JUDGMENT OF THE COURT (First Chamber)

13 October 2005 *

In Case C-458/03,

REFERENCE under Article 234 EC for a preliminary ruling from the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen (Italy), made by decision of 23 July 2003, received at the Court on 30 October 2003, in the proceedings

Parking Brixen GmbH

v

Gemeinde Brixen,

Stadtwerke Brixen AG,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, K. Lenaerts, J.N. Cunha Rodrigues (Rapporteur) and E. Juhász, Judges,

* Language of the case: German.

Advocate General: J. Kokott,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 January 2005,

after considering the observations submitted on behalf of:

— Parking Brixen GmbH, by K. Zeller and S. Thurin, avvocati,

— the Gemeinde Brixen, by N. De Nigro, Rechtsanwalt,

— Stadtwerke Brixen AG, by A. Mulser, Rechtsanwalt,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Fiengo, avvocato dello Stato,

— the Netherlands Government, by C. Wissels, acting as Agent,

— the Austrian Government, by M. Fruhmann, acting as Agent,

— the Commission of the European Communities, by K. Wiedner, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 1 March 2005,

gives the following

Judgment

1 The request 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) Articles 43 EC, 49 EC and 86 EC, and the principles of non-discrimination, transparency and equal treatment.

2 That request was made in the course of a dispute between, on the one hand, Parking Brixen GmbH (hereinafter 'Parking Brixen') and, on the other hand, the Gemeinde Brixen (Municipality of Brixen) and Stadtwerke Brixen AG concerning the award to that company of the management of two car parks within that municipality.

Law

Community law

3 Article 43 EC provides:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. ...

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

4 The first paragraph of Article 49 EC provides:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

5 The eighth recital in the preamble to Directive 92/50 states:

'... the provision of services is covered by this Directive only in so far as it is based on contracts; ... the provision of services on other bases, such as law or regulations, or employment contracts, is not covered.'

6 Article 1 of that Directive provides:

'For the purposes of this Directive:

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

...

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

...'

National law

7 Article 22(3) of Italian Law No 142 of 8 June 1990 on the government of autonomous areas (Ordinary Supplement to the GURI No 135 of 12 June 1990; hereinafter 'Law No 142/1990') provides that municipalities and provinces may use the following management structures for local public services for which they are responsible under the law:

'(a) direct management, where, owing to the small size or the characteristics of the service, it would not be expedient to create an institution or an undertaking;

(b) concessions to third parties, where there are technical or economic reasons or reasons of social expediency;

(c) by special undertakings, also for the management of a number of services of economic and commercial importance;

(d) by institutions, for the provision of social services without commercial importance;

(e) by companies limited by shares with a majority local public shareholding, where participation by other public or private persons appears expedient owing to the nature of the service to be provided.'

8 Article 44 of Regional Law No 1 of 4 January 1993, in its original version, largely reproduced Article 22 of Law No 142/1990. Subsequently, Article 44 was amended by Regional Law No 10 of 23 October 1998.

9 Article 44 of Regional Law No 1, as amended by Regional Law No 10, provides:

'...

6. Municipalities shall by regulations establish the procedures and selection criteria for the forms of organisation set forth hereunder for the management of public services of economic and commercial importance:

(a) formation of special undertakings;

(b) formation of, or participation in, public or private limited companies, under predominantly public local influence;

(c) entrusting the management of public services to third parties, in which case suitable procedures for their being put out to competition must be laid down for their selection. Without prejudice to other legal provisions, such relationships may not endure more than 20 years and may be renewed with the same subject-matter only in accordance with the rules referred to in this subparagraph. Cooperatives, associations representing, by virtue of the law, the sick or handicapped, as well as voluntary associations and non-profit-making organisations are to be accorded preference on equal conditions.

...

18. The associated local authorities may, at any time, entrust to companies formed as referred to in paragraph 6 and to companies referred to in paragraph 17 the performance of other public services compatible with the company's objects, by resolution of the board simultaneously approving the service contract relating thereto.'

10 The provisions of Article 44(6) and (18) of Regional Law No 1, as amended by Regional Law No 10, are reproduced word for word as Article 88(6) and (18) of the consolidated text of the provisions concerning local government in the Trentino-Südtirol Autonomous Region.

