the meaning of point (d) of that subparagraph.
- 29 Consequently, the failure of an economic operator to abide by its contractual obligations can, in principle, be considered as professional misconduct.
- 30 Nevertheless, the concept of ‘grave misconduct’ must be understood as normally referring to conduct by the economic operator at issue which denotes a wrongful intent or negligence of a certain gravity on its part. Accordingly, any incorrect, imprecise or defective performance of a contract or a part thereof could potentially demonstrate the limited professional competence of the economic operator at issue, but does not automatically amount to grave misconduct.
- 31 In addition, in order to find whether ‘grave misconduct’ exists, a specific and individual assessment of the conduct of the economic operator concerned must, in principle, be carried out.
- 32 However, the rules at issue in the main proceedings oblige the contracting authority to exclude an economic operator from the procedure for the award of a contract when, owing to circumstances for which the economic operator is responsible, the contracting authority has annulled or terminated a contract with that economic operator in the framework of a previous public contract.
- 33 In this regard, it is important to note that, given the specific characteristics of national legal systems as regards civil liability, the concept of ‘circumstances for which the economic operator is responsible’ is very broad and could extend to situations beyond conduct which denotes a wrongful intent or negligence of a certain gravity by the economic operator at issue. Yet, the first subparagraph of Article 54(4) of Directive 2004/17 refers to a power to apply the exclusion criteria listed in Article 45 of Directive 2004/18 ‘on the terms and conditions set out therein’, meaning that the concept of ‘grave misconduct’, as referred to in paragraph 25 above, cannot be replaced by the concept of ‘circumstances for which the economic operator concerned is responsible’.
- 34 Furthermore, the national legislation at issue in the main proceedings itself establishes the parameters that require the contracting authority at issue to exclude an economic operator from a newly undertaken procedure for the award of a contract due to the previous conduct of that operator, without allowing the contracting authority the power to assess, on a case-by-case basis, the gravity of the allegedly wrongful conduct of that operator in the performance of the previous contract.
- 35 Consequently, it is clear that the national rules at issue in the main proceedings do not merely follow the general framework for applying point (d) of the first subparagraph of Article 45(2) of Directive 2004/18, but impose on the contracting authorities mandatory requirements and conclusions to be automatically drawn in certain circumstances, thus exceeding the discretion enjoyed by the Member States, pursuant to the second subparagraph of Article 45(2) of that

directive, in specifying the implementing conditions for the ground for exclusion set out in point (d) of the first subparagraph of Article 45(2) with regard for EU law.

- 36 In the light of all the foregoing considerations, the answer to the first question is that point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 must be interpreted as precluding national legislation which provides that a situation of grave professional misconduct, which leads to the automatic exclusion of the economic operator at issue from a procedure for the award of a public contract in progress, arises where the contracting authority concerned has annulled, terminated or renounced a public contract with that same economic operator owing to circumstances for which that operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract's value.

The second question

- 37 In essence, that question, raised in case the answer to the first question is in the negative, asks whether the principles and rules of EU public procurement law allow, on the grounds of the protection of the public interest, the legitimate interests of the contracting authorities or the maintenance of fair competition between economic operators, national legislation, such as that at issue in the main proceedings, requiring the contracting authorities to automatically exclude an economic operator from a procedure for the award of a public contract in a situation such as that referred to in the first question.
- 38 While it is indeed apparent from Article 54(4) of Directive 2004/17 that the contracting powers can lay down criteria for qualitative selection in addition to the grounds for exclusion set out in Article 45 of Directive 2004/18, the fact remains that, in accordance with settled case-law of the Court, Article 45(2) of Directive 2004/18 exhaustively lists the grounds capable of justifying the exclusion of a contractor from participation in a contract for reasons, based on objective factors, that relate to his professional qualities and therefore precludes Member States from adding to the list contained in that provision other grounds for exclusion based on criteria relating to professional qualities (see Joined Cases C-226/04 and C-228/04 *La Cascina and Others* [2006] ECR I-1347, paragraph 22; *Michaniki*, paragraph 43; and Case C-74/09 *Bâtiments et Ponts Construction and WISAG Produktionservice*, [2010] ECR I-7271, paragraph 43).
- 39 It is only when the grounds for exclusion concerned do not relate to the professional qualities of economic operators, and, therefore, do not fall within that exhaustive list that it is possible to consider whether those grounds may be permissible under the principles or other rules of EU public procurement law (see, to this effect, *Fabricom*, paragraphs 25 to 36; *Michaniki*, paragraphs 44 to 69; and Case C-538/07 *Assitur* [2009] ECR I-4219, paragraphs 21 to 33).
- 40 However, in the present case, Article 24(1)(1a) of the Law on public procurement sets out a ground for exclusion relating to the professional quality of the economic operator concerned, as is borne out by the fact, pointed out in paragraphs 10 and 23 above, that the Polish legislature relied on point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 in support the adoption of that national provision. Such a ground for exclusion, which goes beyond the scope of the exhaustive list in that first subparagraph, as is apparent from the response to the first question, is not, therefore, permissible under the principles or other rules of EU public procurement law.

41 Consequently, the answer to the second question is that the principles or rules of EU public procurement law do not allow, on the grounds of the protection of the public interest, the legitimate interests of the contracting authorities or the maintenance of fair competition between economic operators, national legislation, such as that at issue in the main proceedings, requiring the contracting authorities to automatically exclude an economic operator from a procedure for the award of a public contract in a situation such as that referred to in the reply to the first question referred for a preliminary ruling.

The temporal effects of the present judgment

42 The Polish Government asked the Court, at the hearing, to limit the temporal effects of the present judgment in the event that the Court interpreted point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 as precluding national legislation of the kind at issue in the main proceedings.

43 In support of its application, the Polish Government relies on the alleged lack of clarity of that provision of EU law, not yet interpreted by the Court, as well as the risk of serious economic repercussions at national level that such an interpretation would entail.

44 In this regard, it should be borne in mind that the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force and it is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith (see, inter alia, Joined Cases C-338/11 to C-347/11 *Santander Asset Management SGIIC and Others* [2012] ECR I-0000, paragraphs 58 and 59, and Case C-525/11 *Mednis* [2012] ECR I-0000, paragraphs 41 and 42).

45 More specifically, the Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of EU provisions, to which the conduct of other Member States or the European Commission may even have contributed (see, inter alia, *Santander Asset Management SGIIC and Others*, paragraph 60, and *Mednis*, paragraph 43).

46 The alleged existence of significant objective uncertainty regarding the implications of the relevant provisions of EU law cannot be accepted in the case in the main proceedings. First, the situation of 'grave professional misconduct' within the meaning of point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 manifestly does not cover the ground for exclusion laid down by Article 24(1)(1a) of the Law on public procurement. Second, it is apparent from the case-law, which was well established at the moment of the adoption of the national provision at issue in the main proceedings, that such a ground for exclusion could not be justified by reference to the principles or other rules of EU public procurement law.

47 As regards the financial consequences which might ensue for a Member State in the context of a reference for a preliminary ruling, they do not in themselves justify limiting the temporal

effects of the ruling (*Santander Asset Management SGIC and Others*, paragraph 62, and *Mednis*, paragraph 44).

- 48 It must be noted that, in any event, the Polish Government has not provided any factual evidence allowing the Court to assess whether there exists, as a result of this judgment, a risk of serious economic repercussions for the Republic of Poland.
- 49 Accordingly, there is no need to limit the temporal effects of the present judgment.

Costs

- 50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

- 1. Point (d) of the first subparagraph of Article 45(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as precluding national legislation which provides that a situation of grave professional misconduct, which leads to the automatic exclusion of the economic operator at issue from a procedure for the award of a public contract in progress, arises where the contracting authority concerned has annulled, terminated or renounced a public contract with that same economic operator owing to circumstances for which that operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract's value.**
- 2. The principles or rules of European Union public procurement law does not allow, on the grounds of the protection of the public interest, the legitimate interests of the contracting authorities or the maintenance of fair competition between economic operators, national legislation, such as that at issue in the main proceedings, requiring the contracting authorities to automatically exclude an economic operator from a procedure for the award of a public contract in a situation such as that referred to in the reply to the first question referred for a preliminary ruling.**

C-218/11 Édukövízig and Hochtief Construction

JUDGMENT OF THE COURT (Seventh Chamber)

18 October 2012 (*)

(Directive 2004/18/EC — Public works contracts, public supply contracts and public service contracts — Articles 44(2) and 47(1)(b), (2) and (5) — Economic and financial standing of tenderers — Minimum capacity established on the basis of a single accounting indicator — Accounting indicator liable to be influenced by divergences between national laws as regards annual company accounts)

In Case C-218/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from Fővárosi Ítéltábla (Hungary), made by decision of 20 April 2011, received at the Court on 11 May 2011, in the proceedings

Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság (Édukövízig),

Hochtief Construction AG Magyarországi Fióktelepe, now Hochtief Solutions AG Magyarországi Fióktelepe,

v

Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság,

intervening parties:

Vegyépszer Építő és Szerelő Zrt,

MÁVÉPCELL Kft,

THE COURT (Seventh Chamber),

composed of G. Arestis, acting for the President of the Chamber, J. Malenovský and D. Šváby (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 29 March 2012,

after considering the observations submitted on behalf of:

- Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság (Édukövízig), by G. Buda, A. Cséza and D. Kuti, ügyvédek,

- Hochtief Construction AG Magyarországi Fióktelepe, now Hochtief Solutions AG Magyarországi Fióktelepe, by Z. Mucsányi, ügyvéd,
- the Hungarian Government, by Z. Fehér, K. Szíjjártó and G. Koós, acting as Agents,
- the Czech Government, by M. Smolek and T. Müller, acting as Agents,
- the German Government, by T. Henze and J. Möller, acting as Agents,
- the European Commission, by A. Tokár and A. Sipos, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 44(2) and 47(1)(b), (2) and (5) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).
- 2 The reference has been made by the Fővárosi Ítéltábla (Budapest Court of Appeal) (Hungary), sitting in an appeal against a decision of the Közbizottság (Public Procurement Arbitration Board of the Public Procurement Council), the administrative arbitration authority. The decision was made in a dispute between Hochtief Construction AG Magyarországi Fióktelepe, now Hochtief Solutions AG Magyarországi Fióktelepe ('Hochtief Hungary'), the Hungarian subsidiary of Hochtief Solutions AG, a company incorporated under German law, and Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság (Édukövíz) (North Transdanubia Environmental Protection and Water Management Directorate, 'Édukövíz') regarding a restricted tendering procedure launched by the latter body. In those proceedings, brought by Hochtief Hungary, the arbitration authority is the defendant and Édukövíz is an applicant, together with Hochtief Hungary.

Legal context

European Union law

Directive 2004/18

- 3 Directive 2004/18 includes the following recitals:

'...

- (2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of

freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

...

(39) Verification of the suitability of tenderers, in open procedures, and of candidates, in restricted and negotiated procedures with publication of a contract notice and in the competitive dialogue, and the selection thereof, should be carried out in transparent conditions. For this purpose, non-discriminatory criteria should be indicated which the contracting authorities may use when selecting competitors and the means which economic operators may use to prove they have satisfied those criteria. In the same spirit of transparency, the contracting authority should be required, as soon as a contract is put out to competition, to indicate the selection criteria it will use and the level of specific competence it may or may not demand of the economic operators before admitting them to the procurement procedure.

(40) A contracting authority may limit the number of candidates in the restricted and negotiated procedures with publication of a contract notice, and in the competitive dialogue. Such a reduction of candidates should be performed on the basis of objective criteria indicated in the contract notice. ...

...'

4 Under Article 2 of Directive 2004/18, entitled 'Principles of awarding contracts':

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Article 44 of the Directive, entitled 'Verification of the suitability and choice of participants and award of contracts', provides:

'1. Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55 ... after the suitability of the economic operators ... has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.

2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

These minimum levels shall be indicated in the contract notice.

3. In restricted procedures, negotiated procedures with publication of a contract notice and in the competitive dialogue procedure, contracting authorities may limit the number of suitable candidates they will invite to tender, to negotiate or to conduct a dialogue with, provided a sufficient number of suitable candidates is available. The contracting authorities shall indicate in the contract notice the objective and non-discriminatory criteria or rules they intend to apply ...

...'

6 Article 47 of the Directive, entitled 'Economic and financial standing', provides:

'1. Proof of the economic operator's economic and financial standing may, as a general rule, be furnished by one or more of the following references:

- (a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;
- (b) the presentation of balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the economic operator is established;
- (c) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on these turnovers is available.

2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

3. Under the same conditions, a group of economic operators as referred to in Article 4 may rely on the capacities of participants in the group or of other entities.

4. Contracting authorities shall specify, in the contract notice or in the invitation to tender, which reference or references mentioned in paragraph 1 they have chosen and which other references must be provided.

5. If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

Directive 78/660/EEC

7 As is apparent from its first recital, Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article [44(2)(g)] of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11) brought about the harmonisation of national provisions concerning, inter alia, the presentation and content of annual accounts and valuation methods and publication thereof in respect of certain companies with limited liability. Article 1(1) of that directive, which lists the types of companies concerned, includes, as regards the Federal Republic of Germany, the 'Aktiengesellschaft'.

- 8 However, the harmonisation brought about by that directive is only partial. Thus, it includes the provision, in Article 6, that the Member States may authorise or require adaptation of the layout of the balance sheet and profit and loss account in order to include the appropriation of profit.

German and Hungarian law

- 9 It is clear from the order for reference that both the German and the Hungarian legislation on the annual accounts of companies provide that the item on the balance sheet relating to profit or loss must take account of the distribution of dividends. However, while the Hungarian legislation authorises that practice only where it does not have the effect of making that item in the balance sheet negative, the German legislation does not provide for any such restriction, at least as regards the transfer of profits from a subsidiary to a parent company.

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

- 10 By notice published in the *Official Journal of the European Union* of 25 July 2006, Édukováizig launched a restricted procedure for awarding a public contract for transport infrastructure works. According to the file, the estimated value of those works was between HUF 7.2 billion and HUF 7.5 billion or between EUR 23 300 000 and EUR 24 870 000 approximately.
- 11 As regards the economic and financial standing of the candidates, the awarding authority required the production of a uniform document, drawn up in accordance with the accounting rules, and fixed a minimum level in so far as it required requiring that the profit/loss item in the balance sheet should not have been negative for more than one of the last three completed financial years ('the economic requirement').
- 12 Hochtief AG is the parent company of the group to which Hochtief Solutions AG, a wholly owned subsidiary, belongs. They are companies incorporated under German law. Hochtief Hungary is the Hungarian subsidiary of Hochtief Solutions AG. According to the order for reference, Hochtief Hungary has, at the very least, the option of relying exclusively on the position of Hochtief Solutions AG as regards the economic requirement.
- 13 Under a profit transfer agreement, Hochtief Solutions AG must transfer any profit that it makes to its parent company every year, so that the profit recorded in the balance sheet of Hochtief Solutions AG is systematically zero or negative.
- 14 Hochtief Hungary questioned the lawfulness of the economic requirement on the ground that it was discriminatory and breached certain provisions of the Hungarian law implementing Directive 2004/18.
- 15 The referring court explained, in that connection, that, under the rules on annual accounts applicable to companies incorporated under German law, or at least to groups of companies incorporated under German law, it is possible for a company to show a positive profit/loss after tax but a negative profit/loss in the balance sheet because of a distribution of dividends or a transfer of profits exceeding the profit after tax, whereas the Hungarian legislation prohibits any distribution of dividends which would result in a negative profit/loss in the balance sheet.
- 16 Hochtief Hungary challenged the lawfulness of the economic requirement before the Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság. Hochtief Hungary brought an action

against the decision of the latter before the court of first instance and subsequently appealed to the referring court.

- 17 Before the referring court, Hochtief Hungary argued that the economic requirement does not allow a non-discriminatory and objective comparison of the candidates to be made, since the rules on annual accounts of companies as regards the payment of dividends within groups of undertakings may vary from one Member State to another. That, in any event, was the case with regard to Hungary and the Federal Republic of Germany. The economic requirement was indirectly discriminatory because it disadvantaged candidates who were unable to fulfil it, or could do so only with difficulty, because they are subject, in the Member State where they are established, to different legislation from that which is applicable in the Member State of the awarding authority.
- 18 The referring court finds, first, that it is clear from Articles 44(2) and 47(1)(b) of Directive 2004/18 that a contracting authority may fix a minimum level of economic and financial standing with reference to the balance sheet and, second, that Article 47 takes account of the differences which may exist between national legislations relating to the annual accounts of companies. Therefore, it raises the question of how it is possible to define a minimum level of economic and financial standing which is comparable whatever the place of establishment of a company where that level must be proven by documents which constitute the references mentioned in Article 47(1)(b), but the content of and information provided by which may differ from one Member State to another.
- 19 Against that background, the Fővárosi Ítéltábla decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is the requirement that the minimum capacity levels stipulated in Article 44(2) of Directive 2004/18 ... be in accordance with Article 47(1)(b) of that Directive to be interpreted in such a way that the contracting authority is entitled to link the minimum capacity levels to a single indicator in an accounting document (balance sheet) that it selects to monitor economic and financial standing?

2. If the answer to the first question is yes, [is] the consistency requirement laid down by Article 44(2) of [that] Directive ... fulfilled by data selected for assessment of the minimum capacity levels (profit/loss according to the balance sheet), where such data has different content pursuant to the accounting legislation of individual Member States?

3. Is it sufficient, for the purposes of correcting any discrepancies which doubtless exist between Member States, if the contracting authority ensures that there is an opportunity to employ external resources (Article 47[(2) of Directive 2004/18]), in addition to the documents selected as proof of economic and financial standing, or must the contracting authority, in order to meet the requirement of consistency as regards all the documents selected by it, ensure that that capacity can be demonstrated in another manner (Article 47(5) [of that Directive])?’

Admissibility of the question referred for a preliminary ruling

- 20 Éduková vizig maintains, as a preliminary point, that the reference for a preliminary ruling is inadmissible on two grounds. First, it concerns legal matters which, as they were not discussed during the procedure prior to the proceedings pending before the referring court, have no relevance to the dispute which is actually before that court. Second, the economic requirement

does not, it argues, raise any real difficulty since Hochtief Hungary could have either relied on its own balance sheet, which would have allowed it to meet that requirement, or acted on behalf of Hochtief Solutions AG, which, in the light of the profit transfer contract with its parent company, Hochtief AG, should, under the legislation applicable to it, have relied on the economic and financial standing of the latter, which is legally liable, which would also have been sufficient to meet the economic requirement.

- 21 As regards the first ground of inadmissibility thus raised, it must be observed that it concerns the ambit of the case before the referring court as determined by the application of the national procedural rules, a question whose consideration does not fall within the jurisdiction of this Court.
- 22 As regards the second ground of inadmissibility, it is based on the alleged consequences of the assessment of factual matters which have to do either with Hungarian law, that is to say, the possibility that Hochtief Hungary could meet the economic requirement itself, or with German company law, that is to say, the possibility that Hochtief Solutions AG could meet that same requirement as a result of the obligation to rely on the economic standing of its parent company, which are matters which it is not for this Court to assess.
- 23 For the rest, it must be borne in mind that, within the framework of the cooperation between the Court of Justice and national courts and tribunals established by Article 267 TFEU, it is solely for the national court to determine, in the light of the particular circumstances of each case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The Court can refuse a request submitted by a national court only where it is quite obvious that the ruling sought by that court on the interpretation of European Union law bears no relation to the actual facts of the main action or its purpose or where the problem is general or hypothetical (see, *inter alia*, Case C-203/09 *Volvo Car Germany* [2010] ECR I-10721, paragraph 23 and the case-law cited).
- 24 As none of those situations arises here, the questions referred by the referring court must be answered.

The questions referred for a preliminary ruling

The first and second questions

- 25 By its first and second questions, which should be considered together, the referring court essentially asks whether Articles 44(2) and 47(1)(b) of Directive 2004/18 must be interpreted as meaning that a contracting authority may fix a minimum level of economic and financial standing with reference to a given item on the balance sheet, even if there may be differences as regards that item between the legislations of the various Member States and, as a result, in the balance sheets of companies, depending on the legislation to which they are subject as regards the preparation of their annual accounts.
- 26 Under the first subparagraph of Article 44(2) of Directive 2004/18, a contracting authority may require minimum levels of economic and financial standing in accordance with Article 47 of that directive. Article 47(1)(b) provides that a contracting authority may ask candidates and tenderers to provide proof of that standing through the presentation of their balance sheet.