11 Article 115 of Decree-Law No 267 of 18 August 2000, the single text of the laws on the organisation of local authorities (Ordinary Supplement to the GURI No 227 of 28 September 2000, hereinafter 'Decree-Law No 267/2000'), authorises municipalities to convert their special undertakings into limited companies and to be their sole shareholder for a period not exceeding two years from the date of such conversion.

The main proceedings and the questions referred for a preliminary ruling

12 Under Article 22 of Law No 142/1990, the Gemeinde Brixen had had recourse, for the management of certain local public services for which it was responsible, to Stadtwerke Brixen, a special undertaking owned by that municipality.

13 Under Article 1 of its statutes, Stadtwerke Brixen was endowed, from 1 January 1999, with legal personality and corporate autonomy and it constituted a municipal body, the specific function of which is the uniform and integrated provision of local public services.

14 Under Article 2 of its statutes, Stadtwerke Brixen's objective was, in particular:

'(f) the management of car parks and multi-storey car parks including the carrying out of any related activity'.

15 Under Article 115 of Decree-Law No 267/2000, the Gemeinde Brixen, by Decision No 97 of 25 October 2001, converted the special undertaking Stadtwerke Brixen into a limited company called 'Stadtwerke Brixen AG'.

16 Under Article 1(3) of that company's statutes, 'all existing rights and obligations of the special undertaking [Stadtwerke Brixen] shall continue after the conversion and the company [Stadtwerke Brixen AG] shall, as a result, succeed to all the rights and obligations of the [special] undertaking Stadtwerke Brixen'.

17 Under Article 4 of its statutes, Stadtwerke Brixen AG may carry on, among others, the following activities at local, national and international level:

'(g) the management of car parks and garages and related activities'.

18 Article 18 of Stadtwerke Brixen AG's statutes provides that the following powers are conferred on its Administrative Board:

'(1) The Administrative Board shall have the broadest possible powers relating to the company's routine administration with the authority to carry out all acts which it deems appropriate or necessary to attain the objective of the company.

(2) Unless authorised by the shareholders' meeting, the Administrative Board is prohibited from providing guarantees with a value of over EUR 5 (five) million and from signing promissory notes and accepting drafts which exceed this amount.

(3) The purchase and sale of holdings in other companies, the purchase, sale and leasing of businesses or branches of businesses, and the purchase and sale of vehicles up to a value of EUR 5 (five) million per transaction shall be regarded as acts of routine administration.

(4) Those decisions which relate to the fixing and/or amendment of remuneration for special tasks in accordance with Article 2389(2) of the Italian Civil Code shall fall within the exclusive competence of the Administrative Board.'

19 Under Article 5(2) of Stadtwerke Brixen AG's statutes, 'the Gemeinde Brixen's holding in the nominal capital shall, in no circumstances, be below the absolute majority of nominal shares'. In addition, the Gemeinde Brixen shall have the right to

appoint a majority of the members of the company's Administrative Board. Since the supervisory board of the company is to be composed of three full members and two alternates, that municipality shall appoint at least two full members and one alternate of that board.

20 According to the referring court, the conversion of a special undertaking into a company limited by shares entails an obvious increase in its independence. Indeed, Stadtwerke Brixen AG's area of operation has been considerably extended compared with that of Stadtwerke Brixen since it can pursue activities at local, national and international level, whereas the activities of the special undertaking Stadtwerke Brixen were limited to the territory of the Gemeinde Brixen. In addition, the special undertaking Stadtwerke Brixen was subject to the direct control and influence of the municipal council, whereas, as regards Stadtwerke Brixen AG, the control exercised by the municipality is limited to those measures which company law assigns to the majority of shareholders.

21 By Decision No 37 of 23 March 2000, the municipal council of Brixen entrusted the construction and management of a public swimming pool to Stadtwerke Brixen. When it was converted, on 25 October 2001, into a company limited by shares, Stadtwerke Brixen AG succeeded to the rights and obligations resulting from that decision.

22 By Decision No 118 of 18 December 2001, the municipal council of Brixen granted Stadtwerke Brixen AG building rights over the soil and sub-soil of the site intended for the swimming pool, among others over registered plot 491/11 in the Gemeinde Brixen, for the construction of underground parking spaces.

23 Until the planned underground car park was built, provision was made for a temporary car park on the surface. For that purpose, plot 491/11, which had until then been used as a football pitch, was given a temporary tarmac surfacing to

become an above-ground car park with about 200 spaces. According to the referring court, no agreement was made for the operation of plot 491/11 as an above-ground car park.

24 In order to provide additional parking spaces, the above-ground car park on the adjacent plot, namely registered plot 491/6, also in the Gemeinde Brixen, which had about 200 spaces and had been directly managed by the Gemeinde for more than 10 years, was awarded, for the purposes of its management, to Stadtwerke Brixen AG, by Decision No 107 of 28 November 2002 of the municipal council of Brixen. That decision states that, 'for the activity of the baths, a temporary car park has already been built by Stadtwerke Brixen AG in close proximity to municipal land' and that 'it seems therefore necessary and expedient to entrust also to Stadtwerke Brixen AG the management of the adjacent land, consisting of plot 491/6 ... covering 5 137 m^2, which is currently managed directly by the municipality'.

25 On 19 December 2002, the Gemeinde Brixen, in order to implement Decision No 107, concluded with Stadtwerke Brixen AG an agreement which entrusted to it, for a nine-year term, the management of the car park on plot 491/6.

26 In consideration of the management of that car park, Stadtwerke Brixen AG collects the parking charges. However, it pays to the Gemeinde Brixen an annual fee of EUR 151 700, which is indexed on the parking charges, so that an increase in those charges leads to an increase in the fee paid to the municipality. Apart from the management of the car park, Stadtwerke Brixen AG takes responsibility for the free bicycle hiring service and accepts that the weekly market continues to be held on the area in question. Stadtwerke Brixen AG also took over the staff who were previously

employed there by the Gemeinde Brixen. Finally, the routine and non-routine maintenance of the area is the task of that company which takes full responsibility in that regard.

27 Under a concession contract made on 19 June 1992 with the Gemeinde Brixen, Parking Brixen had undertaken to build and manage a car park, which is distinct from those which are the subject-matter of the main proceedings, but also situated within that municipality. Parking Brixen challenged, before the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen (Administrative Court, Autonomous Division for the Province of Bolzen), the award to Stadtwerke Brixen AG of the management of the car parks on plots 491/6 and 491/11. In its submission, the Gemeinde Brixen should have applied the provisions on public procurement.

28 The defendants in the main proceedings, namely Stadtwerke Brixen AG and the Gemeinde Brixen, denied that there was any obligation to proceed by way of a public call for tenders. The Gemeinde maintained in that regard that it completely controls Stadtwerke Brixen AG and that there was therefore no award of a contract to a third party.

29 In those circumstances, the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does the award of the management of the public pay car parks in question constitute a public service contract within the meaning of Directive 92/50/EEC or a public service concession to which the competition rules of the European Community, in particular the obligation to ensure equal treatment and transparency, must be applied?

2. If that award does constitute a service concession relating to the management of a local public service, is the award of the management of public pay car parks which, under Article 44(6)(b) of Regional Law No 1 of 4 January 1993, as amended by Article 10 of Regional Law No 10 of 23 October 1998 and under Article 88(6)(a) and (b) of the consolidated text of the provisions concerning local government, can be effected without a public call for tenders, compatible with Community law, in particular with the principles of freedom to provide services and freedom of competition, the prohibition of discrimination, and the resultant obligations to ensure equal treatment, transparency and proportionality, where a company limited by shares is involved which was set up pursuant to Article 115 of Legislative Decree No 267/2000 by the conversion of a special undertaking of a municipality, whose share capital at the time of the award was held 100% by the municipality itself but whose administrative board enjoys all extensive powers of routine administration up to a value of EUR 5 million per transaction?'

30 By order of the President of the Court of 25 May 2004, an application by Energy Service Srl for leave to intervene was rejected as inadmissible.

The first question

31 By its first question, the referring court is asking whether the award of the management of the public pay car parks in question in the main proceedings involves a public service contract within the meaning of Directive 92/50, or a public service concession.

32 It is appropriate to state at the outset that it is not for the Court to classify specifically the transactions at issue in the main proceedings. That is within the jurisdiction of the national court alone. The Court's role is confined to providing the national court with an interpretation of Community law which will be useful for the decision which it has to take in the dispute before it.