- 27 However, it must be observed that a minimum level of economic and financial standing cannot be established by reference to the balance sheet in general. It follows that the option provided for in the first subparagraph of Article 44(2) of Directive 2004/18 can be implemented, as regards Article 47(1)(b), only by reference to one or more particular aspects of the balance sheet.
- 28 As to the choice of those aspects, Article 47 of Directive 2004/18 leaves a fair degree of freedom to the contracting authorities. Unlike Article 48 of the Directive which, as regards technical and professional capacity, establishes a closed system which limits the methods of assessment and verification available to those authorities and, therefore, limits their opportunities to lay down requirements (see, as regards the similar provisions in earlier directives than Directive 2004/18, Case 76/81 *Transporoute et travaux* [1982] ECR 417, paragraphs 8 to 10 and 15), Article 47(4) expressly authorises contracting authorities to choose the probative references which must be produced by candidates or tenderers to furnish proof of their economic and financial standing. As Article 44(2) of Directive 2004/18 refers to Article 47, the same freedom of choice exists as regards the minimum levels of economic and financial standing.
- 29 However, that freedom is not unlimited. Under the second subparagraph of Article 44(2) of Directive 2004/18 a minimum capacity level must be related and proportionate to the subject-matter of the contract. It follows that the aspect or aspects of the balance sheet chosen by a contracting authority to establish a minimum level of economic and financial standing must be objectively such as to provide information on such standing of an economic operator and that the threshold thus fixed must be adapted to the size of the contract concerned in that it constitutes objectively a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, without, however, going beyond what is reasonably necessary for that purpose.
- 30 As the legislations of the Member States regarding the annual accounts of companies have not been the subject of full harmonisation, it cannot be ruled out that there may be differences between those legislations as regards a particular aspect of the balance sheet by reference to which a contracting authority established a minimum capacity level. However, it must be observed that, as is clear from the wording of Article 47(1)(b) and (c), and (5), Directive 2004/18 contains the idea that, as regards proof of the economic and financial standing of candidates or tenderers, a reference may legitimately be required by a contracting authority even if, objectively, not every candidate or tenderer is able to produce it, if only, in the case of Article 47(1)(b), because of a difference in legislation. Therefore, such a requirement cannot, in itself, be considered to constitute discrimination.
- 31 It follows that the requirement of a minimum level of economic and financial standing cannot, in principle, be disregarded solely because proof of that level has to be furnished by reference to an aspect of the balance sheet regarding which there may be differences between the laws of the different Member States.
- 32 Consequently, the answer to the first and second questions referred is that Article 44(2) and Article 47(1)(b) of Directive 2004/18 must be interpreted as meaning that a contracting authority may require a minimum level of economic and financial standing by reference to one or more particular aspects of the balance sheet, provided that those aspects are such as to provide information on such standing of an economic operator and that that level is adapted to the size of the contract concerned in that it constitutes objectively a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract,

without, however, going beyond what is reasonably necessary for that purpose. The requirement of a minimum level of economic and financial standing cannot, in principle, be disregarded solely because that level relates to an aspect of the balance sheet regarding which there may be differences between the legislations of the different Member States.

The third question

- 33 By its third question, the referring court essentially asks whether Article 47 of Directive 2004/18 must be interpreted as meaning that, where an economic operator cannot meet a minimum level of economic and financial standing because of a difference between the legislations of the Member States in which it and the contracting authority respectively are established as regards the item in the balance sheet by reference to which that minimum capacity was defined, it is sufficient for that operator to rely on the capacities of another entity, in accordance with Article 47(2), or if it must be authorised to prove its economic and financial standing by any other appropriate document, in accordance with Article 47(5).
- 34 It must, however, be observed that, as is clear from the order for reference, the divergence of legislation at issue in the case in the main proceedings does not concern the scope of the item of the balance sheet covered by the economic requirement, that is to say the profit/loss recorded in the balance sheet. Both the German and Hungarian legislations provide that that item takes account of the profit or loss of the financial year and the distribution of dividends. However, those legislations differ in that the Hungarian law prohibits the distribution of dividends or the transfer of profits from having the consequence of making that item negative, whereas the German law does not prohibit that, in any event not in the situation of a subsidiary like Hochtief Solutions AG, which is linked to its parent company by a profit transfer agreement.
- 35 Therefore, that difference in legislation concerns the fact that, unlike the Hungarian law, the German law does not limit the possibility which a parent company has of deciding that the profits of its subsidiary will be transferred to it, even if that transfer has the effect of making the profit/loss in the balance sheet negative for that subsidiary, without, however, requiring such a transfer of profits.
- 36 Consequently, it must be held that, by its question, the referring court seeks to know whether Article 47 of Directive 2004/18 must be interpreted as meaning that, where an economic operator is unable to meet a minimum level of economic and financial standing such as the economic requirement because of an agreement under which that economic operator systematically transfers its profits to its parent company, it is sufficient for that operator to be able to rely on the capacities of another entity, in accordance with Article 47(2), or whether it must be authorised to prove its economic standing by any other appropriate document, in accordance with Article 47(5), having regard to the fact that such an agreement is authorised without limitation by the legislation of the Member State of establishment of that economic operator, whereas, under the legislation of the Member State of establishment of the contracting authority, it would only be authorised on condition that the transfer of profits does not have the effect of making the profit/loss in the balance sheet negative.
- 37 It appears that, in such a situation, the fact that a subsidiary is unable to meet a minimum level of economic and financial standing defined by reference to a particular aspect of the balance sheet is, in the final analysis, the result, not of a difference in legislation, but of a decision by its parent company which obliges that subsidiary to transfer all its profits systematically to it.

- 38 In that situation, that subsidiary has only the option provided for by Article 47(2) of Directive 2004/18, which allows it to rely on the economic and financial standing of another entity by producing the undertaking of that entity to make the necessary resources available to it. Clearly, that option is particularly suited to such a situation, since the parent company may thus itself remedy the fact that it has placed its subsidiary in a position in which it cannot meet the minimum capacity level.
- 39 The answer to the third question is therefore that Article 47 of Directive 2004/18 must be interpreted as meaning that where an economic operator cannot meet a minimum level of economic and financial standing consisting in a requirement that the profit/loss item in the balance sheet of candidates or tenderers should not be negative for more than one of the last three completed financial years, because of an agreement under which that economic operator systematically transfers its profits to its parent company, that operator has no other option, in order to meet that minimum capacity level, than to rely on the capacities of another entity, in accordance with Article 47(2). It is irrelevant in that regard that the legislation of the Member State of establishment of that economic operator and that of the Member State of establishment of the contracting authority differ in that such an agreement is authorised without limitation by the legislation of the first Member State whereas, under the legislation of the second, it would only be authorised on condition that the transfer of profits does not have the effect of making the profit/loss item in the balance sheet negative.

Costs

- 40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

- 1. Articles 44(2) and 47(1)(b) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that a contracting authority may require a minimum level of economic and financial standing by reference to one or more particular aspects of the balance sheet, provided that those aspects are such as to provide information on such standing of an economic operator and that that level is adapted to the size of the contract concerned in that it constitutes objectively a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, without, however, going beyond what is reasonably necessary for that purpose. The requirement of a minimum level of economic and financial standing cannot, in principle, be disregarded solely because that level relates to an aspect of the balance sheet regarding which there may be differences between the legislations of the different Member States.**
- 2. Article 47 of Directive 2004/18 must be interpreted as meaning that where an economic operator cannot meet a minimum level of economic and financial standing consisting in a requirement that the profit/loss item in the balance sheet of candidates or tenderers should not be negative for more than one of the last three completed financial years, because of an agreement under which that economic operator**

systematically transfers its profits to its parent company, that operator has no other option, in order to meet that minimum capacity level, than to rely on the capacities of another entity, in accordance with Article 47(2). It is irrelevant in that regard that the legislation of the Member State of establishment of that economic operator and that of the Member State of establishment of the contracting authority differ in that such an agreement is authorised without limitation by the legislation of the first Member State whereas, under the legislation of the second, it would only be authorised on condition that the transfer of profits does not have the effect of making the profit/loss item in the balance sheet negative.

C-368/10 Commission v Netherlands

JUDGMENT OF THE COURT (Third Chamber)

10 May 2012 (*)

(Failure of a Member State to fulfil obligations — Directive 2004/18/EC — Procedures for the award of public works contracts, public supply contracts and public service contracts — Contract for the supply, installation and maintenance of dispensing machines for hot drinks, and the supply of tea, coffee and other ingredients — Article 23(6) and 23(8) — Technical specifications — Article 26 — Conditions for performance of the contract — Article 53(1) — Criteria for award of the contracts — Most economically advantageous tender — Products derived from organic agriculture and fair trade — Use of labels in the formulation of the technical specifications and the award criteria — Article 39(2) — Concept of ‘additional information’ — Article 2 — Principles for award of contracts — Principle of transparency — Articles 44(2) and 48 — Verification of the suitability and choice of participants — Minimum level of technical or professional abilities — Compliance with ‘criteria of sustainability of purchases and socially responsible business’)

In Case C-368/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 22 July 2010,

European Commission, represented by C. Zadra and F. Wilman, acting as Agents, with an address for service in Luxembourg,

applicant,

v

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

defendant,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász, G. Arestis and D. Šváby (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 October 2011,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2011

gives the following

Judgment

1 By its application, the European Commission requests the Court to find that, because in a tendering procedure for a public contract for the supply and management of automatic coffee machines which was the subject of a contract notice published in the *Official Journal of the European Union* on 16 August 2008, the province of North Holland:

- inserted in the technical specifications a condition requiring the Max Havelaar and EKO labels or in any event labels based on similar or the same criteria;
- included, for appraising the ability of operators, criteria and evidence concerning sustainable purchasing and socially responsible business, and
- included, when formulating award criteria, a reference to the Max Havelaar and/or EKO labels, or in any event labels based on the same criteria,

the Kingdom of the Netherlands failed to fulfil its obligations under, respectively, Article 23(6) and (8), Articles 2, 44(2) and 48(1) and (2) and Article 53(1) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum OJ 2004 L 351, p. 44), as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007 (OJ 2007 L 317, p. 34) ('Directive 2004/18').

I – Legal context

2 Directive 2004/18 contains inter alia the following recitals in its preamble:

(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

...

(5) Under Article 6 of the [EC] Treaty [corresponding to Article 11 TFEU], environmental protection conditions are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that [EC] Treaty [corresponding, in essence, to Article 3 TFEU to Article 6 TFEU and Article 8 TFEU], in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting authorities may contribute to the protection of the

environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts.

...

- (29) The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To this end, it must be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it must be possible to draw up the technical specifications in terms of functional performance and conditions, and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting authorities must be able to provide a reason for any decision that equivalence does not exist in a given case. Contracting authorities that wish to define environmental conditions for the technical specifications of a given contract may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services. They can use, but are not obliged to use appropriate specifications that are defined in eco-labels, such as the European Eco-label, (multi-)national eco-labels or any other eco-label providing the conditions for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and providing the label is accessible and available to all interested parties. ... The technical specifications should be clearly indicated, so that all tenderers know what the conditions established by the contracting authority cover.

...

- (33) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the conditions — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.

...

- (39) Verification of the suitability of tenderers, in open procedures, and of candidates, in restricted and negotiated procedures with publication of a contract notice and in the competitive dialogue, and the selection thereof, should be carried out in transparent conditions. For this purpose, non-discriminatory criteria should be indicated which the contracting authorities may use when selecting competitors and the means which economic operators may use to prove they have satisfied those criteria. In the same spirit of transparency, the contracting authority should be required, as soon as a contract is put out to competition, to indicate the selection criteria it will use and the level of

specific competence it may or may not demand of the economic operators before admitting them to the procurement procedure.

...

- (46) Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: “the lowest price” and “the most economically advantageous tender”.

To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. ...

Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications and the value for money of each tender to be measured.

In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental conditions, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social conditions, in response in particular to the needs — defined in the specifications of the contract — of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.’

- 3 According to Article 1(2)(c) of Directive 2004/18, public supply contracts are public contracts other than those referred to in point (b) of that subparagraph, having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products, and a public contract having as its object the supply of products and which also covers, as an incidental matter, siting and installation operations is to be considered a public supply contract. Under Article 7 of that directive, the directive is applicable to such a contract, unless it has been awarded in the defence field or by a central purchasing body, the value of which exclusive of value added tax is estimated to be equal to or greater than EUR 206 000 when it is awarded by a contracting authority not covered by Annex IV to the directive. That annex does not refer to provinces in relation to the Kingdom of the Netherlands.

- 4 Article 2 of Directive 2004/18 provides:

'Principles of awarding contracts

Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Paragraph 1(b) of Annex VI to Directive 2004/18 defines the concept of 'technical specification', in relation to public supply contracts, as 'a specification in a document defining the required characteristics of a product ... such as quality levels, environmental performance levels, design for all conditions ... and conformity assessment, performance, use of the product, safety or dimensions, including conditions relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures.'

6 Article 23 of that directive provides:

'1. The technical specifications as defined in point 1 of Annex VI shall be set out in the contract documentation ...

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. ... the technical specifications shall be formulated:

...

b) or in terms of performance or functional conditions; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

...

6. Where contracting authorities lay down environmental characteristics in terms of performance or functional conditions as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by and any other eco-label, provided that:

– those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract,

– the conditions for the label are drawn up on the basis of scientific information,

– the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and,

– they are accessible to all interested parties.

Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents;

they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

...

8. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words “or equivalent”.’

7 Article 26 of Directive 2004/18 provides:

‘Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.’

8 Article 39(2) of Directive 2004/18 states:

‘Provided that it has been requested in good time, additional information relating to the specifications and any supporting documents shall be supplied by the contracting authorities or competent departments not later than six days before the deadline fixed for the receipt of tenders.’

9 Article 44(1) of Directive 2004/18, under the heading ‘Verification of the suitability and choice of participants and award of contracts’, provides that contracting authorities, after checking the suitability of the tenderers not excluded, in accordance with the criteria concerning, inter alia, professional and technical knowledge or ability referred to in Article 48 of the directive, are to award the contracts on the basis of the criteria referred to, in essence, in Article 53 of that directive. Pursuant to Article 44(2) of the directive:

‘The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

...’

10 Article 48(1) of Directive 2004/18, entitled ‘Technical and/or professional ability’:

‘The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.’

11 Pursuant to Article 48(2), evidence of the economic operators’ technical abilities may be furnished by one or more of the following means according to the nature, quantity or

importance, and use of the works, supplies or services. With regard to public supply contracts, points (a)(ii), (b) to (d) and (j) of that provision refer to the following elements:

- the submission of a list of the principal deliveries effected in the past three years;
- an indication of the technicians or technical bodies involved, which may not directly belong to the undertaking, especially those responsible for quality control;
- a description of the technical facilities and measures used by the supplier for ensuring quality and the undertaking's study and research facilities;
- where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by or on behalf of the contracting authorities on the production capacities of the supplier and, if necessary, on the means of study and research which are available to it and the quality control measures it will operate;
- with regard to the products to be supplied, samples, descriptions and/or photographs, or certificates attesting the conformity of products to certain specifications or norms.

12 Under the aforementioned Article 48(6), the contracting authority is to specify, in the notice or in the invitation to tender, which references under paragraph 2 it wishes to receive.

13 Article 53 of Directive 2004/18 provides:

'Contract award criteria

1. ... [T]he criteria on which the contracting authorities shall base the award of public contracts shall be either:

- a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion;

...'

II – The background to the action

A – The contract notice

14 On 16 August 2008, at the request of the province of Noord Holland in the Netherlands, a contract notice was published in the *Official Journal of the European Union* for the supply and management of automatic coffee machines as from 1 January 2009 ('the contract notice').

15 Section II, point 1.5 of that notice describes the contract as follows:

'The province of North Holland has a contract for the management of automatic coffee machines. The contract expires on 1 January 2009. The province intends to enter into a new contract from 1 January 2009 by means of a European tender procedure. An important aspect

is the desire of the province of North Holland to increase the use of organic and fair trade products in automatic coffee machines.’

- 16 Section III, point 1 of the contract notice deals with the conditions relating to the contract. Following information concerning the deposits and guarantees, the main terms concerning financing and payment and the legal form of recourse to sub-contractors, point 1.4 of that section contains the word ‘no’ under the heading ‘Other particular conditions to which the performance of the contract is subject’.
- 17 Section IV, point 2.1 of the contract notice states that the contract will be awarded to the most economically advantageous tender. It follows from paragraph 3.4 of the same section that the time-limit for receipt of tenders was set as 26 September 2008 at 12 noon.

B – The specifications

- 18 The contract notice referred to specifications, entitled ‘Call for tenders’, dated 11 August 2008 (‘the specifications’).
- 19 Under the heading ‘Context of the contract’ sub-chapter 1.3 of the specifications reproduces, in its first paragraph, the content of point 1.5 of section II of the contract notice. The second paragraph of that sub-chapter states as follows:

‘The tenders shall be evaluated both on the basis of qualitative and environmental criteria and on the basis of price.’
- 20 Sub-chapter 1.4 of the specifications describes the content of the contract, in summary form, as follows:

‘The province of North Holland places an order for the supply, installation and maintenance of semi-automatic (full-operational) machines for the dispensing of hot and cold drinks, on a hire basis. The province of North Holland also places an order for the supply of ingredients for the dispensing machines ... Sustainability and functionality constitute important aspects.’
- 21 According to section 1.5 of the specifications, the contract concerned was to be of three years’ duration, capable of being extended by one year.
- 22 In accordance with sub-chapter 3.4 of the specifications, concerning the conditions for registration, the presentation of alternatives was not authorised. Interested parties and tenderers were obliged to carry out research concerning the relevant market conditions, inter alia by asking questions of the contracting authority which should produce responses in an information notice.
- 23 The information notice was defined in section 5 of sub-chapter 2.3 of the specifications as a document containing the replies to the questions posed by interested parties in addition to possible amendments to the specifications or to other contract documents, forming part of the specifications and taking precedence over the other parts thereof including the annexes. It was also laid down, in sections 3 and 5 of that sub-chapter, that the information notice would be published online on the province of North Holland’s tender procedure website, with all interested parties receiving notice by email as soon as replies were published on the site.

- 24 Sub-chapter 4.4 of the specifications was entitled ‘Suitability conditions/minimum conditions’. Those conditions were defined, in the introductory part of the specifications, as conditions to be satisfied by a tenderer in order that his tender could be taken into consideration, expressed either as grounds for exclusion or minimum conditions.
- 25 Sections 1 to 5 of the aforementioned sub-chapter 4.4 concerned, respectively, turnover, professional risk indemnity insurance, the tenderer’s experience, quality conditions and the evaluation of customer satisfaction.
- 26 Section 4 of the aforementioned sub-chapter 4.4, headed ‘Quality conditions’ contained a point 2, drafted as follows:

‘In the context of sustainable purchasing and socially responsible business the Province of North Holland requires that the supplier fulfil the criteria concerning sustainable purchasing and socially responsible business. In what way do you fulfil the criteria concerning sustainable purchasing and socially responsible business? It is also necessary to state in what way the supplier contributes to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production ...’

- 27 That condition was reiterated in section 6, the last point of that same sub-chapter 4.4, which contained a summary, inter alia of ‘Quality standards’ in the following terms:

‘11. Sustainability of purchases and [socially responsible business: knock-out criterion]’.

- 28 Headed ‘Minimum condition 1: Schedule of conditions’, section 1 of sub-chapter 5.2 of the specifications referred back to a separate annex and laid down that the tenderers had to comply with the schedule of conditions as set out therein.

- 29 Annex A to the specifications, headed ‘Schedule of conditions’ contained inter alia the following points:

‘31 The province of North Holland uses the Max Havelaar and EKO labels for coffee and tea consumption. ... [Assessment:] condition [.]

...

35 If possible, the ingredients should comply with the EKO and/or Max Havelaar labels. ... [Maximum] 15 [points. Assessment:] preferred[.]’

- 30 According to the annexes and the general scheme of the specifications that point 35 relates to certain ingredients used for the preparation of drinks with the exception of tea and coffee, such as milk, sugar and cocoa (‘the ingredients’).

C – The information notice

- 31 On 9 September 2008, the province of North Holland published points 11 and 12 of the information notice provided for under sub-chapter 2.3 of the specifications. Those points relate to a question concerning points 31 and 35 of Annex A to the specifications, worded as follows: ‘Can we assume in respect of the stated labels “or equivalent” applies[?]’ The contracting authority replied as follows:

‘00011 ... [point] 31 ...

...

In so far as the criteria are equivalent or identical.

00012 ... [point] 35 ...

...

The ingredients may bear a label based on the same criteria.'

- 32 According to the notice published in the *Official Journal of the European Union* on 24 December 2008, the contract was awarded to the Netherlands company Maas International.

D – The EKO and MAX HAVELAAR labels

- 33 According to the Commission's arguments, which are not disputed in that regard by the Kingdom of the Netherlands, the EKO and MAX HAVELAAR labels have the following characteristics.

1. The EKO label

- 34 The private Netherlands label EKO is granted to products made up of at least 95% of ingredients from organic agricultural production. It is administered by a foundation established under Netherlands private law which has the objective of promoting organic agriculture such as that covered, at the time of the facts in the main proceedings, by Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs (OJ 1991 L 198, p. 1), as amended by Council Regulation (EC) No 392/2004 of 24 February 2004 (OJ 2004 L 65, p. 1) ('Regulation No 2092/91') and to combat fraud. That foundation was designated as the competent authority responsible for checking compliance with the obligations laid down by that regulation.

- 35 EKO is a trade mark registered at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM).

2. The MAX HAVELAAR label

- 36 The MAX HAVELAAR label is also a private label administered by a foundation established under Netherlands private law, in conformity with the rules laid down by an international umbrella organisation, the Fairtrade Labelling Organisation (FLO). It is used in a number of countries, including the Netherlands.

- 37 The label is intended to promote the marketing of fair trade products and certifies that the products in respect of which it is granted are purchased at a fair price and under fair conditions from organisations made up of small-scale producers in developing countries. In that regard, the grant of that label is based on compliance with four criteria: the price must cover all the costs; it must contain a premium compared to the market price; production must be subject to pre-financing and the importer must have long-term trading relationships with the producers. The FLO carries out both the audit and the certification.

- 38 MAX HAVELAAR is also a trade mark registered at OHIM.

III – The pre-litigation procedure and the procedure before the Court of Justice

- 39 The Commission sent a letter of formal notice to the Kingdom of the Netherlands on 15 May 2009. According to that letter, the specifications stipulated by the province of North Holland in the context of the contract at issue infringed Directive 2004/18 by imposing the MAX HAVELAAR and EKO labels, or labels based on comparable or identical criteria, in respect of the tea or coffee to be supplied, by using those labels as an award criterion for the ingredients and evaluating the technical and professional abilities of tenderers on the basis of suitability criteria which do not form part of the complete system provided for in that regard by that directive.
- 40 By letter of 17 August 2009, the Kingdom of the Netherlands admitted that the contract at issue contained lacunae with regard to that directive, which however did not have effect of disadvantaging certain economic operators who may be interested, while disputing a number of the Commission's complaints.
- 41 On 3 November 2009, the Commission sent the Netherlands a reasoned opinion in which it repeated the complaints already made, calling upon the Netherlands to take all the measures necessary to comply with that opinion within the period of two months from receipt thereof.
- 42 By letter of 31 December 2009, that Member State argued that there was no foundation for the position supported by the Commission.
- 43 Consequently, the Commission decided to bring the present action.
- 44 By order of the President of the Court of 11 February 2011, the Kingdom of Denmark was granted leave to intervene in support of the form of order sought by the Kingdom of the Netherlands. Note was taken of the withdrawal of that intervention by order of the Third Chamber of the Court of 14 November 2011.