33 For that purpose the Court may deduce from the case-file of the main proceedings the matters which are relevant to the interpretation of Community law.

34 In that context it is appropriate to note that the main proceedings concern the award of the management of two distinct car parks: first, that on plot 491/11 and, second, that on plot 491/6.

35 As regards the above-ground car park on plot 491/11, the order for reference states only that no agreement was concluded for its operation. In particular, that decision contains no information about the conditions for remunerating the car park operator.

36 In those circumstances, the Court can state only that it does not have sufficient information to give a useful interpretation of Community law in reply to that part of the question.

37 As regards the car park on plot 491/6, it is clear from the order for reference, as noted in paragraphs 24 to 26 of this judgment, that the car park had been managed

directly by the Gemeinde Brixen for more than 10 years when its management was entrusted, for a term of nine years, to Stadtwerke Brixen AG by a contract which it concluded with the municipality on 19 December 2002. In consideration for managing the car park, parking charges are collected from its users by Stadtwerke Brixen AG, which pays the Gemeinde Brixen an annual fee. In addition, Stadtwerke Brixen AG accepts that the weekly market will continue to be held on the area in question, provides the free bicycle hiring service and takes responsibility for the maintenance of that area.

38 In view of that information, it must be understood that, by its first question, the referring court is asking, in essence, whether the award, by a public authority to a service provider, of the management of a public pay car park, in consideration for which that provider is remunerated by amounts paid by third parties for the use of the car park, is a public service contract within the meaning of Directive 92/50, or a public service concession to which that directive does not apply.

39 As stated in the eighth recital in its preamble, Directive 92/50 applies to 'public service contracts', which are defined in Article 1(a) thereof as 'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority'. It follows from that definition that a public service contract within the meaning of that directive involves consideration which is paid directly by the contracting authority to the service provider.

40 In the situation referred to in the first question, on the other hand, the service provider's remuneration comes not from the public authority concerned, but from sums paid by third parties for the use of the car park in question. That method of remuneration means that the provider takes the risk of operating the services in

question and is thus characteristic of a public service concession. Therefore, in a situation such as that in the main proceedings, it is not a case of a public service contract, but of a public service concession.

41 In that regard, it is relevant to point out that that interpretation is confirmed by 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), even though it was not applicable at the date of the facts in the main proceedings. Under Article 1(4) of that directive, '"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'.

42 It is common ground that public service concessions are excluded from the scope of Directive 92/50 (see order in Case C-358/00 *Buchhändler-Vereinigung* [2002] ECR I-4685, paragraph 28).

43 The reply therefore to the first question must be that the award, by a public authority to a service provider, of the management of a public pay car park, in consideration for which that provider is remunerated by sums paid by third parties for the use of that car park, is a public service concession to which Directive 92/50 does not apply.

The second question

44 By its second question, the referring court is asking, in essence, whether the award of a public service concession without it being put out to competition is compatible with Community law, if the concessionaire is a company limited by shares resulting from the conversion of a special undertaking of a public authority, a company whose share capital is at the time of the award 100% owned by the concession-granting public authority, but whose administrative board enjoys all extensive powers of routine administration and can effect independently, without the agreement of the shareholders' meeting, certain transactions up to a value of EUR 5 million.

45 That question refers, first, to the conduct of the concession-granting authority in relation to the award of a specific concession and, second, to the national legislation which permits the award of such a concession without a call for tenders.

46 Notwithstanding the fact that public service concession contracts are, as Community law stands at present, excluded from the scope of Directive 92/50, 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, to that effect, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60, and Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 16).

47 The prohibition on any discrimination on grounds of nationality is set out in Article 12 EC. The provisions of the Treaty which are more specifically applicable to public

service concessions include, in particular, Article 43 EC, the first paragraph of which states that restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are to be prohibited, and Article 49 EC, the first paragraph of which provides that restrictions on freedom to provide services within the Community are to be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

48 According to the Court's case-law, Articles 43 EC and 49 EC are specific expressions of the principle of equal treatment (see Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 8). The prohibition on discrimination on grounds of nationality is also a specific expression of the general principle of equal treatment (see Case 810/79 *Überschär* [1980] ECR 2747, paragraph 16). In its case-law relating to the Community directives on public procurement, the Court has stated that the principle of equal treatment of tenderers is intended to afford equality of opportunity to all tenderers when formulating their tenders, regardless of their nationality (see, to that effect, Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraphs 33 and 54). As a result, the principle of equal treatment of tenderers is to be applied to public service concessions even in the absence of discrimination on grounds of nationality.