IV – The action

- 45 The Commission submits three pleas in law in support of its action.
- 46 The first and third pleas concern the use of the labels EKO and MAX HAVELAAR in the context, first, of the technical specifications of the contract at issue concerning the coffee and tea to be supplied and, second, of the award criteria concerning the ingredients to be supplied. The first plea contains two parts, alleging, first, infringement of Article 23(6) of Directive 2004/18, regarding the use of the EKO label and, second, Article 23(8) of that directive regarding the use of the MAX HAVELAAR label. The third plea relates to the infringement of Article 53(1) of that directive and is based on two complaints, the Commission claiming that the latter provision precludes the use of labels and that the abovementioned labels were not linked to the subject-matter of the contract at issue.
- 47 The second plea refers to the compliance, by the tenderers, with the 'criteria of sustainable purchasing and socially responsible business'. It is subdivided into three parts alleging the infringement, respectively, of Articles 44(2), first subparagraph, and 48 of Directive 2004/18, since that condition does not correspond to one of those linked to the subject-matter of the contract, and of the transparency obligation provided for in Article 2 of that directive, since the concepts 'sustainable purchasing' and 'socially responsible business' lacked sufficient clarity.

A – Preliminary observations

1. Applicability of Directive 2004/18

48 It must be noted, first, that the contract at issue, which consists in the making available, in the context of a hire contract, and in the maintenance of drinks dispensers and the supply of the products required for them to function, constitutes a public supply contract within the meaning of Article 1(2)(c) of Directive 2004/18.

49 Second, the estimate made by the Commission concerning the estimated value of the contract, that is EUR 760 000, is not disputed by the Kingdom of the Netherlands. It must therefore be held that the directive applies to that contract in the light of the thresholds laid down in Article 7 thereof.

2. Consideration of the scope of the conditions and of the preference referred to in the context of the first and third pleas

50 The parties disagree with regard to the meaning of the condition and of the preference mentioned, respectively, in points 31 and 35 of Annex A to the specifications. The Commission submits, with reference to those points, that that condition and preference refer to the fact that the products concerned are to bear the EKO and/or MAX HAVELAAR labels, or at least labels based on equivalent or identical criteria, if points 11 and 12 of the information notice are taken into consideration. According to the Kingdom of the Netherlands, it is apparent on the contrary from section II, point 1.5 of the contract notice and sub-chapter 1.3 of the specifications that the contracting authority required or expressed the preference that products of organic agricultural production and fair trade be supplied, the mentioning of those labels or of equivalent labels being only illustrative of the criteria to be complied with.

51 It must, first, be held that the specifications cannot be interpreted as proposed by the Kingdom of the Netherlands.

52 In that regard, it must be recalled that the meaning of the specifications must be determined by adopting the perspective of potential tenderers since the aim of the procedures for the award of public works contracts laid down in Directive 2004/18 is precisely to guarantee to potential tenderers established in the European Union access to public contracts of interest to them (see Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 53). Thus, in the present case, the specifications could be understood by the potential tenderers only as referring to the possession of the labels mentioned in the context of the requirement or preference in question.

53 That requirement and preference were stated in the annex to the specifications containing the 'Requirements Schedule' with which, in conformity with sub-chapter 5.2, section 1 of the specifications, the tenders had to comply, as it was drafted. Points 31 and 35 of that schedule referred explicitly and without reservation to the EKO and MAX HAVELAAR labels, to the exclusion of all alternatives, the submission of which was in any case prohibited under sub-chapter 3.4 of the specifications. In those circumstances, it cannot be conceded that the reference, which is lacking in clarity, to the effect that '[a]n important aspect is the desire of the province of North Holland to increase the use of organic and fair trade products in automatic coffee machines' contained in section II, point 1.5, of the contract notice and sub-chapter 1.3 of the specifications, that is to say, not in the parts of the contract documents dealing with conditions or preferences of the contracting authority, was such as to show that

the requirement and preference in question alluded in a generic fashion to the fact that the products concerned were organic or fair trade produce.

- 54 Second, the later clarifications in points 11 and 12 of the information notice, according to which the reference to the EKO and MAX HAVELAAR labels in the condition and preference also covered equivalent labels, that is to say based on identical or comparable award criteria, cannot be taken into consideration under Article 39(2) of Directive 2004/18.
- 55 While, as the Advocate General states in paragraph 71 of her Opinion, additional information relating to the specifications and any supporting documents, referred to in that provision, may clarify certain points or supply certain information, they cannot change, even by means of corrections, the meaning of the essential contractual conditions, to which category the technical specifications and the award criteria belong, as those conditions were formulated in the specifications, upon which the economic operators concerned legitimately relied in taking the decision to prepare to submit a tender or, on the other hand, not to participate in the procurement procedure concerned. That is apparent both from the very use, in Article 39(2), of the expression ‘additional information’ and from the brief period of time, that is to say six days, allowed between the communication of such information and the deadline for receipt of the tenders, in accordance with that provision.
- 56 In that regard, both the principle of equal treatment and the obligation of transparency which flows from it require the subject-matter of each contract and the criteria governing its award to be clearly defined from the beginning of the award procedure (see, to that effect, Case C-299/08 *Commission v France* [2009] ECR I-11587, paragraphs 41 and 43).
- 57 It must therefore be held that the contractual documents which determine the subject-matter and criteria governing the award of the contract required, first, that the coffee and tea to be supplied were to bear the EKO and MAX HAVELAAR labels and, second, expressed the preference that the ingredients to be supplied should bear the same labels.

B – The first plea in law, alleging infringement of Article 23(6) and (8) of Directive 2004/18 concerning the technical specifications concerning the coffee and tea to be supplied

- 58 The first plea relied upon by the Commission concerns the requirement mentioned in point 31 of Annex A to the specifications, which states that ‘The province of North Holland uses the MAX HAVELAAR and EKO labels for consumption of coffee and tea’.

1. The first plea relied on by the Commission alleging the infringement of Article 23(6) of Directive 2004/18 concerning the use of the EKO label in the context of the technical specifications relating to the coffee and tea to be supplied.

a) Arguments of the parties

- 59 By the first branch of the first plea, the Commission submits, in essence, that the requirement that the coffee and tea to be supplied must bear the EKO label or equivalent, that is to say certifying that they are products of organic agriculture, constitutes a description of the required characteristics of the products concerned, and therefore a technical specification subject to Article 23 of Directive 2004/18. Article 23(6) of the directive which authorises, subject to certain conditions, use of an eco-label, in order to describe environmental characteristics, does not however allow an eco-label as such to be prescribed.

60 For the Kingdom of the Netherlands, given that it is well known to economic operators active in the sector of activity concerned, the EKO label refers unequivocally, in the mind of such operators, to products of organic agriculture, by reference, at the time when the contractual documents were drafted, to Regulation No 2092/91. In any case, an economic operator concerned displaying ordinary care would have discovered without difficulty on the internet the description of the criteria referring to that label or could have asked the contracting authority about it. It would therefore be unrealistic to consider that the reference to the EKO label ran the risk of undermining the principle of equal treatment on the ground that a potential tenderer who did not understand that reference would have lost interest in the contract at issue or decisively delayed his actions.

b) Findings of the Court

61 As a preliminary point, it should be pointed out that, under Article 23(3)(b) of Directive 2004/18, the technical specifications may be formulated in terms of performance or functional requirements which may include environmental characteristics. According to recital 29 in the preamble to that directive, a given production method may constitute such an environmental characteristic. Therefore, as is agreed by the parties, the EKO label, in so far as it is based on environmental characteristics and fulfils the conditions listed in Article 23(6) of Directive 2004/18, constitutes an 'eco-label' within the meaning of that provision. Second, by laying down a requirement with regard to a characteristic of the tea and coffee to be supplied in connection with that label, the Province of North Holland has established, in that regard, a technical specification. It is therefore in the light of that last mentioned provision that this part of the first plea must be considered.

62 It must be recalled that under Article 2 of Directive 2004/18, which lays down the principles of awarding contracts, contracting authorities are to treat economic operators equally and non-discriminatorily and are to act in a transparent way. Those principles are of crucial importance with regard to the technical specifications, in the light of the risks of discrimination linked to the choice of those specifications or the manner in which they are formulated. Thus, Article 23(2) and (3)(b) and the last sentence of recital 29 in the preamble to Directive 2004/18 state that the technical specifications must afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition and be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contracts, being clearly indicated, so that all tenderers know what the requirements established by the contracting authority cover. It is therefore in the light of those considerations that Article 23(6) of Directive 2004/18 must be interpreted.

63 The text of the first subparagraph of that provision, with regard to the requirements concerning environmental characteristics, confers on contracting authorities the option to use the detailed specifications of an eco-label, but not the eco-label as such. The requirement to be precise, laid down in Article 23(3)(b) of Directive 2004/18 — to which Article 23(6) of the directive refers — and expressly stated in the last sentence of recital 29 in the preamble to the directive, precludes an extensive interpretation of that provision.

64 Admittedly, in order to facilitate compliance with such a requirement, the second sub-paragraph of Article 23(6) also authorises the contracting authorities to indicate that the products bearing the eco-label, the detailed specifications of which they used, are presumed to comply with the specifications concerned. That second sub-paragraph does not however extend the scope of Article 23(6) because it permits recourse to the eco-label itself only

indirectly, as proof of compliance with ‘the technical specifications laid down in the contract documents’.

- 65 According to that second sub-paragraph of Article 23(6) of Directive 2004/18, the contracting authorities must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.
- 66 As to the remainder, it should be noted that while, as is also pointed out by the Kingdom of the Netherlands, the contracting authority has the right to expect that the economic operators concerned are informed and reasonably aware, such a legitimate expectation nevertheless assumes that the contracting authority itself formulated its requirements clearly (see, to that effect, Case C-423/07 *Commission v Spain* [2010] ECR I-3429, paragraph 58). *A fortiori*, that expectation cannot be relied upon to relieve the contracting authorities of the obligations imposed on them by Directive 2004/18.
- 67 Moreover, far from constituting an excessive regard for formalities, the obligation of the contracting authority to mention expressly the detailed environmental characteristics it intends to impose even where it refers to the characteristics defined by an eco-label, is indispensable in order to allow potential tenderers to refer to a single official document, coming from the contracting authority itself and thus without being subject to the uncertainties of searching for information and the possible temporal variations in the criteria applicable to a particular eco-label.
- 68 In addition, it must be noted that the objection of the Kingdom of the Netherlands that, since the EKO label provides information relating to the organic origin of products bearing that label, the reference to detailed characteristics would have required it to list all the requirements of Regulation No 2092/91, which would have been much less clear than referring to that label, is irrelevant. Directive 2004/18 does not preclude, in principle, a reference, in the contract notice or contract documents, to legislative or regulatory provisions for certain technical specifications where such a reference is, in practice, unavoidable, provided that it is accompanied by all the additional information required by that directive (see, by analogy, *Commission v Spain*, paragraphs 64 and 65). Thus, since the marketing, in the European Union, of products obtained from organic agriculture and presented as such must comply with relevant European Union legislation, a contracting party may, if appropriate, without disregarding the concept of ‘technical specification’ within the meaning of point 1(b) of Annex VI to Directive 2004/18 or Article 23(3) thereof, state in the contract documents that the product to be supplied must comply with Regulation No 2092/91 or with any other subsequent regulation replacing that regulation.
- 69 With regard to the later clarification made to point 11 of the information notice, according to which the reference to the EKO label also covered an equivalent label, it must be stated, in addition to what has been stated in points 54 to 56 above, that such a clarification cannot, in any event, compensate for the failure to identify the detailed technical specifications corresponding to the label concerned.
- 70 It follows from the foregoing considerations that by requiring, in the contract documents, that certain products to be supplied were to bear a specific eco-label, rather than using the detailed specifications defined by that eco-label, the province of North Holland established a technical specification which was incompatible with Article 23(6) of Directive 2004/18. Therefore, the first part of the first plea is well founded.

2. The second part of the first plea, alleging infringement of Article 23(8) of Directive 2004/18 concerning use of the MAX HAVELAAR label in relation to the technical specifications concerning the coffee and tea to be supplied

a) Arguments of the parties

71 By the second part of its first plea, the Commission submits, in essence, that the requirement that the coffee and tea to be supplied should bear the MAX HAVELAAR label or another equivalent label, that is to say showing that they are fair trade products, is a description of the required characteristics of the products concerned and therefore a technical specification subject to Article 23 of Directive 2004/18. That requirement would infringe Article 23(8) which prohibits, in principle, technical specifications from 'refer[ring] to a specific ... source, or a particular process, or to trade marks ... or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products': the abovementioned label, which corresponds to a registered mark, falls within each of those categories.

72 First, the Kingdom of the Netherlands disputes that the criteria on which the MAX HAVELAAR label is based may be construed as requirements relating to a process or method of production, submitting that they are social conditions applicable to the acquisition of the products to be supplied in the context of the performance of the contract in question, covered by the concept of 'conditions for performance of the contract' within the meaning of Article 26 of Directive 2004/18. In the alternative, supposing that the requirement concerning the label were to be regarded as a technical specification, it rejects the proposition that Article 23(8) applies.

b) Findings of the Court

73 As stated in paragraph 37 above, the MAX HAVELAAR label describes products of fair trade origin purchased at a price and under conditions more favourable than those determined by market forces from organisations made up of small-scale producers in developing countries. According to the file, that label is based on four criteria, that is to say: the price must cover all the costs; it must contain a supplementary premium compared to the market price; production must be subject to pre-financing and the importer must have long-term trading relationships with the producers.

74 Such criteria do not correspond to the definition of the concept of technical specification in paragraph 1(b) of Annex VI to Directive 2004/18, given that that definition applies exclusively to the characteristics of the products themselves, their manufacture, packaging or use, and not to the conditions under which the supplier acquired them from the manufacturer.

75 By contrast, compliance with those criteria does fall under the concept of 'conditions for performance of contracts' within the meaning of Article 26 of that directive.

76 Pursuant to the article, the conditions governing the performance of a contract may, in particular, refer to social considerations. Thus, to require that the tea and coffee to be supplied must come from small-scale producers in developing countries, subject to trading conditions favourable to them, falls within those considerations. Accordingly, the lawfulness of such a requirement must be examined in the light of the aforesaid Article 26.

77 It must however be noted that, in the context of the pre-litigation procedure and also in the application initiating proceedings, the Commission criticised the clause concerning the

specifications on the basis of Article 23(8) of that directive alone, claiming only at the stage of its rejoinder that the arguments developed in that regard applied *mutatis mutandis* to a condition for performance governed by Article 26 thereof.

78 Since the subject-matter of the proceedings under Article 258 TFEU is delimited by the pre-litigation procedure provided for in that provision, those proceedings must be based on the same grounds and pleas as the reasoned opinion, meaning that if a complaint was not included in the reasoned opinion, it is inadmissible at the stage of proceedings before the Court (see, to that effect, Case C-305/03 *Commission v United Kingdom* [2006] ECR I-1213, paragraph 22 and case-law cited).

79 Accordingly, the second part of the first plea must be rejected as inadmissible.

C – The third plea, alleging infringement of Article 53(1) of Directive 2004/18 concerning the award criteria relating to the ingredients to the supplied

80 The third plea is linked to the first, since the Commission refers therein to the resort, in the contract documents, to the EKO and MAX HAVELAAR labels, but as an award criterion within the meaning of Article 53 of Directive 2004/18.

81 As a preliminary point, it must be noted that, as held in paragraphs 51 to 57 above, by reference to the contract documents which determine the award criteria for the contract, the province of North Holland established an award criterion which consists in the fact that the ingredients to be supplied are to bear the EKO and/or MAX HAVELAAR labels.

1. Arguments of the parties

82 The Commission submits, in essence, that such an award criterion infringes Article 53 of Directive 2004/18 in two respects. First, it is not linked to the subject-matter of the contract, in so far as the criteria underlying the EKO and MAX HAVELAAR labels do not concern the products to be supplied themselves, but the general policy of the tenderers, especially in the case of the MAX HAVELAAR label. Second, that award criterion is not compatible with the requirements regarding equal access, non-discrimination and transparency, having the effect inter alia of disadvantaging potential tenderers who are not from the Netherlands or who do not hold the EKO and/or MAX HAVELAAR labels for their products.

83 According to the Kingdom of the Netherlands, the award criterion in question is transparent, objective and non-discriminatory. Those labels are well-known to the economic operators in the sector of activity concerned, they are based on underlying criteria derived from the European Union legislation concerning organic production of agricultural products (with regard to the EKO label), or determined by the body which grants the label and potentially accessible to all the economic operators concerned (with regard to the MAX HAVELAAR label) and a potential tenderer exercising ordinary care can in any case easily inform himself about those underlying criteria. In addition, Directive 2004/18 does not impose, with regard to the award criteria, the same requirements as for the technical specifications, as provided for in Article 23 of that directive, and logically so, since it is not necessary that all the tenderers should be able to fulfil an award criterion. Finally, the award criterion at issue is linked to the subject-matter of contract, which concerns inter alia the supply of organic fair trade products, compliance with that criterion providing an indication of the quality of the tenders so making it possible to assess their value for money.

2. Findings of the Court

- 84 It must be pointed out, first, that under Article 53(1)(a) of Directive 2004/18, where, as in the present case, a contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender from the point of view of that authority, the authority must base its decision on various criteria which are for it to determine in compliance with the requirements of the directive, that provision containing, as follows from the use of the phrase ‘for example’, a non-exhaustive list of the possible criteria.
- 85 Article 53 of Directive 2004/18 is further elucidated by recital 46 in the preamble to the directive, the third and fourth paragraphs of which lay down that the award criteria may, in principle, be not only economic but also qualitative. Thus, among the examples referred to in Article 53(1)(a) of the directive, are environmental characteristics. As the Advocate General points out in point 103 of her Opinion, the fourth paragraph of that recital also indicates that ‘a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs — defined in the specifications of the contract — of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong’. It must therefore be accepted that contracting authorities are also authorised to choose the award criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons.
- 86 Second, Article 53(1)(a) of Directive 2004/18 requires that the award criteria be linked to the subject-matter of the contract. In that regard, recital 46 in the preamble lays down, in its third paragraph, that ‘the determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured’, the ‘most economically advantageous tender’ being ‘[that] which ... offers the best value for money’.
- 87 Third, as follows from the first and fourth paragraphs of that recital, compliance with the principles of equality, non-discrimination and transparency requires that the award criteria are objective, ensuring that tenders are compared and assessed objectively and thus in conditions of effective competition. That would not be the case for criteria having the effect of conferring on the contracting authority an unrestricted freedom of choice (see, with regard to similar provisions of the predecessor directives to Directive 2004/18, Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 61 and case-law cited).
- 88 Fourth and finally, as noted in the second paragraph of that recital, the same principles require the contracting authority to ensure the procedure for awarding a public contract complies at every stage with both the principle of the equal treatment of potential tenderers and the principle of transparency of the award criteria, the formulation of the award criteria being such as to allow all reasonably well-informed tenderers exercising ordinary care to know the exact scope thereof and thus to interpret them in the same way (see, inter alia, with regard to the provisions of the predecessor directives to Directive 2004/18, Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraphs 56 to 58).
- 89 In order to assess the validity of the claim that there is an insufficient link between the award criterion at issue and the subject-matter of the contract, it is necessary, first, to take into consideration the criteria underlying the EKO and MAX HAVELAAR labels. As is clear from paragraphs 34 and 37 above, those underlying criteria characterise the products derived from,

respectively, organic agriculture and fair trade. With regard to the method of organic production subject to European Union legislation, that is, at the relevant time, Regulation No 2092/91, recitals (2) and (9) in the preamble to that regulation state that that method of production promotes environmental protection, inter alia because it implies significant restrictions on the use of fertilisers and pesticides. With regard to fair trade, it is clear from paragraph 37 above that the criteria laid down by the foundation which grants the MAX HAVELAAR label seek to promote the interests of small-scale producers in developing countries while maintaining trading relations with them which take into account the actual need of those producers, and not only the dictates of the market. It follows from those statements that the award criterion at issue concerned environmental and social characteristics falling within the scope of Article 53(1)(a) of Directive 2004/18.

- 90 Second, it must be held that, in accordance with the description of the contract in sub-chapter 1.4 of the specifications, that contract concerned in particular the supply of coffee, tea and the other ingredients required for the manufacture of the drinks available in the dispensers. It also follows from the drafting of the award criterion at issue that it covered only the ingredients to be supplied in the framework of that contract, without any bearing on the general purchasing policy of the tenderers. Therefore, those criteria related to products the supply of which constituted part of the subject-matter of that contract.
- 91 Finally, as is apparent from point 110 of the Advocate General's Opinion, there is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof. The Court held thus, in paragraph 34 of *EVN and Wienstrom*, that European Union legislation on public procurement does not preclude, in the context of a contract for the supply of electricity, a contracting authority from applying an award criterion requiring that the electricity supplied be produced from renewable energy sources. There is therefore nothing, in principle, to preclude such a criterion from referring to the fact that the product concerned was of fair trade origin.
- 92 It must therefore be held that the award criterion at issue is linked — as required by Article 53(1)(a) of Directive 2004/18 — to the subject-matter of the contract concerned, meaning that the Commission's claim in that regard is unfounded.
- 93 With regard to the complaint that the province of North Holland required the possession of specific labels in its award criterion, it must be noted that, under point 35 in Annex A to the specifications, the contracting authority provided that where the ingredients to be supplied bore the EKO and/or MAX HAVELAAR labels that would result in the award of a certain number of points in the classification of the competing tenders for the purposes of the award of the contract. That condition must be examined in the light of the requirements of precision and objectivity which apply to contracting authorities in that regard.
- 94 With regard to the specific issue of the use of labels, the European Union legislature gave certain precise indications concerning the implications of those requirements in the context of the technical specifications. As is evident from paragraphs 62 to 65 above, after having stated, in Article 23(3)(b) of Directive 2004/18, that those specifications must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract, in Article 23(6) of the directive the legislature authorised the contracting authorities to have recourse to the criteria underlying an eco-label in order to establish certain characteristics of a product, but not to make an eco-label a technical specification, use of such a label being allowed only in order to create a presumption that the

products bearing that label comply with the characteristics thus defined, expressly subject to any other appropriate means of proof being allowed.

- 95 Contrary to what is argued by the Kingdom of the Netherlands, there is no reason to consider that the consequences of the principles of equality, non-discrimination and transparency are different where award criteria are concerned, such criteria also being essential conditions of a public contract, since they will determine the choice of the successful tender from among those which satisfy the requirements expressed by the contracting authority in the technical specifications.
- 96 With regard to the clarification subsequently made to paragraph 12 of the information notice, according to which the reference to the EKO and MAX HAVELAAR labels also covered equivalent labels, it must be stated, in addition to what is said in paragraphs 54 to 56 above, that such a clarification cannot, in any event, compensate for the lack of precision regarding the criteria underlying the labels concerned.
- 97 It follows from all the foregoing considerations that by providing, in the specifications, that the fact that certain products to be supplied bore specific labels would give rise to the grant of a certain number of points in the choice of the most economically advantageous tender, without having listed the criteria underlying those labels and without having allowed proof that a product satisfies those underlying criteria by all appropriate means, the province of North Holland established an award criterion that was incompatible with Article 53(1)(a) of Directive 2004/18. Therefore, to that extent, the third plea in law is well founded.

D – The second plea in law, alleging infringement of Articles 2, 44(2) and 48 of Directive 2004/18 concerning the requirement of compliance with the criteria of ‘sustainability of purchases’ and ‘socially responsible business’

- 98 The second plea, which is made up of four parts, refers to the requirement, laid down in point 2 of section 4 of sub-chapter 4.4. of the specifications, that the contracting authority, in essence, comply with the ‘criteria of sustainability of purchases and socially responsible business’, inter alia by contributing to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production, the tenderers having been asked to state how they meet those criteria.

1. Arguments of the parties

- 99 By the first part of this plea, the Commission submits that the requirement in question constitutes a minimum level of technical ability contrary to the first paragraph of Article 44(2) and to Article 48 of Directive 2004/18, in so far as it falls outside the criteria provided for in that article, which establishes a complete system. The Kingdom of the Netherlands contends, first, that that requirement amounts in reality to a condition for the performance of the contract governed by Article 26 of the directive. In the alternative, it considers that that requirement is part of the system established in Article 48 of Directive 2004/18, by reference to Article 48(2)(c) thereof, which refers to a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking’s study and research facilities. By the same requirement, the tenderers could have shown that they were capable of performing the contract by meeting the necessary qualitative criteria.
- 100 The second part of this plea, alleging infringement of the second paragraph of Article 44(2) of Directive 2004/18 refers to the absence of a link, at least a sufficient one, between the

requirement at issue and the subject-matter of the contract at issue, which is disputed by the defendant Member State since, in its view, the sustainability of purchases and socially responsible business are consistent with a market relating, inter alia, to the supply of coffee and tea derived from organic agriculture and fair trade.

101 By the third part of the second plea, the Commission claims that Article 2 of Directive 2004/18 has been infringed because the terms ‘sustainability of purchases’ and ‘socially responsible business’ lack sufficient clarity. That is not so, according to the Kingdom of the Netherlands since, inter alia, those expressions are understood by all reasonably informed undertakings and extensive information is available about them on the internet.

2. Findings of the Court

a) Classification of the clause concerned in the specifications

102 The parties disagree regarding the classification of the requirement at issue, according to which the tenderers must comply with the ‘criteria of sustainability of purchases and socially responsible business’, inter alia by contributing to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production. The Commission submits that that requirement concerned the tenderers’ general policy and therefore related to their technical and professional ability within the meaning of Article 48 of Directive 2004/18. By contrast, according to the Kingdom of the Netherlands, that requirement applied to the contract at issue, meaning that it was a condition for performance of the contract within the meaning of Article 26 of that directive.

103 The last mentioned argument cannot be accepted. The clause at issue appears in section 4 of sub-chapter 4.4 of the specifications, entitled ‘Suitability requirements/minimum levels’, which corresponds to the terminology used inter alia in the title and Article 44(2) of Directive 2004/18, which refers to Articles 47 and 48 thereof, entitled respectively ‘Economic and financial standing’ and ‘Technical and/or professional ability’. Furthermore, the first three sections of that sub-chapter concerned the minimum levels required by the contracting authority with regard to turnover, professional risk indemnity insurance and the experience of the tenderers, that is to say factors to which reference is made expressly in those Articles 47 and 48. In addition, the ‘suitability requirements’ were defined in the introductory part of the specifications as requirements expressed either as grounds for exclusion or minimum levels to be satisfied by a tenderer so that his tender could be taken into consideration, being thus distinct from the tender as such. Finally, the requirement at issue was formulated in a general way and not specifically in relation to the contract at issue.

104 It follows from those considerations that potential tenderers could have considered that requirement as referring only to a minimum level of professional capacity required by the contracting authority within the meaning of Articles 44(2) and 48 of Directive 2004/18. It is therefore in the light of those provisions that the lawfulness of that requirement must be assessed.

b) The alleged infringement of Articles 44(2) and 48 of Directive 2004/18

105 As Article 48(1) to 48(6) render apparent, Article 48 exhaustively lists the factors on the basis of which the contracting authority may evaluate and assess the technical and professional abilities of the tenderers. Moreover, while Article 44(2) authorises the contracting authority to establish minimum capacity levels which tenderers must satisfy in order that their tender can

be taken into consideration for the award of the contract, those levels can be fixed only, pursuant to the first paragraph of Article 44(2), by reference to the factors listed in Article 48 of the directive, concerning technical and professional ability.

- 106 Contrary to what is argued by the Kingdom of the Netherlands, the requirement of respect for the 'criteria of sustainable purchasing and socially responsible business' is not connected to any of those factors.
- 107 In particular, the information requested pursuant to that requirement, that is to say the statement of '[in what way the tenderer] fulfils the criteria of sustainable purchasing and socially responsible business [and] contributes to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production' cannot be assimilated to 'a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking's study and research facilities' referred to in Article 48(2)(c) of Directive 2004/18. The term 'quality' which is used not only in that provision but also in subparagraphs (b), (d) and (j) of that paragraph must, in the context of that Article 48, be understood as the technical quality of the services provided or supplies of a kind similar to that of the services or supplies which constitute the subject-matter of the contract concerned, the contracting authority being entitled to require that the tenderers inform it how they check and guarantee the quality of those services or supplies, to the extent provided for in those subparagraphs.
- 108 It follows from those foregoing considerations that by requiring, on the basis of suitability requirements and minimum capacity levels stated in the specifications, that tenderers comply with the criteria of sustainable purchasing and socially responsible business and state how they comply with those criteria and contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production, the province of North Holland established a minimum level of technical ability not authorised by Articles 44(2) and 48 of Directive 2004/18. Therefore, the first branch of the second plea is well founded.

c) Alleged infringement of Article 2 of Directive 2004/18

- 109 The principle of transparency implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract (see, inter alia, Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I-3801).
- 110 As the Advocate General stated in paragraph 146 of her Opinion, it must be held that the requirements relating to compliance with the 'criteria of sustainability of purchases and socially responsible business' and the obligation to 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production' are not so clear, precise and unequivocal as to enable all reasonably informed tenderers exercising ordinary care to be completely sure what the criteria governing those requirements are. The same applies, and all the more so, in relation to the requirement addressed to tenderers that they state in their tender 'in what way [they] fulfil' those criteria or 'in what way [they] contribute' to the goals sought by the contracting authority with regard

to the contract and to coffee production, without precisely indicating to them what information they must provide.

111 Therefore, by requiring tenderers, in the specifications at issue, to comply with ‘the criteria of sustainable purchasing and socially responsible business’, to ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’ and to state in their tender ‘in what way [they] fulfil’ those criteria or ‘in what way [they] contribute’ to the goals sought by the contracting authority with regard to the contract and to coffee production, the province of North Holland established a clause which does not comply with the obligation of transparency provided for in Article 2 of Directive 2004/18.

112 Accordingly, it follows from all of the foregoing considerations that because, in the tendering procedure for a public contract for the supply and management of coffee machines, which was the subject of a contract notice published in the *Official Journal of the European Union* on 16 August 2008, the province of North Holland:

- established a technical specification incompatible with Article 23(6) of Directive 2004/18 by requiring that certain products to be supplied were to bear a specific eco-label, rather than using detailed specifications;
- established award criteria incompatible with Article 53(1)(a) of that directive by providing that the fact that certain products to be supplied bore specific labels would give rise to the grant of a certain number of points in the choice of the most economically advantageous tender, without having listed the criteria underlying those labels and without having allowed proof that a product satisfies those underlying criteria by all appropriate means;
- established a minimum level of technical ability not authorised by Articles 44(2) and 48 of that directive by requiring, on the basis of suitability requirements and minimum capacity levels stated in the specifications, that tenderers comply with the ‘criteria of sustainable purchasing and socially responsible business’ and state how they comply with those criteria and ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’, and
- prescribed a clause contrary to the obligation of transparency provided for in Article 2 of that directive by requiring that tenderers comply with ‘the criteria of sustainable purchasing and socially responsible business’ and state how they comply with those criteria and ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’,

the Kingdom of the Netherlands has failed to fulfil its obligations under the aforementioned provisions. Those considerations also mean that the action must be dismissed as to the remainder.

V – Costs

113 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the

Commission has applied for costs and the Kingdom of the Netherlands has been unsuccessful in its pleas, the latter must be ordered to pay the costs.

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

1. Declares that, on account of the fact that, in the tendering procedure for a public contract for the supply and management of coffee machines, which was the subject of a contract notice published in the *Official Journal of the European Union* on 16 August 2008, the province of North Holland:

- established a technical specification incompatible with Article 23(6) of Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007, by requiring that certain products to be supplied were to bear a specific eco-label, rather than using detailed specifications;
- established award criteria incompatible with Article 53(1)(a) of Directive 2004/18 by providing that the fact that certain products to be supplied bore specific labels would give rise to the grant of a certain number of points in the choice of the most economically advantageous tender, without having listed the criteria underlying those labels and without having allowed proof that a product satisfies those underlying criteria by all appropriate means;
- established a minimum level of technical ability not authorised by Articles 44(2) and 48 of Directive 2004/18 by requiring, on the basis of suitability requirements and minimum capacity levels stated in the specifications applicable in the context of that contract, that tenderers comply with the ‘criteria of sustainable purchasing and socially responsible business’ and state how they comply with those criteria and ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’, and
- prescribed a clause contrary to the obligation of transparency provided for in Article 2 of Directive 2004/18 by requiring that tenderers comply with ‘the criteria of sustainable purchasing and socially responsible business’ and state how they comply with those criteria and ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’,

the Kingdom of the Netherlands has failed to fulfil its obligations under the aforementioned provisions;

2. Dismisses the action as to the remainder;

3. Orders the Kingdom of the Netherlands to pay the costs.

C-599/10 SAG ELV Slovensko and Others

JUDGMENT OF THE COURT (Fourth Chamber)

29 March 2012 (*)

(Public procurement — Directive 2004/18/EC — Contract award procedures — Restricted call for tenders — Assessment of the tender — Requests by the contracting authority for clarification of the tender — Conditions)

In Case C-599/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Najvyšší súd Slovenskej republiky (Slovak Republic), made by decision of 9 November 2010, received at the Court on 17 December 2010, in the proceedings

SAG ELV Slovensko a.s.,

FELA Management AG,

ASCOM (Schweiz) AG,

Asseco Central Europe a.s.,

TESLA Stropkov a.s.,

Autostrade per l'Italia SpA,

EFKON AG,

Stalexport Autostrady SA

v

Úrad pre verejné obstarávanie,

intervening party:

Národná diaľničná spoločnosť a.s.,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, A. Prechal, K. Schiemann, C. Toader and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 14 December 2011,

after considering the observations submitted on behalf of:

- SAG ELV Slovensko a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe a.s. and TESLA Stropkov a.s., by R. Gorej, L. Vojčík and O. Gajdošech, avocats,
- Autostrade per l'Italia SpA, EFKON AG and Stalexport Autostrady SA, by L. Poloma and G.M. Roberti, avocats,
- the Úrad pre verejné obstarávanie, by B. Šimorová, acting as Agent,
- Národná diaľničná spoločnosť a.s., by D. Nemčíková and J. Čorba, advokát,
- the Slovak Government, by B. Ricziová, acting as Agent,
- the European Commission, by C. Zadra and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 2, 51 and 55 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).
- 2 The reference has been made in proceedings between the Úrad pre verejné obstarávanie (Public Procurement Office; 'the Úrad') and undertakings which were unsuccessful in a call for tenders launched during 2007 by Národná diaľničná spoločnosť a.s. ('NDS'), a commercial undertaking wholly controlled by the Slovak State, with a view to the supply of services relating to toll collection on motorways and certain roads.

Legal context

European Union law

- 3 Article 2 of Directive 2004/18 provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'
- 4 Article 51 of that directive which, within Title II, Chapter VII, thereof, forms part of Section 2, entitled 'Criteria for qualitative selection', states:

'The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50.'
- 5 Article 55 of that directive, which forms part of Section 3, entitled 'Award of the contract', provides:

'1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

- (a) the economics of the construction method, the manufacturing process or the services provided;
- (b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;
- (c) the originality of the work, supplies or services proposed by the tenderer;
- (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;
- (e) the possibility of the tenderer obtaining State aid.

2. The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

...'

National law

6 Article 42, entitled 'Procedure for assessment of tenders', of Law No 25/2006 on public procurement, in the version that the national court considers to be applicable to the main proceedings, provides:

'1. Tenders shall be assessed by a committee *in camera*. The committee shall assess the tenders having regard to compliance with the requirements of the contracting authority or contracting entity concerning the object of the contract and shall exclude tenders which fail to meet those requirements specified in the contract notice or in the notice used as a means of calling for competition and in the tender specifications. ...

In the evaluation of tenders with a variant, Article 37(3) shall be applied.

2. The committee may ask tenderers in writing to explain their tenders. However, it may not seek or accept a proposal from a tenderer to make a change that would give the tender an advantage.

3. Where a tender contains an abnormally low price, the committee shall ask the tenderer in writing to explain its price proposal. The request must be designed to obtain details of the basic characteristic parameters of the tender which the committee considers important and which apply in particular to:

- (a) the economics of the construction methods, manufacturing processes or the services provided;
- (b) the technical solution or particularly favourable conditions available to the tenderer for the delivery of supplies, performance of construction works, provision of service;

- (c) the special nature of the supplies, the construction works or the services proposed by the tenderer;
- (d) compliance with the laws relating to the protection of employment and labour conditions in force in the place of the supplies, construction works or services,
- (e) whether the tenderer may be granted State aid.

(4) The committee shall take into consideration the clarification of a tender or of an abnormally low price and the evidence provided by a tenderer. The committee shall exclude a tender in the case where:

- (a) the tenderer has failed to submit a written explanation within three working days from the date of receipt of a request for clarification, unless the committee has fixed a longer period, or
- (b) the clarification submitted fails to comply with the requirement under paragraphs (2) or (3).

...

(7) The committee shall assess tenders which have not been excluded pursuant to the criteria specified in the contract notice or in the notice used as a means of calling for competition or in the tender specifications, and on the basis of the rules of their application, as specified in the tender documents, which are non-discriminatory and support fair competition.

...'

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

- 7 NDS launched a restricted call for tenders by notice published in the *Official Journal of the European Union* on 27 September 2007, with a view to concluding a public contract having an estimated value in excess of EUR 600 million for the supply of toll collection services on motorways and certain roads.
- 8 In the course of that procedure, NDS sent requests for tender clarification to two groups of undertakings, including candidates. These were, firstly, SAG ELV Slovensko a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe a.s. and TESLA Stropkov a.s. ('SAG ELV and Others'), and, secondly, Autostrade per l'Italia SpA, EFKON AG and Stalexport Autostrady SA ('Slovakpass'). In addition to questions specific to each of the tenders relating to their technical aspects, those two groups were asked to provide clarification of the abnormally low prices which they had proposed. Answers were given to those questions.
- 9 Subsequently, SAG ELV and Others and Slovakpass were excluded from the procedure by decisions of 29 April 2008.
- 10 Those decisions were challenged before NDS, which upheld them, and subsequently before the competent administrative appeal body, the Úrad, which on 2 July 2008 in turn dismissed the appeals brought before it.

- 11 The Úrad took the view that, although one of the grounds put forward by NDS to justify the exclusion of the two groups concerned from the call for tender procedure, namely the failure to produce certificates for installations not yet approved, was unfounded, the other two grounds advanced did, however, justify that exclusion. Firstly, those two groups had failed to provide an adequate response to the request for clarification of the abnormally low price in their tenders. Secondly, those tenders failed to comply with certain conditions set out in the tender specifications, namely those in Article 11.1. P 1.20 as regards SAG ELV and Others, requiring, in essence, determination of the parameters enabling calculation of tolls as a function of the toll sections by season, days of the week, hours of the day, and those set out in Article 12. T. 1.5 as regards Slovakpass, requiring provision of a diesel-powered emergency electricity generator.
- 12 SAG ELV and Others and Slovakpass challenged those decisions before the Krajský súd Bratislava (Bratislava Regional Court) (Slovak Republic). By judgment of 6 May 2009, that court dismissed the action brought by SAG ELV and Others. Similarly, by judgment of 13 October 2009, it dismissed the actions brought by Slovakpass, which it had joined and which sought, first, annulment of the decision of the Úrad of 2 July 2008 and, second, annulment of the decision by which NDS had confirmed the soundness of its measure creating a tender assessment committee, also contested by Slovakpass.
- 13 Appeals against those two judgments were lodged before the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic). Having regard to the arguments raised by SAG ELV and Others and by Slovakpass, and in the light of the grounds relied on by the European Commission in the action for failure to fulfil obligations brought against the Slovak Republic because of irregularities in the public procurement procedure at issue in the main proceedings, the national court has doubts as to whether the NDS decisions concerned comply with the principles of European Union law on non-discrimination and transparency in the award of public contracts. In particular, it is unsure whether those principles preclude the contracting authority from being able to reject a tender on a ground alleging non-compliance with the tender specifications without first having asked the tenderer to clarify that failure to comply, or on a ground alleging that the price offered is abnormally low, without having questioned the tenderer sufficiently clearly on that point.
- 14 In those circumstances, the Najvyšší súd Slovenskej republiky decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
 - ‘1. Is the interpretation that, under Article 51, in conjunction with Article 2, of [Directive 2004/18], taking account of the principle[s] of non discrimination and transparency in the award of public contracts, the contracting authority is obliged to seek clarification of a tender, respecting the subjective procedural right of the individual to be requested to supplement or clarify certificates and documents submitted pursuant to Articles 45 to 50 of the Directive, if a disputable or unclear understanding of the tenderer’s bid could result in the exclusion of that tenderer, in conformity with the above Directive in the wording in effect in the relevant period?
 2. Is the interpretation that, under Article 51, in conjunction with Article 2, of [Directive 2004/18], taking account of the principle[s] of non discrimination and transparency in the award of public contracts, the contracting authority is not obliged to seek clarification of a tender if the contracting authority considers it established that the requirements regarding the subject matter of the contract have not been met, in conformity with the Directive in the wording in effect in the relevant period?

3. Is a provision of national law under which a committee established to evaluate tenders only may request tenderers in writing to clarify their bid in conformity with Article 51 and Article 2 of [Directive 2004/18] in the wording in effect in the relevant period?

Is a contracting authority's procedure, according to which it is not obliged to request a tenderer to clarify an abnormally low price, in conformity with Article 55 of [Directive 2004/18], and, on the formulation of the question put by the contracting authority to the applicants in connection with the abnormally low price, did [the applicants] have the opportunity to explain sufficiently the constituent features of the tender submitted?'

Admissibility of the questions referred

- 15 In accordance with settled case-law, questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 27 and the case-law cited).
- 16 In the light of those principles, the Slovak Government has argued, in its written observations, that the reference for a preliminary ruling is inadmissible on the ground, first, that, in the dispute brought before the national court by SAG ELV and Others, no complaint was raised regarding clarification of the tenders made in the public procurement procedure by the tenderers.
- 17 It is, however, common ground that the Court has received one single reference for a preliminary ruling made by the national court concerning two disputes which were brought before that court at the same time and which have been joined. Accordingly, the situation referred to by the Slovak Government as regards the appeal lodged by SAG ELV and Others could in any event affect the admissibility of that reference only if it were established that no complaint relating to the clarification of the offer of tenderers in the public procurement procedure had been raised in the other dispute in the main proceedings either. Since such a situation has not been established or even alleged, the first objection to admissibility must be rejected.
- 18 Second, the Slovak Government submits that that part of the national court's third question, which concerns the request for clarification of the abnormally low tender, as formulated by the contracting authority, has no bearing on the action brought by Slovakpass, in which the challenge related to the assessment made of that request by the court at first instance.
- 19 Although the Slovak Government submits in that regard that, in accordance with national procedural law, the national court could not consider a plea other than that which had been raised before it, such a complaint, which is thus based on a rule of national law, does not necessarily mean that the question referred is manifestly unconnected with the facts or subject-matter of the disputes in question.

- 20 Finally, it is common ground that, in the main proceedings, the unsuccessful tenderers were declared unsuccessful after the contracting authority had assessed the answers to the requests for clarification of the tenders which they had submitted. In those circumstances, the questions referred by the national court, which relate to the conditions in which such requests must or may be made, having regard to the requirements of European Union law, do not appear to be manifestly unconnected with the facts or subject-matter of the disputes in question.
- 21 Accordingly, it is appropriate for the Court to give a ruling.

Consideration of the questions referred

Preliminary observations

- 22 As the Slovak Government and the Commission have pointed out, it is necessary to note, firstly, that Article 51 of Directive 2004/18 is among the provisions which form part of Section 2 relating to the criteria for qualitative selection of tenderers. The provisions of that article are therefore irrelevant to the assessment which the Court must make in order to answer the questions which have been referred and which relate, having regard to the facts of the cases in the main proceedings, solely to that stage of the restricted call for tenders procedure in which, following selection of the tenderers entitled to submit a tender, it is for the contracting authority to assess those tenders. There is therefore no need for the Court to rule on the interpretation of Article 51 of Directive 2004/18.
- 23 Secondly, the fact that the contracting authority has, in the present proceedings, set up a committee responsible for assessing, on its behalf, the tenders submitted by the tenderers does not relieve that authority of its responsibility to comply with the requirements of European Union law in the field of public procurement. Thus, although the national court asks whether a provision of national law providing that the committee set up to assess the tenders can only ask the tenderers in writing to clarify the tender is compatible with European Union law, that question must be understood as being asked generally as if the contracting authority itself were placed in that position.
- 24 In those circumstances, the Court must understand the questions referred to it, taken as a whole, as seeking to ascertain to what extent contracting authorities, when they take the view, in a restricted public procurement procedure, that the tender submitted by a tenderer is abnormally low or imprecise or does not meet the technical requirements of the tender specifications, may or must seek clarification from the tenderer concerned, having regard to Articles 2 and 55 of Directive 2004/18.
- 25 With regard to Article 2 of Directive 2004/18, it must be borne in mind that the principal objectives of the European Union rules in the field of public procurement include that of ensuring the free movement of services and the opening-up to undistorted competition in all the Member States. In order to pursue that twofold objective, European Union law applies, inter alia, the principle of equal treatment of tenderers and the obligation of transparency resulting therefrom (see, to that effect, Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraphs 31 and 32 and the case-law cited). The obligation of transparency, for its part, is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority (see, to that effect, Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 111). As regards the award of contracts, Article 2 of Directive 2004/18 requires contracting authorities to comply with the same principles and obligations.

- 26 It is in the light of those considerations that the questions referred to the Court must be answered, by examining in turn the situation in which the contracting authority considers the tender to be abnormally low and that in which it takes the view that the tender is imprecise or does not meet the technical requirements of the tender specifications.

An abnormally low tender

- 27 It must be borne in mind that, under Article 55 of Directive 2004/18, if, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority must, before it may reject those tenders, 'request in writing details of the constituent elements of the tender which it considers relevant'.
- 28 It follows clearly from those provisions, which are stated in a mandatory manner, that the European Union legislature intended to require the awarding authority to examine the details of tenders which are abnormally low, and for that purpose obliges it to request the tenderer to furnish the necessary explanations to prove that those tenders are genuine (see, to that effect, Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraphs 46 to 49).
- 29 Accordingly, the existence of a proper exchange of views, at an appropriate time in the procedure for examining tenders, between the contracting authority and the tenderer, to enable the latter to demonstrate that its tender is genuine, constitutes a fundamental requirement of Directive 2004/18, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings (see, to that effect, *Lombardini and Mantovani*, paragraph 57).
- 30 In that regard, it must be borne in mind, firstly, that although the list in the second subparagraph of Article 55(1) of Directive 2004/18 is not exhaustive, it is also not purely indicative, and therefore does not leave contracting authorities free to determine which are the relevant factors to be taken into consideration before rejecting a tender which appears to be abnormally low (judgment of 23 April 2009 in Case C-292/07 *Commission v Belgium*, paragraph 159).
- 31 Secondly, in order for Article 55(1) of Directive 2004/18 to be effective, the contracting authority must set out clearly the request sent to the tenderers concerned so that they are in a position fully and effectively to show that their tenders are genuine.
- 32 It is, however, for the national court alone to ascertain, having regard to all the documents in the file placed before it, whether the request for clarification enabled the tenderers concerned to provide a sufficient explanation of the composition of their tender.
- 33 Furthermore, Article 55 of Directive 2004/18, far from precluding a provision of national legislation such as Article 42(3) of Law No 25/2006, which, in essence, provides that if a tenderer offers an abnormally low price, the contracting authority must ask it in writing to clarify its price proposal, requires the inclusion of such a provision in the national legislation on public procurement (see, to that effect, *Commission v Belgium*, paragraph 161).
- 34 Accordingly, Article 55 of Directive 2004/18 does preclude, in particular, a contracting authority from claiming, as the national court states in its third question, that it is not obliged to request a tenderer to clarify an abnormally low price.

An imprecise tender or one which does not meet the technical requirements of the tender specifications

- 35 In this regard, it must be noted that, in contrast to the situation concerning abnormally low prices, Directive 2004/18 does not contain any provision which expressly sets out the procedure to be followed in the event that the contracting authority finds, in a restricted public procurement procedure, that the tender submitted by a tenderer is imprecise or does not meet the technical requirements of the tender specifications.
- 36 By its very nature, the restricted public procurement procedure means that, once the tenderers have been selected and once their respective tenders have been submitted, in principle those tenders can no longer be amended either at the request of the contracting authority or at the request of the tenderers. The principle of equal treatment of tenderers and the obligation of transparency resulting therefrom preclude, in that procedure, any negotiation between the contracting authority and one or other of the tenderers.
- 37 To enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful, to the detriment of the other tenderers and in breach of the principle of equal treatment.
- 38 In any event, it does not follow from Article 2 or from any other provision of Directive 2004/18, or from the principle of equal treatment or the obligation of transparency, that, in such a situation, the contracting authority is obliged to contact the tenderers concerned. Those tenderers cannot, moreover, complain that there is no such obligation on the contracting authority since the lack of clarity of their tender is attributable solely to their failure to exercise due diligence in the drafting of their tender, to which they, like other tenderers, are subject.
- 39 Article 2 of Directive 2004/18 does not therefore preclude the absence, in national legislation, of a provision which would oblige the contracting authority to request tenderers, in a restricted public procurement procedure, to clarify their tenders in the light of the technical requirements of the tender specifications before rejecting them because they are imprecise or do not meet those requirements.
- 40 None the less, Article 2 of that directive does not preclude, in particular, the correction or amplification of details of a tender where appropriate, on an exceptional basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender. Nor does that article preclude a provision of national legislation such as Article 42(2) of Law No 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tender without, however, requesting or accepting any amendment to the tender.
- 41 In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat the various tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome.

- 42 In order to provide a useful answer to the national court, it must be added that a request for clarification of a tender may be made only after the contracting authority has looked at all the tenders (see, to that effect, *Lombardini and Mantovani*, paragraphs 51 and 53).
- 43 Furthermore, that request must be sent in an equivalent manner to all undertakings which are in the same situation, unless there is an objectively verifiable ground capable of justifying different treatment of the tenderers in that regard, in particular where the tender must, in any event, in the light of other factors, be rejected.
- 44 In addition, that request must relate to all sections of the tender which are imprecise or which do not meet the technical requirements of the tender specifications, without the contracting authority being entitled to reject a tender because of the lack of clarity of a part thereof which was not covered in that request.
- 45 Having regard to all of the foregoing considerations, the answer to the questions referred is that:
- Article 55 of Directive 2004/18 must be interpreted as requiring the inclusion in national legislation of a provision such as Article 42(3) of Law No 25/2006 on public procurement, which, in essence, provides that if a tenderer offers an abnormally low price, the contracting authority must ask it in writing to clarify its price proposal. It is for the national court to ascertain, having regard to all the documents in the file placed before it, whether the request for clarification enabled the tenderer concerned to provide a sufficient explanation of the composition of its tender;
 - Article 55 of Directive 2004/18 precludes a contracting authority from taking the view that it is not required to ask a tenderer to clarify an abnormally low price;
 - Article 2 of Directive 2004/18 does not preclude a provision of national law, such as Article 42(2) of Law No 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tenders without, however, requesting or accepting any amendment to the tenders. In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat the various tenderers equally and fairly, in such a way that a request for clarification cannot appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome.

The application for suspension of the effects of the judgment

- 46 The Slovak Government has requested the Court to limit in time the effects of the present judgment should it interpret the general principles referred to in Article 2 of Directive 2004/18 in such a way as to deduce from them an obligation on the part of the contracting authority to request a tenderer, in the context of the assessment of the conformity of a tender with the requirements relating to the subject-matter of the contract as defined in the tender specifications, to clarify its tender.
- 47 However, the interpretation of Article 2 of Directive 2004/18 arrived at in the present judgment does not lead to such a finding. The request of the Slovak Government is, accordingly and in any event, devoid of purpose.

Costs

- 48 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decisions on costs are a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 55 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as requiring the inclusion in national legislation of a provision such as Article 42(3) of Slovak Law No 25/2006 on public procurement, in the version applicable in the main proceedings, which, in essence, provides that if a tenderer offers an abnormally low price, the contracting authority must ask it in writing to clarify its price proposal. It is for the national court to ascertain, having regard to all the documents in the file placed before it, whether the request for clarification enabled the tenderer concerned to provide a sufficient explanation of the composition of its tender.

Article 55 of Directive 2004/18 precludes a contracting authority from taking the view that it is not required to ask a tenderer to clarify an abnormally low price.

Article 2 of Directive 2004/18 does not preclude a provision of national law, such as Article 42(2) of the abovementioned Law No 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tenders without, however, requesting or accepting any amendment to the tenders. In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat the various tenderers equally and fairly, in such a way that a request for clarification cannot appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome.

C-6/05 Medipac-Kazantzidis

JUDGMENT OF THE COURT (First Chamber)

14 June 2007 (*)

(Free movement of goods – Directive 93/42/EEC – Hospital purchase of medical devices bearing the CE marking – Protective measures – Public supply contract – Contract falling below the threshold of application of Directive 93/36/EEC – Principle of equal treatment and obligation of transparency)

In Case C-6/05,

REFERENCE for a preliminary ruling under Article 234 EC, by the Simvoulío tis Epikratias (Greece), made by decision of 17 November 2004, received at the Court on 5 January 2005, in the proceedings

Medipac-Kazantzidis AE

v

Venizelio-Pananio (PE.S.Y. KRITIS),

THE COURT (First Chamber),

composed of P. Jann, President of Chamber, K. Lenaerts, E. Juhász (Rapporteur), K. Schiemann and M. Ilešič, Judges,

Advocate General: E. Sharpston,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 June 2006,

after considering the observations submitted on behalf of:

- Medipac-Kazantzidis AE, by K. Giannakopoulos, dikigoros,
- Venizelio-Pananio (PE.S.Y. KRITIS), by V. Chasouraki-Damanaki, dikigoros, and M. Ntourontakis, director,
- the Greek Government, by S. Spyropoulos and by Z. Chatzipavlou and D. Tsagkaraki, acting as Agents,
- the Austrian Government, by M. Fruhmann, acting as Agent,

- the Commission of the European Communities, by M. Patakia and X. Lewis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 November 2006,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) ('Directive 93/36'), and Council Directive 93/42/EEC of 14 June 1993 concerning medical devices (OJ 1993 L 169, p. 1), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1) ('Directive 93/42').
- 2 The reference was made by the Simvoulío tis Epikratias (Greek Council of State) in the context of proceedings between the company Medipac-Kazantzidis AE ('Medipac') and Venizelio-Pananio (PE.S.Y. KRITIS) ('Venizelio-Pananio'), which is the general hospital of Heraklion, concerning an invitation to tender issued by that hospital and to which that company responded.

Legal context

Community legislation

- 3 Article 5(1) of Directive 93/36 provides:
 - '(a) Titles II, III and IV and Articles 6 and 7 shall apply to public supply contracts awarded by:
 - (i) the contracting authorities referred to in Article 1 (b), ... where the estimated value net of value-added tax (VAT) is not less than the equivalent in [euros] of 200 000 special drawing rights (SDRs);
 - ...
 - (b) This Directive shall apply to public supply contracts for which the estimated value equals or exceeds the threshold concerned at the time of publication of the notice in accordance with Article 9(2);
 - ...
 - (d) The thresholds laid down in subparagraph (a) and the values of the thresholds expressed in [euros] and in national currencies shall be published in the *Official Journal of the European Communities* at the beginning of the month of November which follows the revision laid down in the first paragraph of subparagraph (c).'
- 4 The values of the thresholds provided for by the directives governing public contracts applicable as from 1 January 2002 were published in the *Official Journal of the European*

Communities of 27 November 2001 (OJ 2001 C 332, p. 21). A table in point 1 of that notice shows that 200 000 SDR is equivalent to EUR 249 681.

5 The 3rd, 5th, 8th, 13th, 17th and 21st recitals in the preamble to Directive 93/42 state:

‘Whereas the national provisions for the safety and health protection of patients, users and, where appropriate, other persons, with regard to the use of medical devices should be harmonised in order to guarantee the free movement of such devices within the internal market;

...

Whereas medical devices should provide patients, users and third parties with a high level of protection and attain the performance levels attributed to them by the manufacturer; whereas, therefore, the maintenance or improvement of the level of protection attained in the Member States is one of the essential objectives of this Directive;

...

Whereas, in accordance with the principles set out in the Council resolution of 7 May 1985 concerning a new approach to technical harmonisation and standardisation ..., rules regarding the design and manufacture of medical devices must be confined to the provisions required to meet the essential requirements; whereas, because they are essential, such requirements should replace the corresponding national provisions; whereas the essential requirements should be applied with discretion to take account of the technological level existing at the time of design and of technical and economic considerations compatible with a high level of protection of health and safety;

...

Whereas, for the purpose of this Directive, a harmonised standard is a technical specification (European standard or harmonisation document) adopted, on a mandate from the Commission, by either [the European Committee for standardisation (CEN) or by the European Committee for Electrotechnical Standardisation (Cenelec)] or both of these bodies in accordance with Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations ..., and pursuant to the ... [general guidelines on cooperation between the Commission and these two bodies signed on 13 November 1984]; ... whereas, for specific fields, what already exists in the form of European Pharmacopoeia monographs should be incorporated within the framework of this Directive; whereas, therefore, several European Pharmacopoeia monographs may be considered equal to the abovementioned harmonised standards;

...

Whereas medical devices should, as a general rule, bear the CE mark to indicate their conformity with the provisions of this Directive to enable them to move freely within the Community and to be put into service in accordance with their intended purpose;

...

Whereas the protection of health and the associated controls may be made more effective by means of medical device vigilance systems which are integrated at Community level’.

- 6 Article 1(1) of Directive 93/42 provides that it is to apply to medical devices and their accessories. For the purposes thereof, accessories are to be treated as medical devices in their own right.
- 7 Under Article 2 of Directive 93/42, Member States are to take all necessary steps to ensure that medical devices may be placed on the market and/or put into service only if they comply with the requirements laid down in that directive when duly supplied and properly installed, maintained and used in accordance with their intended purpose.
- 8 Under Article 3 of that directive, medical devices must meet the essential requirements set out in Annex I thereto which apply to them, taking account of their intended purpose.
- 9 Article 4(1) of Directive 93/42 prohibits Member States from creating any obstacle to the placing on the market or the putting into service within their territory of medical devices bearing the CE marking provided for in Article 17 of that same directive which indicates that they have been the subject of an assessment of their conformity in accordance with the provisions of Article 11 thereof.
- 10 Under Article 5(1) of Directive 93/42, Member States are to presume compliance with the essential requirements referred to in Article 3 in respect of medical devices which are in conformity with the relevant national standards adopted pursuant to the harmonised standards, the references of which have been published in the *Official Journal of the European Communities*.
- 11 Article 5(2) provides that, for the purposes of Directive 93/42, reference to harmonised standards also includes the monographs of the European Pharmacopoeia notably on surgical sutures, the references of which have been published in the *Official Journal of the European Communities*.
- 12 Article 5(3) of Directive 93/42 refers to Article 6(2) thereof with respect to the procedure to be followed by the Member States where they consider that the harmonised standards do not entirely meet the essential requirements referred to in Article 3 of that directive.
- 13 Article 8 of that directive, entitled 'Safeguard clause', reads as follows:
- '1. Where a Member State ascertains that the devices referred to in Article 4(1) and (2) second indent, when correctly installed, maintained and used for their intended purpose, may jeopardise the health and/or safety of patients, users or, where applicable, other persons, it shall take all appropriate interim measures to withdraw such devices from the market or prohibit or restrict their being placed on the market or put into service. The Member State shall immediately inform the Commission of any such measures, indicating the reasons for its decision and, in particular, whether non-compliance with this Directive is due to:
- (a) failure to meet the essential requirements referred to in Article 3;
 - (b) incorrect application of the standards referred to in Article 5, in so far as it is claimed that the standards have been applied;
 - (c) shortcomings in the standards themselves.
2. The Commission shall enter into consultation with the parties concerned as soon as possible. Where, after such consultation, the Commission finds that:

- the measures are justified, it shall immediately so inform the Member State which took the initiative and the other Member States; where the decision referred to in paragraph 1 is attributed to shortcomings in the standards, the Commission shall, after consulting the parties concerned, bring the matter before the Committee referred to in Article 6(1) within two months if the Member State which has taken the decision intends to maintain it and shall initiate the procedures referred to in Article 6,
 - the measures are unjustified, it shall immediately so inform the Member State which took the initiative and the manufacturer or his authorised representative established within the Community.
3. Where a non-complying device bears the CE marking, the competent Member State shall take appropriate action against whomsoever has affixed the mark and shall inform the Commission and the other Member States thereof.
4. The Commission shall ensure that the Member States are kept informed of the progress and outcome of this procedure.'

14 Article 10 of Directive 93/42 provides:

'1. Member States shall take the necessary steps to ensure that any information brought to their knowledge, in accordance with the provisions of this Directive, regarding the incidents mentioned below involving a Class I, IIa, IIb or III device is recorded and evaluated centrally:

- (a) any malfunction or deterioration in the characteristics and/or performance of a device, as well as any inadequacy in the labelling or the instructions for use which might lead to or might have led to the death of a patient or user or to a serious deterioration in his state of health;
- (b) any technical or medical reason in relation to the characteristics or performance of a device for the reasons referred to in subparagraph (a), leading to systematic recall of devices of the same type by the manufacturer.

2. Where a Member State requires medical practitioners or the medical institutions to inform the competent authorities of any incidents referred to in paragraph 1, it shall take the necessary steps to ensure that the manufacturer of the device concerned, or his authorised representative established in the Community, is also informed of the incident.

3. After carrying out an assessment, if possible together with the manufacturer, Member States shall, without prejudice to Article 8, immediately inform the Commission and the other Member States of the incidents referred to in paragraph 1 for which relevant measures have been taken or are contemplated.'

15 Article 11 of Directive 93/42 governs the procedure for assessing the conformity of medical devices with the requirements of that directive. To that end, as set out in the 15th recital in the preamble to the directive, medical devices are grouped into four product classes and the tests to which they are subjected are made progressively more stringent based on the vulnerability of the human body and taking account of the potential risks associated with the technical design and manufacture of the devices.

16 Article 14b of that directive provides:

‘Where a Member State considers, in relation to a given product or group of products, that, in order to ensure protection of health and safety and/or to ensure that public health requirements are observed pursuant to Article 36 of the Treaty, the availability of such products should be prohibited, restricted or subjected to particular requirements, it may take any necessary and justified transitional measures. It shall then inform the Commission and all the other Member States giving the reasons for its decision. The Commission shall, whenever possible, consult the interested parties and the Member States and, where the national measures are justified, adopt necessary Community measures in accordance with the procedure referred to in Article 7(2).’

17 Under Article 17(1) of Directive 93/42, medical devices, other than devices which are custom-made or intended for clinical investigations, considered to meet the essential requirements referred to in Article 3 must bear the CE marking of conformity when they are placed on the market.

18 Under Article 18 of that directive:

‘Without prejudice to Article 8:

- (a) where a Member State establishes that the CE marking has been affixed unduly, the manufacturer or his authorised representative established within the Community shall be obliged to end the infringement under conditions imposed by the Member State;
- (b) where non-compliance continues, the Member State must take all appropriate measures to restrict or prohibit the placing on the market of the product in question or to ensure that it is withdrawn from the market, in accordance with the procedure in Article 8.

...’.

19 Annex I to Directive 93/42, entitled ‘Essential requirements’, sets out the following in Part I, entitled ‘General requirements’:

- ‘1. The devices must be designed and manufactured in such a way that, when used under the conditions and for the purposes intended, they will not jeopardise the clinical condition or the safety of patients, or the safety and health of users or, where applicable, other persons, provided that any risks which may be associated with their use constitute acceptable risks when weighed against the benefits to the patient and are compatible with a high level of protection of health and safety.
- 2. The solutions adopted by the manufacturer for the design and construction of the devices must conform to safety principles, taking account of the generally acknowledged state of the art.

In selecting the most appropriate solutions, the manufacturer must apply the following principles in the following order:

- eliminate or reduce risks as far as possible (inherently safe design and construction),
- where appropriate take adequate protection measures including alarms if necessary, in relation to risks that cannot be eliminated,

- inform users of the residual risks due to any shortcomings of the protection measures adopted.
3. The devices must achieve the performances intended by the manufacturer and be designed, manufactured and packaged in such a way that they are suitable for one or more of the functions referred to in Article 1(2)(a), as specified by the manufacturer.

...’.

National rules

- 20 Joint Ministerial Decree No DI7/ik.2480, making Greek legislation consistent with Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, of 19 August 1994 (FEK B’ (Greek Official Journal) 679), transposed that directive into Greek law.

The main proceedings and the questions referred for a preliminary ruling

- 21 By notice No 146/2003 of 8 December 2003, Venizelio-Pananio issued a public invitation to tender, on the basis of lowest price as the award criterion, for the supply of various surgical sutures with a value of EUR 131 500 (including VAT). The notice specified that the sutures had to be certified in accordance with the European Pharmacopoeia and bear the CE marking.
- 22 Medipac was one of the nine companies which submitted a tender. The materials proposed by Medipac bore the required marking.
- 23 On 17 March 2004, the committee conducting the tendering procedure issued a recommendation to Venizelio-Pananio’s Administrative Board, reiterating a suggestion from the surgeons of that hospital that the PGA type sutures proposed by Medipac be excluded. According to that recommendation, it had been found that knots done with PGA type materials slipped easily and closed prematurely, that needles frequently twisted or broke and that sutures did not hold sufficiently.
- 24 By Decision No 108 of 24 March 2004, Venizelio-Pananio’s Administrative Board stated that the PGA type sutures proposed by Medipac did not meet the technical specifications for the contract and accordingly rejected its tender.
- 25 On 5 April 2004, Medipac submitted an appeal against that rejection decision to Venizelio-Pananio’s administration. In its appeal, it stated, inter alia, that the technical specifications on which the rejection of its tender was based had not been set out in the invitation to tender, were imprecise to the point of being incomprehensible, did not permit a proper assessment of the requirements relating to the materials to be supplied, and diverged from the technical characteristics for such materials referred to in Directive 93/42. Medipac also maintained that the materials it proposed, which comply with the requirements of the European Pharmacopoeia, did not and could not have the technical imperfections referred to by the hospital. The hospital rejected the appeal by an initial decision of 7 April 2004, which was subsequently repealed and replaced by a second decision adopted on 28 April 2004.
- 26 An action against that rejection decision has been brought before the Simvoulío tis Epikratias. In its action, Medipac puts forward the same reasons that it had raised in its appeal.

27 In those circumstances, the Simvoulio tis Epikratias decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- (1) Whenever tender procedures governed by ... Directive 93/36/EEC for the supply of medical devices under Directive 93/42/EEC are conducted under the lowest-price system, is the contracting authority as the purchaser of the relevant goods able, in accordance with Directive 93/42/EEC, interpreted in conjunction with Directive 93/36/EEC, to reject a tender for medical devices which bear the CE marking and have been the subject of a quality check by the competent certification body, as technically unacceptable at the stage of the technical assessment, in reliance upon sound objections relating to their adequacy in terms of quality which are connected with the protection of public health and the specific form of use for which those devices are intended and in view of which objections the devices are considered inappropriate and unfit for that use (with the self-evident precondition that those objections are subject to review of their validity by the court having jurisdiction if there is a dispute as to whether they pertain)?
- (2) If the preceding question is answered in the affirmative, is the contracting authority as the purchaser of the relevant goods able, for the foregoing reason, directly to consider medical devices which bear the CE marking unsuitable for the form of use for which they are intended, or must the safeguard clauses first be applied which are contained in Directive 93/42/EEC and the ... Joint Ministerial Decree DI7/ik.2480/1994 and which enable the relevant competent authority – which in Greece is the Ministry of Health, Welfare and Social Security acting through the Directorate for Biomedical Technology – to take measures either in accordance with the procedure in Article 8 of the directive, if correctly installed and maintained medical devices may jeopardise the life or safety of patients or users, or under Article 18 of the directive, if it is established that the CE marking has been affixed unduly?
- (3) In the light of the answer to the second question, and in the event that the abovementioned safeguard clauses must first be applied, is the contracting authority obliged to await the outcome of the procedure initiated either under Article 8 or under Article 18 of Directive 93/42/EEC and, further, is it bound by that outcome in the sense that it is obliged to procure the article in question even though its use demonstrably gives rise to risks for public health and generally it is unsuitable for the use for which the contracting authority intends it?’

Admissibility of the reference for a preliminary ruling

Arguments of the Austrian Government

28 The Austrian Government considers that the answer to the questions referred by the national court is not liable to help that court adjudicate on the main proceedings and that the reference for a preliminary ruling is accordingly inadmissible. First, those questions relate expressly to the interpretation of Directive 93/36, but the tendering procedure at issue in the main proceedings does not fall within the scope of application of that directive, since the amount of the contract under the invitation to tender is lower than the threshold laid down in Article 5 of that directive.

29 Second, the reference for a preliminary ruling does not contain the information necessary for the Court to be able to answer the questions referred in a manner that will be helpful to the continuation of the main proceedings. The Austrian Government observes that the reference

does not state whether the surgical sutures in question really are considered to be dangerous for human health or whether they simply do not meet the qualitative expectations of the surgeons concerned, which is a crucial factor in the assessment of the rights and obligations of the contracting authority.

Findings of the Court

- 30 Regarding, in the first place, the applicability of Directive 93/36, it is common ground that it applies only to contracts the value of which is equal to or greater than the threshold laid down in Article 5(1) of that directive (see, to that effect, order in Case C-59/00 *Vestergaard* [2001] ECR I-9505, paragraph 19). The file shows that the value of the contract at issue in the main proceedings is EUR 131 500 (including VAT), which is lower than the threshold of application laid down in that directive.
- 31 In those circumstances, the Court, pursuant to Article 104(5) of its Rules of Procedure, made a written request for clarifications from the national court as to the reasons why it considered that Directive 93/36 was applicable to the contract. That court replied that, for procedural reasons, it was not able to answer such a request. Consequently, the Court decided to hold a hearing, during which the Greek Government confirmed that the value of the contract was lower than the threshold for application of that directive and maintained that the directive did not apply to the main proceedings. The Court accordingly finds that the Austrian Government is correct in arguing that, in those circumstances, an interpretation of Directive 93/36 has no bearing on the outcome of those proceedings.
- 32 However, a useful reply to the questions referred by the national court calls for the consideration of certain general principles applicable to public procurement.
- 33 The Court notes that the national court has categorised Venizelio-Pananio as a ‘contracting authority’. That classification is also accepted by the Greek Government, which stated at the hearing that that hospital is a body governed by public law equated with the State. According to settled case-law, even if the value of a contract which is the subject-matter of an invitation to tender does not attain the threshold of application of the directives by which the Community legislature has regulated the field of public procurement, and the contract in question therefore does not fall within the scope of application of those directives, contracting authorities awarding contracts are nevertheless bound to abide by the general principles of Community law, such as the principle of equal treatment and the resulting obligation of transparency (see, to that effect, Case C-324/98 *Telaustria and Telefonadress*[2000] ECR I-10745, paragraphs 60 and 61; order in *Vestergaard*, paragraphs 20 and 21; Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16 and 17, and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraphs 46 to 48).
- 34 Admittedly, the national court does not refer directly in its reference for a preliminary ruling to the general principles of Community law. It is settled case-law, however, that in order to provide a satisfactory answer to a national court which has referred a question to it, the Court may deem it necessary to consider rules of Community law to which the national court has not referred in its reference (Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9; Case C-315/88 *Bagli Pennacchiotti* [1990] ECR I-1323, paragraph 10; Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 39, and *Telaustria and Telefonadress*, paragraph 59).
- 35 Second, regarding the Austrian Government’s line of argument relating to insufficient information on the facts of the main proceedings, the Court notes that the information

contained in the reference for a preliminary ruling has been supplemented by the written observations submitted to the Court. Moreover, an audience has been held, which has enabled the Greek and Austrian Governments and the Commission to submit additional observations. The Court is thus sufficiently enlightened to be able to respond to the questions referred.

- 36 In the light of the foregoing, the Court finds that the reference for a preliminary ruling is admissible and that it is appropriate to reply to the questions referred by the national court.

The questions referred for a preliminary ruling

The first and second questions

- 37 By its first and second questions, which are closely linked and must be examined together, the national court asks, essentially, whether under the general principles of Community law applicable to tendering procedures, a contracting authority which has initiated such a procedure with a view to purchasing medical devices may directly exclude a tender for products for reasons relating to the protection of public health although those products bear the CE marking as required by the specifications of the invitation to tender, or whether that authority is required first to apply the safeguard clauses provided for in Articles 8 and 18 of Directive 93/42.

Observations submitted to the Court

- 38 With regard to Directive 93/42, Medipac states that Member States may not prohibit, restrict or impede the placing on the market of medical devices which satisfy the provisions of that directive and which bear the CE marking. It maintains, as does the Commission, that a combined reading of Articles 3 and 17 of Directive 93/42 indicates that medical devices bearing that marking satisfy all compliance and safety requirements as laid down in Annex I to that directive. It follows that that directive introduces a presumption of compliance for products bearing the CE marking which may be rebutted only in the context of the safeguard procedure referred to in Articles 8 and 18.
- 39 Venizelio-Pananio and the Greek and Austrian Governments state that Directive 93/42 is intended to ensure that medical devices offer a high level of protection to patients, users and third parties. They infer therefrom that if a tender for medical devices certified in accordance with that directive is however inadequate from a technical standpoint, a contracting authority is entitled to exclude those devices directly from the tendering procedure. The Austrian Government adds, however, that the contracting authority is bound to inform the competent national authority of that exclusion so that the latter may take appropriate interim measures and commence the procedure provided for in Article 8 of that directive.
- 40 The Greek Government adds that Directive 93/42 in principle lays down only minimum requirements to be satisfied by a medical device in order to be able to bear the CE marking within the Community. The Austrian Government states that a contracting authority is free to impose qualitative requirements which go beyond the minimum required at Community level.

Findings of the Court

- 41 The Court finds as a preliminary point that the file does not show that, in the main proceedings, the contracting authority imposed particular requirements going beyond the minimum required by Community law.

- 42 It follows from the provisions referred to in paragraphs 5 to 19 of this judgment that Directive 93/42 harmonises the essential requirements to be met by medical devices falling within its scope of application. Once those devices comply with the harmonised standards and are certified in accordance with the procedures provided for by that directive, they must be presumed to comply with those essential requirements and therefore be deemed to be appropriate for the use for which they are intended. Those medical devices must also be allowed to circulate freely throughout the Community.
- 43 It follows from the Court's settled case-law that the obligations arising from Community directives are binding, inter alia, on bodies or entities which are subject to the authority or control of a public authority or the State (see, to that effect, Case 152/84 *Marshall* [1986] ECR 723, paragraph 49; Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraphs 30 and 31; Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 18; order in Case C-297/03 *Sozialhilfverband Rohrbach* [2005] ECR I-4305, paragraph 27). Consequently, the obligation to presume that medical devices which meet the harmonised standards and bear the CE marking comply with the requirements of Directive 93/42 extends to Venizelio-Pananio in its capacity as a body governed by public law.
- 44 The Court notes, however, as pointed out by the Advocate General in point 92 of her Opinion, that the presumption of compliance of medical devices may be rebutted. In that respect, Directive 93/42 provides for the implementation of safeguard measures where a finding is made that certain medical devices bearing the CE marking may nevertheless pose risks for patients or users.
- 45 Article 10 of that directive provides that Member States are to take the necessary steps to ensure that information relating to incidents occurring after the placing on the market of medical devices which may pose a risk for the health of a patient or a user are recorded and evaluated centrally. If, following such an evaluation, Member States take or contemplate taking measures, they must inform the Commission immediately.
- 46 Article 8(1) of Directive 93/42 requires Member States which have found there to be risks linked to medical devices which have been certified as being in compliance with that directive to take all appropriate interim measures to withdraw those medical devices from the market or prohibit or restrict their being placed on the market or put into service. In those circumstances, the Member State concerned is required by that same provision to notify the Commission immediately of the measures taken, indicating in particular the reasons for the measures. Under Article 8(2) of Directive 93/42, the Commission must in turn examine whether those interim measures are justified and, if so, inform immediately the Member State which initiated such measures and the other Member States.
- 47 Under Article 8(3) of Directive 93/42, where a medical device bearing the CE marking nevertheless does not comply with the essential requirements provided for by that directive, the Member State concerned is to take appropriate action and to inform the Commission and the other Member States. Moreover, Article 18 of that same directive provides that where a Member State establishes that the CE marking has been affixed unduly, the manufacturer or his authorised representative established within the Community is to be obliged to end the infringement under conditions imposed by the Member State.
- 48 It is clear from the wording of Article 8(1) of that directive that the obligations provided for therein are imposed on a body on which the Member State has conferred competence to ascertain the risks which devices which comply with that directive may nevertheless pose for

public health and/or safety and to take, where necessary, measures of general application provided for by that article in order to deal with the situation.

- 49 Since Venizelio-Pananio clearly was not given such competence by the Greek State, it is not entitled to implement on its own the safeguard measures referred to in Article 8 of Directive 93/42. It follows that, once that hospital had doubts as to the technical reliability of the surgical sutures proposed by Medipac, it was required, by virtue of the obligation imposed on it as an entity governed by public law, to assist in the correct application of Directive 93/42, to inform the competent national authority so that the latter could conduct its own checks and, where necessary, implement such safeguard measures. The file shows that in the main proceedings Venizelio-Pananio did refer the question of the appropriateness of the sutures for their intended use to the Greek national body overseeing medicinal products and that the latter confirmed that they complied with the standards in force. That reference was made only on 5 May 2004, however, that is, after the hospital had rejected Medipac's tender. Venizelio-Pananio thus rebutted the presumption of compliance of its own motion, without following the safeguard procedure introduced by the abovementioned directive.
- 50 However, not only the wording of Article 8 of Directive 93/42 but also the purpose of the harmonisation system established by it preclude a contracting authority from being entitled to reject, outside that safeguard procedure and on grounds of technical inadequacy, medical devices which are certified as being in compliance with the essential requirements provided for by that directive.
- 51 Directive 93/42, in so far as it amounts to a harmonisation measure adopted pursuant to Article 100a of the EEC Treaty (which became Article 100a of the EC Treaty, itself now, after amendment, Article 95 EC), is intended to promote the free movement of medical devices which have been certified as being in compliance with that directive, precisely by replacing the various measures taken in this field in the Member States, which may amount to an obstacle to that free movement.
- 52 In that context, the need to reconcile the free movement of those devices with the protection of patients' health implies that, in the event of the emergence of a risk linked to devices which have been certified as being in compliance with Directive 93/42, the Member State concerned must implement the safeguard procedure provided for in Article 8 of that directive; bodies which are not empowered to do so may not themselves decide unilaterally on the action to be taken in such circumstances.
- 53 Moreover, where proposed products, although bearing the CE marking, give rise to concern on the part of the contracting authority as to patients' health or safety, the principle of equal treatment of tenderers and the obligation of transparency, which apply irrespective of whether Directive 93/36 is applicable, preclude, in order to avoid arbitrariness, the contracting authority from being able itself to reject the tender in question directly and requires it to follow a procedure, such as the safeguard procedure provided for in Article 8 of Directive 93/42, which is such as to ensure objective and independent assessment and checking of the alleged risks.
- 54 Moreover, that principle and that obligation prohibit the contracting authority from rejecting a tender which satisfies the requirements of the invitation to tender on grounds which are not set out in the tender specifications and which are relied on subsequent to the submission of the tender.

55 In the light of the foregoing, the answer to the first and second questions must be that the principle of equal treatment and the obligation of transparency preclude a contracting authority, which has issued an invitation to tender for the supply of medical devices and specified that those devices must comply with the European Pharmacopoeia and bear the CE marking, from rejecting, directly and without following the safeguard procedure provided for in Articles 8 and 18 of Directive 93/42, on grounds of protection of public health, the materials proposed, if they comply with the stated technical requirement. If the contracting authority considers that those materials may jeopardise public health, it is required to inform the competent national authority with a view to setting that safeguard procedure in motion.

The third question

56 By its third question, the national court asks the Court how the safeguard measures provided for by Directive 93/42 must be implemented by a contracting authority in the context of an ongoing tendering procedure. It asks in particular whether the contracting authority must await the end of the safeguard procedure and whether it is bound by the outcome of that procedure.

57 As evidenced by the answer given to the first and second questions, a contracting authority is entitled to reject a tender for medical devices bearing the CE marking, on grounds of technical inadequacy, only in the context of the safeguard procedure provided for by Directive 93/42.

58 More specifically, a contracting authority's power to reject the tender for medical devices bearing the CE marking on grounds of technical inadequacy is subject to the outcome of the safeguard procedure, namely the Commission's decision establishing, in accordance with Article 8(2) of that directive, that the adoption of measures prohibiting the placing on the market or putting into service of the devices is justified.

59 It follows that a contracting authority, once it has decided to refer the matter to the competent national authority, is required to suspend the award procedure so as to set in motion the safeguard procedure provided for by Directive 93/42 and to await the end of the latter procedure. The Commission's decision is binding on the contracting authority. If the safeguard procedure were to lead to a finding that those materials do not comply with the requirements of that directive, the measures of general application taken by the Member State would entail the exclusion of those products from the award procedure which was suspended.

60 The suspension of a tendering procedure for the supply of medical devices may, of course, lead to delays liable to give rise to problems in running a hospital such as Venizelio-Pananio. However, as pointed out by the Advocate General in point 118 of her Opinion and pursuant to Article 14b of Directive 93/42, the objective of the protection of public health constitutes an overriding public-interest requirement entitling Member States to derogate from the principle of the free movement of goods provided that the measures taken comply with the principle of proportionality (see Case 120/78 *Rewe-Zentral* [1979] ECR 649 ('*Cassis de Dijon*'), paragraph 8; Case C-270/02 *Commission v Italy* [2004] ECR I-1559, paragraphs 21 and 22; and Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos and Carrefour-Marinopoulos* [2006] ECR I-8135, paragraphs 20 to 23).

61 Consequently, in a situation of urgency, a hospital such as Venizelio-Pananio is entitled to take all interim measures required to enable it to procure the medical devices necessary for its operation. In such cases, however, it must be able to show that there is a situation of urgency

justifying such a derogation from the principle of free movement of goods and demonstrate that the measures taken are proportionate.

- 62 In the light of the foregoing, the answer to the third question must be that a contracting authority, which has referred a matter to the competent national authority with a view to setting in motion the safeguard procedure provided for by Articles 8 and 18 of Directive 93/42 concerning medical devices bearing the CE marking, is required to suspend the tendering procedure until the end of that safeguard procedure, the outcome of that procedure being binding on the contracting authority. If the implementation of such a safeguard procedure gives rise to delays liable to jeopardise the operation of a public hospital and thereby public health, the contracting authority is entitled to take all interim measures required to enable it to procure the materials necessary for the smooth running of that hospital, subject to compliance with the principle of proportionality.

Costs

- 63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

- 1. The principle of equal treatment and the obligation of transparency preclude a contracting authority, which has issued an invitation to tender for the supply of medical devices and specified that those devices must comply with the European Pharmacopoeia and bear the CE marking, from rejecting, directly and without following the safeguard procedure provided for in Articles 8 and 18 of Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003, on grounds of protection of public health, the materials proposed, if they comply with the stated technical requirement. If the contracting authority considers that those materials may jeopardise public health, it is required to inform the competent national authority with a view to setting that safeguard procedure in motion.**

- 2. A contracting authority, which has referred a matter to the competent national authority with a view to setting in motion the safeguard procedure provided for by Articles 8 and 18 of Directive 93/42, as amended by Regulation No 1882/2003, concerning medical devices bearing the CE marking, is required to suspend the tendering procedure until the end of that safeguard procedure, the outcome of that procedure being binding on the contracting authority. If the implementation of such a safeguard procedure gives rise to delays liable to jeopardise the operation of a public hospital and thereby public health, the contracting authority is entitled to take all interim measures required to enable it to procure the materials necessary for the smooth running of that hospital, subject to compliance with the principle of proportionality.**

JUDGMENT OF THE COURT (Fourth Chamber)

5 December 2013 (*)

(Public procurement – Negotiated procedure with prior publication of a contract notice – Whether possible for the contracting authority to negotiate on tenders which do not comply with the mandatory requirements of the technical specifications relating to the contract)

In Case C-561/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Riigikohus (Estonia), made by decision of 23 November 2012, received at the Court on 5 December 2012, in the proceedings

Nordecon AS,

Ramboll Eesti AS

v

Rahandusministeerium,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, M. Safjan, J. Malenovský, A. Prechal and S. Rodin, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Nordecon AS, by A. Ots,
- the Estonian Government, by M. Linntam and N. Grünberg, acting as Agents,
- the Czech Government, by M. Smolek and T. Müller, acting as Agents,
- the Spanish Government, by A. Rubio González, acting as Agent,
- the European Commission, by A. Tokár and L. Naaber-Kivisoo, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 30(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).
- 2 The request has been made in proceedings between Nordecon AS, the legal successor to Nordecon Infra AS, ('Nordecon') and Ramboll Eesti AS ('Ramboll Eesti'), on the one hand, and Rahandusministeerium (Ministry for Finance), on the other hand, concerning the annulment of a negotiated procedure for the award of a public contract with prior publication of a contract notice.

Legal context

European Union law

- 3 Article 1(11) of Directive 2004/18 provides:

“Negotiated procedures” means those procedures whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these.’
- 4 Article 2 of Directive 2004/18, entitled ‘Principles of awarding contracts’, provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’
- 5 Article 23 of Directive 2004/18, entitled ‘Technical specifications’, provides at paragraphs 1 and 2 thereof:
 - ‘1. The technical specifications as defined in point 1 of Annex VI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents. ...
 2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.’
- 6 Article 24 of Directive 2004/18, entitled ‘Variants’, provides at paragraphs 1 to 4 thereof:
 - ‘1. Where the criterion for award is that of the most economically advantageous tender, contracting authorities may authorise tenderers to submit variants.
 2. Contracting authorities shall indicate in the contract notice whether or not they authorise variants: variants shall not be authorised without this indication.
 3. Contracting authorities authorising variants shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation.

4. Only variants meeting the minimum requirements laid down by these contracting authorities shall be taken into consideration.

...'

7 Article 30 of Directive 2004/18, entitled 'Cases justifying use of the negotiated procedure with prior publication of a contract notice', provides at paragraphs 1 to 3 thereof:

'1. Contracting authorities may award their public contracts by negotiated procedure, after publication of a contract notice, in the following cases:

(a) in the event of irregular tenders or the submission of tenders which are unacceptable under national provisions compatible with Articles 4, 24, 25, 27 and Chapter VII, in response to an open or restricted procedure or a competitive dialogue insofar as the original terms of the contract are not substantially altered.

...

(b) in exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing;

(c) in the case of services, inter alia services within category 6 of Annex II A, and intellectual services such as services involving the design of works, insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures;

...

2. In the cases referred to in paragraph 1, contracting authorities shall negotiate with tenderers the tenders submitted by them in order to adapt them to the requirements which they have set in the contract notice, the specifications and additional documents, if any, and to seek out the best tender in accordance with Article 53(1).

3. During the negotiation, the contracting authorities shall ensure equal treatment for all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.'

Estonian law

8 Article 27(1) Law on public procurement (riigihangete seadus; 'the RHS') provides:

'A negotiated procedure with publication of a contract notice is a procurement procedure in which any interested person may submit an application to take part in the procedure and in which the contracting authority makes a proposal to at least three applicants, to be chosen by the contracting authority on the basis of objective, non-discriminatory criteria, to submit tenders and negotiates the tenders with those applicants in order to adapt them to the requirements laid down in the specifications and choose the successful tender.'

9 Article 31(5) of the RHS provides:

'Where the contracting authority awards a contract to the tenderer who has submitted the most economically advantageous tender and the contract notice provides for the possibility of

submitting in the tender, in addition to solutions corresponding to all the conditions laid down in the contract notice and the specifications, alternative solutions as well, it is to define in the specifications the conditions relating to the alternative solutions and the conditions under which they shall be submitted.'

10 Article 52(1) of the RHS provides:

'The contracting authority shall evaluate alternative solutions where it awards the contract to the tenderer who has submitted the most economically advantageous tender and where the contract notice permits alternative solutions to be submitted.'

11 Article 67(1) of the RHS provides:

'The contracting authority shall open all the tenders, except in the cases provided for in Article 65(4) herein, and negotiate with the tenderers the tenders submitted in order to adapt them, if necessary, to the requirements laid down in the contract notice and in the specifications and choose the successful tender.'

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

12 On 25 September 2008, the Maanteeamet (the Estonian Highways Office) launched a negotiated procedure with the publication of a contract notice entitled 'Planning and construction of the Aruvalla to Kose section of the E263 [road]'

13 In accordance with points 4.3.1 and 4.7.1 of Annex III to the specifications relating to the contract at issue in the main proceedings, the central reservation of that section of road was to be 13.5 metres wide from the 26.6 kilometre mark to the 32 kilometre mark and 6 metres wide from the 32 kilometre mark to the 40 kilometre mark.

14 On 20 January 2010, the Maanteeamet declared that the four tenders submitted, namely, the tenders of the Lemminkäinen and Marko consortiums, the joint tender of Ehitusfirma Rand ja Tuulberg AS, Binders SIA and Insenerbuve SIA, and the tender of the Nordecon consortium, made up of Nordecon Infra AS and Ramboll Eesti, were admissible, even though the tender from the latter consortium proposed a central reservation 6 metres wide along the entire length of that section of road.

15 During the negotiations which followed the submission of those tenders, the Maanteeamet, by letter of 26 April 2010, invited the tenderers other than the Nordecon consortium to alter the width of the central reservation in their original tenders and to set it at 6 metres for the entire length of the section of road concerned, as the Nordecon consortium had proposed. After negotiations with all the tenderers, the latter submitted their offers by 27 May 2010, the date fixed by the contracting authority, after correcting the price because of the alteration requested.

16 By two decisions of 10 June 2010 the Maanteeamet first declared all the tenders admissible and secondly accepted the joint tender of the Lemminkäinen consortium, which was the lowest in price.

17 On 21 July 2010, in response to a complaint by Nordecon Infra AS, those two decisions were annulled by the Rahandusministeerium's complaints committee, which found that, in a negotiated procedure with prior publication of a contract notice, the negotiation conducted by

the contracting authority could not relate to matters satisfying the requirements clearly and unambiguously laid down in the contract documents, such as those relating to the width of the central reservation. On 27 September 2010, the Maanteeamet's director general rejected the joint tender of the Lemminkäinen consortium and accepted the tender of the Nordecon consortium, that offer being the lowest in price after the tender of the Lemminkäinen consortium.

- 18 Following the Merko consortium's introducing an application for annulment, the Rahandusministeerium, by decision of 26 October 2010, annulled the procurement procedure at issue in the main proceedings on the grounds, in particular, that the contracting authority had unlawfully declared the tender of the Nordecon consortium admissible and declared that tender, which included an alternative solution not permitted under the contract notice, successful and that the negotiations conducted by the contracting authority could not concern matters satisfying the requirements clearly and unambiguously laid down in the contract documents, such as those relating to the width of the central reservation of the section of road concerned.
- 19 Nordecon, which in the meantime had become the legal successor to Nordecon Infra AS, and Ramboll Eesti brought an action against that decision before the Tallina halduskohus (Administrative Court, Tallinn), which dismissed the action by judgment of 2 March 2011. According to the Tallina halduskohus, the tender of the appellants in the main proceedings ought to have been declared inadmissible, for the contract notice concerned had, in breach of Article 31(5) and 52 of the RHS, provided, not for the possibility of submitting alternative solutions and of awarding the contract to be awarded to the tenderer offering the most economically advantageous tender, but for the lowest price to be taken into consideration. Moreover, in a negotiated procedure with prior publication of a contract notice, negotiations might relate only to aspects that were not defined at the time of the submission of the tender or that did not appear in the contract documents.
- 20 Nordecon and Ramboll Eesti brought an appeal against the Tallina halduskohus's judgment before the Tallina ringkonnakohus (Regional Court, Tallinn). By judgment of 21 December 2011, the Tallina ringkonnakohus upheld the Tallina halduskohus's judgment.
- 21 As regards point 8.1 of the tender specifications relating to the contract at issue in the main proceedings, under which the Maanteeamet had allowed alternative solutions, except for the construction of the surface structures of a main road (including access roads), the Tallina ringkonnakohus held that the contract notice did not provide for the possibility of submitting alternative solutions or for the award of the contract to the tenderer offering the most economically advantageous tender. The Maanteeamet therefore allowed, in infringement of Articles 31(5) and 52(1) of the RHS, alternative solutions to be submitted. Furthermore, the original tender of the appellants in the main proceedings ought to have been rejected.
- 22 Nordecon AS and Ramboll Eesti AS appealed on a point of law to the Riigikohus (Supreme Court), asking it to set aside the judgment of the Tallina ringkonnakohus, deliver a new judgment and declare the decision of the Rahandusministeerium of 26 October 2010 unlawful.
- 23 According to the referring court, it is not in dispute that the submission of alternative solutions was not allowed by the contract notice or that the evaluation of the tenders was not carried out by the yardstick of the most economically advantageous tender.

- 24 While granting that, in a negotiated procedure with prior publication of a contract notice, questions relating to the conditions under which a contract is awarded may, at least in part, be left open to negotiation, without its being necessary to consider alternative solutions, the referring court asks whether the contracting authority may also undertake negotiations when there are tenders that do not satisfy the mandatory requirements of the contract documents and whether the negotiations undertaken must, at the very least, lead to the successful tender's being consistent with those mandatory requirements.
- 25 In that regard, the referring court notes that Article 30(2) of Directive 2004/18 leaves open the question whether, during such negotiations, tenders may also be adapted to the mandatory requirements of the technical specifications. If such an adaptation is possible, the referring court asks whether it is also possible to conduct negotiations on the basis of tenders which, in their original form, do not fully satisfy the mandatory requirements. Nor, according to the referring court, does the directive clearly indicate whether the adaptation following from negotiations must result in the tender's fully complying with the technical specifications and whether, so as to achieve such compliance, the contracting authority may also alter the technical specifications.
- 26 It is on that basis that the Riigikohus decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
- '1. Must Article 30(2) of Directive [2004/18] be interpreted as allowing the contracting authority to conduct negotiations with tenderers in respect of tenders which do not comply with the mandatory requirements laid down in the technical specifications relating to the contract?
 2. If the answer to [the first question] is in the affirmative, must Article 30(2) of Directive 2004/18 then be interpreted as allowing the contracting authority during the negotiations, after the tenders have been opened, to alter the mandatory requirements of the technical specifications, provided that the subject-matter of the contract is not altered and equal treatment of all tenderers is ensured?
 3. If the answer to [the second question] is in the affirmative, must Article 30(2) of Directive 2004/18 then be interpreted as precluding legislation which, after the tenders have been opened, excludes alteration of the mandatory requirements of the technical specifications during the negotiations?
 4. If the answer to [the first question] is in the affirmative, must Article 30(2) of Directive 2004/18 then be interpreted as prohibiting the contracting authority from accepting as the best tender a tender which, at the end of the negotiations, does not comply with the mandatory requirements of the technical specifications?'

Admissibility of the request for a preliminary ruling

- 27 Nordecon, while not raising an objection of inadmissibility, contests the relevance of the questions referred for a preliminary ruling, claiming that resolution of the dispute in the main proceedings does not depend on any answer that may be given to those questions. In particular, it contends that the main question asked by the Riigikohus, that is to say, the first, to which all the other questions are connected, is not relevant, for the negotiations were not conducted with tenderers that had submitted irregular tenders. Accordingly, those questions are based on erroneous assumptions.

- 28 In that regard, it is settled case-law that, in proceedings under Article 267 TFEU, the Court is empowered to give rulings on the interpretation or the validity of a European Union provision only on the basis of the facts which the national court puts before it (see Case 104/77 *Oehlschlger* [1978] ECR-791, paragraph 4; Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 52; and Order of 8 November 2012 in Case C-433/11 *SKP* [2012] I-0000, paragraph 24).
- 29 In the context of those proceedings, which are based on a clear separation of functions between the national courts and the Court, any assessment of the facts of the case is a matter for the national court. Similarly it is solely for the national court before which the dispute has been brought and which must assume responsibility for the forthcoming judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is, in principle, bound to give a ruling on the substance (see, to that effect, *Eckelkamp and Others*, paragraph 27).
- 30 The Court may refuse to give a substantive ruling on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the facts of the main action or its subject-matter, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*Eckelkamp and Others*, paragraph 28).
- 31 In the present case, the referring court takes as its starting-point the finding that the contracting authority negotiated tenders that did not comply with the mandatory requirements of the specifications, which it is not for the Court to call in question. Moreover, none of the situations referred to in paragraph 30 of the present judgment that allow the Court to refuse to rule on a question referred for a preliminary ruling has, in the present case, been established.
- 32 The reference for a preliminary ruling must therefore be considered to be admissible.

Consideration of the questions referred

- 33 By its first question, the referring court asks whether Article 30(2) of Directive 2004/18 allows the contracting authority to negotiate with tenderers tenders that do not comply with the mandatory requirements laid down in the technical specifications of the contract.
- 34 In that regard, it must be recalled that, in certain cases, Article 30(2) of Directive 2004/18 allows the negotiated procedure to be used in order to adapt the tenders submitted by the tenderers to the requirements set in the contract notice, the specifications and additional documents, if any, and to seek out the best tender.
- 35 According to Article 2 of Directive 2004/18, contracting authorities are to treat economic operators equally and in a non-discriminatory manner and are to act in a transparent way.
- 36 The Court has stated that the obligation of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority (Case C-599/10 *SAG ELV Slovensko and Others* [2012] ECR I-0000, paragraph 25).

- 37 Accordingly, even though the contracting authority has the power to negotiate in the context of a negotiated procedure, it is still bound to see to it that those requirements of the contract that it has made mandatory are complied with. Were that not the case, the principle that contracting authorities are to act transparently would be breached and the aim mentioned in paragraph 36 above could not be attained.
- 38 Moreover, allowing a tender that does not comply with the mandatory requirements to be admissible with a view to negotiations would entail the fixing of mandatory conditions in the call for tenders being deprived of useful effect and would not allow the contracting authority to negotiate with the tenderers on a basis, made up of those conditions, common to those tenderers and would not, therefore, allow it to treat them equally.
- 39 In the light of the foregoing considerations, the answer to the first question is that Article 30(2) of Directive 2004/18 does not allow the contracting authority to negotiate with tenderers tenders that do not comply with the mandatory requirements laid down in the technical specifications of the contract.
- 40 In the light of the answer to the first question, there is no need to reply to the second to fourth questions.

Costs

- 41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 30(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts does not allow the contracting authority to negotiate with tenderers tenders that do not comply with the mandatory requirements laid down in the technical specifications of the contract.

JUDGMENT OF THE COURT (Third Chamber)

19 June 2008 (*)

(Public procurement – Directive 92/50/EEC – Procedures for the award of public service contracts – Concept of ‘award of a contract’)

In Case C-454/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesvergabeamt (Austria), made by decision of 10 November 2006, received at the Court on 13 November 2006, in the proceedings

pressetext Nachrichtenagentur GmbH

v

Republik Österreich (Bund),

APA-OTS Originaltext – Service GmbH,

APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Löhmus, J.N. Cunha Rodrigues (Rapporteur), A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 24 January 2008,

after considering the observations submitted on behalf of:

- pressetext Nachrichtenagentur GmbH, by G. Estermann, Rechtsanwalt,
- the Republik Österreich (Bund), by A. Schittengruber and C. Mayr, acting as Agents,
- APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung, by J. Schramm, Rechtsanwalt,
- the Austrian Government, by M. Fruhmann and C. Mayr, acting as Agents,
- the French Government, by J.-C. Gracia, acting as Agent,

- the Lithuanian Government, by D. Kriauciūnas, acting as Agent,
- the Commission of the European Communities, by D. Kukovec and R. Sauer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 March 2008,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by ('Directive 89/665').
- 2 The reference was made in the context of proceedings between presstext Nachrichtenagentur GmbH ('PN'), on the one hand, and the Republik Österreich (Bund), APA-OTS Originaltext – Service GmbH ('APA-OTS') and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung ('APA'), on the other, concerning a contract for press agency services.

Legal framework

Community legislation

- 3 Article 3(1) of Directive 92/50 provides:

'1. In awarding public service contracts or in organising design contests, contracting authorities shall apply procedures adapted to the provisions of this Directive.'
- 4 Under Article 8 of that directive:

'Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI'.
- 5 Article 9 of that directive states:

'Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.'
- 6 Article 10 of the same directive provides:

'... Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'
- 7 Article 11(3) of that directive provides:

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

...

- (e) for additional services not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the performance of the service described therein, on condition that the award is made to the service provider carrying out such service:
 - when such additional services cannot be technically or economically separated from the main contract without great inconvenience to the contracting authorities,
 - or
 - when such services, although separable from the performance of the original contract, are strictly necessary for its completion.

However, the aggregate estimated value of contracts awarded for additional services may not exceed 50% of the amount of the main contract;

- (f) for new services consisting in the repetition of similar services entrusted to the service provider to which the same contracting authorities awarded an earlier contract, provided that such services conform to a basic project for which a first contract was awarded according to the procedures referred to in paragraph 4. As soon as the first project is put up for tender, notice must be given that the negotiated procedure might be adopted and the total estimated cost of subsequent services shall be taken into consideration by the contracting authorities when they apply the provisions of Article 7. This procedure may be applied solely during the three years following the conclusion of the original contract.’

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

- 8 APA was established in Austria as a limited liability registered cooperative following the Second World War. Almost all of the Austrian daily newspapers as well as the Austrian radio and television broadcasting corporation, ORF, were members of the cooperative. Together with its subsidiaries, APA is the main operator on the news agencies market in Austria and traditionally provides the Republik Österreich (Bund) with various news agency services.
- 9 PN has been present on the Austrian news agency market since 1999 but has hitherto issued press releases for the Austrian federal authorities to a limited extent only. PN has fewer journalists working for it than APA and does not have available to it such large archives as APA.
- 10 In 1994, prior to its accession to the European Union, the Republik Österreich (Bund) concluded an agreement (‘the basic agreement’) with APA relating to the provision of certain services for remuneration. That agreement essentially allows the Austrian federal authorities to access and use current information (the so-called ‘basic service’), to request historical information and previous press releases from an APA database, known as ‘APADok’, and to use the APA original text service, known as ‘OTS’, both for the information they provide and for the dissemination

of their own press releases. The APADok database contains the data from the basic service since 1 January 1988 and the press releases handled by the OTS service since 1 January 1989.

11 The basic agreement was concluded for an indefinite period, subject to a clause by which the parties waived the right to terminate the agreement until 31 December 1999.

12 Article 2(c) of the basic agreement provided:

‘For online inquiries for APA information services as defined in Article 1, APA shall bill as licensing revenues for the use of the electronic data processing system, per minute (net) CPU, a price corresponding to the lowest graduated consumer price of the official tariff (currently ATS 67, HT per minute CPU) less 15%.’

13 The agreement also included provisions relating to the date of the first price increase, the maximum amount of each increase and indexation of prices on the basis of the consumer price index for 1986, the reference value being the index figure calculated for 1994. Article 5(3) of the agreement provided inter alia: ‘... it is expressly agreed that the values of the remuneration provided for in Article 2(a) and (b) shall be guaranteed to be constant. For the calculation of the indexation, the starting point shall be the 86 consumer price index (CPI 86) published by the Austrian Central Statistics Office (ÖSTAT) or the following index replacing it.’

14 In September 2000, APA established a wholly-owned subsidiary, APA-OTS, in the form of a limited liability company. The two companies are bound by a contract excluding profit and loss, which, according to APA and APA-OTS, provides for APA-OTS to be integrated financially, organisationally and economically within APA and for APA-OTS to conduct and manage its business on the basis of instructions from APA. APA-OTS is furthermore required to pass its annual profits to APA, whilst APA has to make good any annual losses incurred by APA-OTS.

15 In September 2000, APA transferred to APA-OTS the operation of its OTS service. This alteration was notified to the Republik Österreich (Bund) in October 2000. An authorised employee of APA gave an assurance to the Austrian authorities that, following that transfer, APA was jointly and severally liable with APA-OTS, and that there would be no change in the overall service performed. The Austrian authorities thereupon authorised the future provision of the OTS service by APA-OTS, and the remuneration for that service has since then been paid direct to APA-OTS.

16 Furthermore, the provisions of the basic agreement were amended by an initial supplemental agreement signed in 2001 and effective as from 1 January 2002. When the transition was made to the euro, that supplemental agreement adjusted the initial contract, as described in paragraphs 17 to 20 of this judgment.

17 First, the amount of the annual charge for the use of editorial articles and media archives, ATS 10 080 000, was replaced with EUR 800 000. Under the indexation clause, the price for 2002 should have been ATS 11 043 172 (converted to EUR 802 538.61 due to transition to the euro). The decision was made to use not that amount but the rounded-off figure of EUR 800 000, giving a reduction of 0.3%.

18 Secondly, the price fixed for online inquiries for APA information services, which had been ATS 67 per minute, was replaced with a price of EUR 4.87 per minute. Apart from the rounding-off effected at the time of transition to the euro, the basic amount of that price remained unchanged.

- 19 Thirdly, for the calculation of the indexation, the index calculated for 1994 on the basis of the consumer price index for 1986 was replaced, as reference point, by the index calculated for 2001 on the basis of the consumer price index for 1996. In that regard, the first supplemental agreement amended inter alia amended Article 5(3) of the basic agreement to read as follows:
- ‘It is expressly agreed that the values of the remuneration provided for in Article 2(a) and (b) shall be guaranteed to be constant. For the calculation of the indexation, the starting point shall be the 96 consumer price index (CPI 96) published by the Austrian Central Statistics Office (ÖSTAT) or the following index replacing it.’
- 20 Fourthly, by way of derogation from that indexation mechanism, some prices were fixed immediately for 2002 to 2004. The price of ATS 8.50 per line for inclusion of press releases in the OTS service was replaced by fixed prices of EUR 0.66 per line for 2002, EUR 0.67 for 2003 and EUR 0.68 for 2004. Had the indexation clause been applied, the price for 2002 should have been ATS 9.31 per line (rounded off to EUR 0.68 per line). The price was thus reduced by 2.94% for 2002 and 1.47% for 2003.
- 21 A second supplemental agreement, signed in October 2005 and effective as from 1 January 2006, introduced two further amendments to the basic agreement. By that second supplemental agreement, the basic agreement was amended as described in paragraphs 22 and 23 of this judgment.
- 22 First, the waiver of the right to terminate the agreement, agreed in the basic agreement until 31 December 1999, was agreed once again until December 2008.
- 23 Secondly, the reduction given on the price for online inquiries for APA information services, fixed at 15% in the basic agreement, was increased to 25%. In that regard, the second supplemental agreement amended Article 2(c) of the basic agreement as follows:
- ‘The following provisions of the [basic agreement as amended by the first supplemental agreement] shall be amended as follows as from 1 January 2006:
1. Article 2(c): the percentage of 15% shall be replaced by 25%.
- ...’
- 24 In 2004, PN offered its news agency services to the Republik Österreich (Bund), but that offer did not lead to the signing of an agreement.
- 25 By actions brought on 4 and 19 July 2006, PN sought, by way of principal head of claim, a declaration from the Bundesvergabebamt (Federal Procurement Office) that the severing of the basic agreement, following the restructuring of APA in 2000, and the supplemental agreements signed in 2001 and 2005, which it referred to as ‘de facto awards’, were unlawful and, in the alternative, that the choice of the various award procedures in question was unlawful.
- 26 In regard to the time-limits for bringing an action, the Bundesvergabebamt points out that, whilst the transactions complained of date back to 2000, 2001 and 2005, the legal remedy available under domestic law in respect of unlawful awards of contracts, namely an application for a declaration having the effect of dissolving the agreement, was created only subsequently, that is to say with effect from 1 February 2006. The period provided for this legal remedy is six months from the date of the unlawful award. The Bundesvergabebamt deems it appropriate to apply Paragraph 1496 of the Austrian General Civil Code (Allgemeines Bürgerliches Gesetzbuch

– ABGB), under which limitation periods do not run if the requisite legal remedy is not available, provided that such application is compatible with Community law.

27 In those circumstances, the Bundesvergabeamt decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Are the terms “awarding” in Article 3(1) of Directive 92/50... and “awarded” in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which a contracting authority intends to obtain services in the future from a service provider established as a limited liability company where those services were previously supplied by a different service provider who is the sole shareholder in the future service provider and has control of the future service provider? In such a case is it legally relevant that the contracting authority has no guarantee that throughout the entire period of the original contract the shares in the future service provider will not be disposed of in whole or in part to third parties and moreover has no guarantee that the membership of the original service provider, which is in the form of a co-operative society, will remain unchanged throughout the entire contract period?
- (2) Are the terms “awarding” in Article 3(1) of Directive 92/50... and “awarded” in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which, during the period of validity of a contract concluded for an indefinite period with certain service providers for the joint provision of services, a contracting authority agrees with those service providers amendments to the charges for specified services under the contract and reformulates an index-linking clause, where these amendments result in different charges and are made upon the changeover to the euro?
- (3) Are the terms “awarding” in Article 3(1) of Directive 92/50... and “awarded” in Articles 8 and 9 of that directive to be interpreted as encompassing circumstances in which, during the period of validity of a contract concluded for an indefinite period with certain service providers for the joint provision of services, a contracting authority agrees with those service providers to amend the contract, first, renewing for a period of three years a waiver of the right to terminate the contract by notice, the waiver no longer being in force at the time of the amendment, and second, also laying down a higher rebate than before for certain volume-related charges within a specified area of supply?
- (4) If the answer to any of the first three questions is that there is an award: is Article 11(3)(b) of Directive 92/50..., or are any other provisions of Community law, such as, in particular, the principle of transparency, to be interpreted as permitting a contracting authority to obtain services by awarding a single contract in a negotiated procedure without prior publication of a contract notice, where parts of the services are covered by exclusive rights as referred to in Article 11(3)(b) of Directive 92/50/EEC? Or do the principle of transparency or any other provisions of Community law require in the case of an award of mostly non-priority services that a contract notice is none the less published prior to the contract award, to enable undertakings in the sectors concerned to assess whether services are in fact being awarded that are subject to an exclusive right? Or do the provisions of Community law relating to the award of public contracts require that in such a case services can only be awarded in separate tender procedures, according to whether they are or are not subject to exclusive rights, in order to allow at least competitive tendering as to part?
- (5) If the answer to the fourth question is to the effect that a contracting authority may award services which are not subject to exclusive rights in a single procurement

procedure together with services which are subject to an exclusive right: can an undertaking which does not have any right to deal with data that is subject to an exclusive right possessed by an undertaking which has a dominant position in the market establish that in that respect it has the capacity, for the purposes of procurement law, to provide a comprehensive service to a contracting authority, by relying on Article 82 EC and an obligation derived from that provision on the market-dominant undertaking which has the power of disposal over the data and is established in a Member State to provide the data on reasonable conditions?

- (6) If the answer to the first, second and third questions is to the effect that the partial contract transfer in 2000 and/or one or both of the contract amendments referred to constituted new awards; and furthermore should the fourth question be answered to the effect that either when awarding a contract for services not subject to exclusive rights by means of a separate award procedure, or when awarding a combined contract (in the present case for press releases, the basic service and rights to use APADok), a contracting authority should have first published a contract notice to ensure that the intended contract award was transparent and capable of being reviewed:

Is “harmed” in Article 1(3) of Directive 89/665... and in Article 2(1)(c) of that directive to be interpreted as meaning that an undertaking in a case such as the present one is harmed, within the meaning of those provisions of Directive 89/665..., simply where he has been deprived of the opportunity to participate in a procurement procedure because the contracting authority did not, prior to making the award, publish a contract notice, on the basis of which the undertaking could have tendered for the contract to be awarded, could have submitted an offer or could have had the claim that exclusive rights were involved reviewed by the competent procurement review body?

- (7) Are the Community law principle of equivalence and the Community law requirement for effective legal protection, or the principle of effectiveness, to be interpreted, having regard to any other relevant provisions of Community law, as conferring an individual and unconditional right on an undertaking against a Member State such that it has at least six months from the time when it could have known that a contract award infringed procurement law to bring legal proceedings before the competent national authority to seek damages following the contract award on account of an infringement of Community procurement law, while it must be allowed additional time for periods when it could not make such a claim owing to the absence of a statutory basis in national law, in circumstances where under national law claims for damages based on infringements of national law are normally subject to a limitation period of three years from the date of knowledge of the wrongdoer and of the damage and, in the absence of legal protection in a particular area of law, the limitation period does not (continue to) run?’

The questions referred for a preliminary ruling

- 28 The Court notes as a preliminary point that, even though the agreement at issue in the main proceedings was concluded prior to the Republic of Austria’s accession to the European Union, the relevant Community rules apply to such an agreement as from the date of that State’s accession (see, to that effect, Case C-76/97 *Tögel* [1998] ECR I-5357, paragraph 14).
- 29 By its first three questions, the Bundesvergabebamt asks, essentially, in which circumstances amendments to an existing agreement between a contracting authority and a service provider

may be regarded as constituting a new award of a public services contract within the meaning of Directive 92/50.

- 30 Directive 92/50 does not provide a specific answer to those questions, but it does contain a number of pertinent indications which should be placed in the overall framework of Community rules governing public procurement.
- 31 It is clear from the case-law that the principal objective of the Community rules in the field of public procurement is to ensure the free movement of services and the opening-up to undistorted competition in all the Member States (see Case 26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 44). That two-fold objective is expressly set out in the second, sixth and twentieth recitals in the preamble to Directive 92/50.
- 32 In order to pursue that two-fold objective, Community law applies inter alia the principle of non-discrimination on grounds of nationality, the principle of equal treatment of tenderers and the obligation of transparency resulting therefrom (see, to that effect, Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31; Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 and 61; and Case C-496/99 *PCommission v CAS Succhi di Frutta* [2004] ECR I-3801, paragraphs 108 and 109).
- 33 Directive 92/50 implements those principles and that obligation of transparency in respect of contracts coming within its ambit and concerning, either solely or for the most part, services listed in Annex I A thereto, by requiring inter alia certain award procedures. For contracts coming within its ambit and concerning, either solely or for the most part, services listed in Annex I B thereto, the directive does not impose the same rules for the award procedures, but that category of public contracts nevertheless remains subject to the fundamental rules of Community law and the obligation of transparency resulting therefrom (see, to that effect, Case C-507/03 *Commission v Ireland* [2007] ECR I-0000, paragraphs 26, 30 and 31).
- 34 In order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, to that effect, Case C-337/98 *Commission v France* [2000] ECR I-8377, paragraphs 44 and 46).
- 35 An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.
- 36 Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. This latter interpretation is confirmed in Article 11(3)(e) and (f) of Directive 92/50, which imposes, in respect of contracts concerning, either solely or for the most part, services listed in Annex I A thereto, restrictions on the extent to which contracting authorities may use the negotiated procedure for awarding services in addition to those covered by an initial contract.
- 37 An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.

38 It is in the light of the foregoing considerations that the questions referred to the Court are to be answered.

The first question

39 By its first question, the Bundesvergabebamt is referring to the transfer to APA-OTS in 2000 of the OTS services hitherto provided by APA. It asks, essentially, whether a change in the contractual partner, in circumstances such as those at issue in the main proceedings, is a new award of contract within the meaning of Articles 3(1), 8 and 9 of Directive 92/50.

40 As a rule, the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract in question, unless that substitution was provided for in the terms of the initial contract, such as, by way of example, provision for sub-contracting.

41 According to the order for reference, APA-OTS is established as a limited liability company and therefore has separate legal personality from APA, the initial contractor.

42 It is also common ground that, since the OTS services were transferred from APA to APA-OTS in 2000, the contracting authority makes payment for those services directly to APA-OTS, and no longer to APA.

43 However, some of the specific characteristics of the transfer of the activity in question permit the conclusion that such amendments, made in a situation such as that at issue in the main proceedings, do not constitute a change to an essential term of the contract.

44 According to the information in the case-file, APA-OTS is a wholly-owned subsidiary of APA, APA has the power to instruct APA-OTS in the conduct and management of its business and the two companies are bound by a contract under which profit and loss are transferred to and assumed by APA. The case-file also shows that a person authorised to represent APA assured the contracting authority that, following the transfer of the OTS services, APA was jointly and severally liable with APA-OTS and that there would be no change in the overall performance experienced.

45 Such an arrangement is, in essence, an internal reorganisation of the contractual partner, which does not modify in any fundamental manner the terms of the initial contract.

46 In that context, the Bundesvergabebamt asks whether legal consequences follow from the fact that the contracting authority does not have an assurance that the shares in APA-OTS will not be transferred to third parties at any time during the currency of the contract.

47 If the shares in APA-OTS were transferred to a third party during the currency of the contract at issue in the main proceedings, this would no longer be an internal reorganisation of the initial contractual partner, but an actual change of contractual partner, which would, as a rule, be an amendment to an essential term of the contract. Such an occurrence would be liable to constitute a new award of contract within the meaning of Directive 92/50.

48 Similar reasoning would apply if the transfer of shares in the subsidiary to a third party was already provided for at the time of transfer of the activities to the subsidiary (see, to that effect, Case C-29/04, *Commission v Austria*[2005] ECR I-9705, paragraphs 38 to 42).

- 49 Until such a development occurs, however, the analysis in paragraph 45 of this judgment remains valid, namely that the situation envisaged is an internal reorganisation of the contractual partner. This conclusion is not affected by the fact that there is no guarantee that the shares in the subsidiary will not be transferred to a third party at any time during the currency of the contract.
- 50 The Bundesvergabebamt also asks what legal consequences arise from the lack of guarantee, for the contracting authority, that there will be no changes in the composition of the shareholders in the service provider at any time during the currency of the contract.
- 51 Public contracts are regularly awarded to legal persons. If a legal person is established as a public company listed on a stock exchange, it follows from its very nature that the composition of its shareholders is liable to change at any time. As a rule, such a situation does not affect the validity of the award of a public contract to such a company. The situation may be otherwise in exceptional cases, such as when there are practices intended to circumvent Community rules governing public contracts.
- 52 Similar considerations apply in the case of public contracts awarded to legal persons established not as publicly-listed companies but as limited liability registered cooperatives, as in the main proceedings. Any changes to the composition of the shareholders in such a cooperative will not, as a rule, result in a material contractual amendment.
- 53 Accordingly, the conclusion in paragraph 45 of this judgment is not affected by those considerations either.
- 54 It follows that the answer to the first question must be that the terms ‘awarding’ and ‘awarded’, used in Articles 3(1), 8 and 9 of Directive 92/50, must be interpreted as not covering a situation, such as that in the main proceedings, where services supplied to the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions, provided that the initial service provider continues to assume responsibility for compliance with the contractual obligations.

The second question

- 55 By its second question, the Bundesvergabebamt refers to the amendments made to the basic agreement by the first supplemental agreement, signed in 2001 and effective as from 1 January 2002. It asks, essentially, whether certain price amendments constitute a new award of a contract for the purposes of Directive 92/50.
- 56 This question concerns, first, the conversion of prices to euros without changing their intrinsic amount, secondly, the conversion of prices to euros entailing a reduction in their intrinsic amount and, thirdly, the reformulation of a price indexation clause.
- 57 The answer must be that, where, following the changeover to the euro, an existing contract is changed in the sense that the prices initially expressed in national currency are converted into euros, it is not a material contractual amendment but only an adjustment of the contract to accommodate changed external circumstances, provided that the amounts in euros are rounded off in accordance with the provisions in force, including those of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1).

- 58 Where the rounding off of the prices converted into euros exceeds the amount authorised by the relevant provisions, that is an amendment to the intrinsic amount of the prices provided for in the initial contract. The question then arises as to whether such a change in prices constitutes a new award of a contract.
- 59 It is evident that the price is an important condition of a public contract (see, to that effect, *Commission v CAS Succhi di Frutta*, paragraph 117).
- 60 Amending such a condition during the period of validity of the contract, in the absence of express authority to do so under the terms of the initial contract, might well infringe the principles of transparency and equal treatment as between tenderers (see, to that effect, *Commission v CAS Succhi di Frutta*, paragraph 121).
- 61 Nevertheless, the conversion of contract prices into euros during the course of the contract may be accompanied by an adjustment of their intrinsic amount without giving rise to a new award of a contract, provided the adjustment is minimal and objectively justified; this is so where it tends to facilitate the performance of the contract, for example, by simplifying billing procedures.
- 62 In the situation at issue in the main proceedings, the annual fee for the use of editorial articles and media archives was reduced by a mere 0.3% in order to give a round figure to facilitate calculations. Moreover, the per-line prices for inclusion of press releases in the OTS service were reduced by 2.94% and 1.47% for 2002 and 2003 respectively, so that they would be expressed in round figures, also liable to facilitate calculations. Not only did those price adjustments relate to a small amount, but they also operated to the detriment rather than to the advantage of the contractor, who consented to a reduction in the prices which would have resulted from the conversion and indexation rules normally applicable.
- 63 In such circumstances, it can be found that an adjustment to the prices of a public contract during its currency does not constitute an amendment to the essential conditions of that contract such as to constitute a new award of a contract within the meaning of Directive 92/50.
- 64 With respect to the reformulation of the indexation clause, the Court notes that Article 5(3) of the basic agreement provided inter alia that '[f]or the calculation of the indexation, the starting point [was to] be the 86 consumer price index (CPI 86) published by the Austrian Central Statistics Office (ÖSTAT) or the following index replacing it.'
- 65 It follows that the basic agreement had provided for the price index to which it referred to be replaced by a subsequent index.
- 66 The first supplemental agreement replaced the price index referred to in the basic agreement, namely the 1986 consumer price index (VPI 86) published by ÖSTAT, by a more recent index, namely the 1996 consumer price index (VPI 96), also published by ÖSTAT.
- 67 As stated in paragraph 19 of this judgment, that supplemental agreement used as a reference point the index calculated for 2001, the year in which it was concluded, instead of the one for 1994, the year in which the basic agreement was concluded. That updating of the reference point is consistent with the updating of the price index.
- 68 It follows that the first supplemental agreement merely applied the stipulations of the basic agreement as regards keeping the indexation clause up to date.

- 69 In such circumstances, the Court considers that the reference to a new price index does not constitute an amendment to the essential conditions of the initial agreement such as to constitute a new award of a contract within the meaning of Directive 92/50.
- 70 It follows that the answer to the second question must be that the terms 'awarding' and 'awarded', used in Articles 3(1) and 8 and 9 of Directive 92/50, must be interpreted as not covering an adjustment of the initial agreement to accommodate changed external circumstances, such as the conversion to euros of prices initially expressed in national currency, the minimal reduction in the prices in order to round them off, and the reference to a new price index where provision was made in the initial agreement to replace the price index fixed previously.

The third question

- 71 By its third question, the Bundesvergabebamt refers to the amendments made to the basic agreement by the second supplemental agreement, signed in October 2005 and effective as from 1 January 2006.
- 72 The Bundesvergabebamt asks, essentially, whether a new award of a contract results, first, from a renewal of the waiver of the right to terminate the contract by notice and, secondly, from an increase in the rebates granted on the prices of certain services covered by the contract.
- 73 First of all, as regards the conclusion of a new waiver of the right to terminate the contract during the period of validity of a contract concluded for an indefinite period, the Court observes that the practice of concluding a public services contract for an indefinite period is in itself at odds with the scheme and purpose of the Community rules governing public contracts. Such a practice might, over time, impede competition between potential service providers and hinder the application of the provisions of Community directives governing advertising of procedures for the award of public contracts.
- 74 Nevertheless, Community law, as it currently stands, does not prohibit the conclusion of public service contracts for an indefinite period.
- 75 Likewise, a clause by which the parties undertake not to terminate for a given period a contract concluded for an indefinite period is not automatically considered to be unlawful under Community law governing public procurement.
- 76 As is apparent from paragraph 34 of this judgment, in determining whether the conclusion of such a clause constitutes a new award of contract, the relevant criterion is whether that clause must be regarded as being a material amendment to the initial contract (see, to that effect, *Commission v France*, paragraphs 44 and 46).
- 77 The clause at issue in the main proceedings formally sets out the waiver of any right to terminate the contract during the period from 2005 to 2008.
- 78 The Court notes, however, that, following the expiry on 31 December 1999 of the waiver of the right to terminate contained in the basic agreement, the contract at issue in the main proceedings could have been terminated at any time, subject to notice being given. It remained in effect, however, for the period from 2000 to 2005 inclusive, since neither the contracting authority nor the service provider exercised their right to terminate the contract.

- 79 There is nothing in the case-file to indicate that, during the period from 2005 to 2008 covered by the waiver of the right to terminate the contract, the contracting authority would have actually considered terminating the contract during its currency and put it out to tender again if that clause had not been present. Even if it had intended to do so, the time period envisaged by the waiver, namely three years, was not such that it would have been prevented from doing so for an excessive period in relation to the time necessary to organise such a procedure. In those circumstances, it has not been demonstrated that such a waiver of the right to terminate the contract, provided that it is not systematically re-inserted in the contract, entails a risk of distorting competition, to the detriment of potential new tenderers. Consequently, it cannot be held to be a material amendment to the initial agreement.
- 80 It follows that, in circumstances such as those at issue in the main proceedings, the presence of a waiver of the right to terminate the contract for a period of three years during the period of validity of a services contract concluded for an indefinite period does not constitute a new award of a contract within the meaning of Directive 92/50.
- 81 Secondly, regarding the higher rebate provided for in the second supplemental agreement, the Court observes that the basic agreement provided, in respect of the services in question, for 'a price corresponding to the lowest graduated consumer price of the official tariff ... less 15%'.
- 82 According to the information provided to the Court, that reference is to the degressive tariff applied by APA, in application of which the prices of the services in question are reduced when the use of those services by APA's contractual partner increases.
- 83 According to the same information, the increase in the rate of the rebates from 15% to 25%, provided for by the second supplemental agreement, is tantamount to applying a lower price. Even though the formal presentation may be different, the reduction of a price and the increase of a rebate have a comparable economic effect.
- 84 In those circumstances, the increase of the rebate may be interpreted as coming within the ambit of the clauses laid down in the basic agreement.
- 85 Moreover, an increase in the rebate, which has the effect of reducing the remuneration received by the contractor as compared to what was initially provided for, does not shift the economic balance of the contract in favour of the contractor.
- 86 Additionally, the mere fact that the contracting authority obtains a greater rebate on part of the services covered by the contract is not liable to entail a distortion of competition to the detriment of potential tenderers.
- 87 It follows from the foregoing that, in a situation such as that at issue in the main proceedings, the fact of laying down, in a supplemental agreement, rebates greater than those initially provided for on certain volume-related prices within a specific area of supply, is not to be regarded as being a material contractual amendment and therefore is not a new award of a contract within the meaning of Directive 92/50.
- 88 Consequently, the answer to the third question must be that the terms 'awarding' and 'awarded', used Articles 3(1), 8 and 9 of Directive 92/50, must be interpreted as not covering a situation such as that at issue in the main proceedings, where a contracting authority, through the use of a supplemental agreement, agrees with the contractor, during the period of validity of a contract concluded with it for an indefinite period, to renew for a period of three years a

waiver of the right to terminate the contract by notice, the waiver no longer being in force at the time of the amendment, and agrees with it to lay down higher rebates than those initially provided for in respect of certain volume-related prices within a specified area of supply.

- 89 In the light of the answers given to the first, second and third questions, it is not necessary to answer the fourth, fifth, sixth and seventh questions.

Costs

- 90 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

- 1. The terms ‘awarding’ and ‘awarded’, used in Articles 3(1), 8 and 9 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as not covering a situation, such as that in the main proceedings, where services supplied to the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions, provided that the initial service provider continues to assume responsibility for compliance with the contractual obligations.**
- 2. The terms ‘awarding’ and ‘awarded’, used in Articles 3(1) and 8 and 9 of Directive 92/50, must be interpreted as not covering an adjustment of the initial agreement to accommodate changed external circumstances, such as the conversion to euros of prices initially expressed in national currency, the minimal reduction in the prices in order to round them off, and the reference to a new price index where provision was made in the initial agreement to replace the price index fixed previously.**
- 3. The terms ‘awarding’ and ‘awarded’, used Articles 3(1), 8 and 9 of Directive 92/50, must be interpreted as not covering a situation such as that at issue in the main proceedings, where a contracting authority, through the use of a supplemental agreement, agrees with the contractor, during the period of validity of a contract concluded with it for an indefinite period, to renew for a period of three years a waiver of the right to terminate the contract by notice, the waiver no longer being in force at the time of the amendment, and agrees with it to lay down higher rebates than those initially provided for in respect of certain volume-related prices within a specified area of supply.**

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