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 obligation of transparency which is imposed on the public authority 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 the impartiality of procurement procedures to be reviewed (see, to that effect, *Telaustria and Telefonadress*, cited above, paragraphs 61 and 62).

50 It is for the concession-granting public authority to evaluate, subject to review by the competent courts, the appropriateness of the detailed arrangements of the call for competition to the particularities of the public service concession in question. However, a complete lack of any call for competition in the case of the award of a public service concession such as that at issue in the main proceedings does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency.

51 Furthermore, Article 86(1) EC provides that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular to those laid down in Articles 12 EC and 81 EC to 89 EC.

52 It follows therefrom 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.

53 Two arguments are deployed to maintain that the provisions of the Treaty and the general principles mentioned in paragraphs 46 to 52 of this judgment do not apply to a public service concession awarded in circumstances such as those of the main proceedings.

54 First, Stadtwerke Brixen AG argues that Articles 43 EC to 55 EC do not apply to a situation such as that in the main proceedings, because it is a situation purely internal to a single Member State, given that Parking Brixen, Stadtwerke Brixen AG and the Gemeinde Brixen all have their seats in Italy.

55 That argument cannot be accepted. It is possible that, in the main proceedings, undertakings established in Member States other than the Italian Republic might have been interested in providing the services concerned (see, to that effect, *Commission* v *Belgium*, cited above, paragraph 33). In the absence of advertising and the opening to competition of the award of a public service concession such as that at issue in the main proceedings, there is discrimination, at least potentially, against undertakings of the other Member States which are prevented from making use of the freedom to provide services and of the freedom of establishment provided for by the Treaty (see, to that effect, *Coname*, cited above, paragraph 17).

56 Secondly, the Italian Republic, Stadtwerke Brixen AG and the Gemeinde Brixen contend that the application of the rules of the Treaty and of the general principles of Community law to a situation such as that in the main proceedings is precluded by the fact that Stadtwerke Brixen AG is not an entity independent of that municipality. In support of that argument, they rely on the judgment in Case C-107/98 *Teckal* [1999] ECR I-8121, paragraphs 49 to 51.

57 In that regard, it is important to recall that, in *Teckal*, cited above, the Court held that Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) is applicable where a contracting authority, such as a local authority, plans to conclude in writing, with an

entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary interest for the supply of goods.

58 As regards the existence of such a contract, the Court stated, in paragraph 50 of the judgment in *Teckal*, that, in accordance with Article 1(a) of Directive 93/36, it is in principle sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.

59 The Court has confirmed that the same considerations apply to Directive 92/50 on public service contracts and 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) (see, respectively, Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraphs 48, 49 and 52, and Case C-84/03 *Commission* v *Spain* [2005] ECR I-139, paragraph 39).

60 Those considerations are based on the premiss that the application of Directives 92/50, 93/36 and 93/37 depends on the existence of a contract concluded between two distinct persons (see *Teckal*, paragraphs 46 and 49). Yet the application of Articles 12 EC, 43 EC and 49 EC, as well as the principles of equal treatment, non-discrimination and transparency associated with them, does not depend on the existence of a contract. As a result, the considerations developed in the case-law cited in paragraphs 56 to 59 of this judgment do not apply automatically either to those provisions of the Treaty or to those principles.

61 Nevertheless, it must be held that those considerations may be transposed to the Treaty provisions and to the principles which relate to public service concessions

excluded from the scope of the directives on public procurement. Indeed, in the field of public procurement and public service concessions, the principle of equal treatment and the specific expressions of that principle, namely the prohibition on discrimination on grounds of nationality and Articles 43 EC and 49 EC, are to be applied in cases where a public authority entrusts the supply of economic activities to a third party. By contrast, it is not appropriate to apply the Community rules on public procurement or public service concessions in cases where a public authority performs tasks in the public interest for which it is responsible by its own administrative, technical and other means, without calling upon external entities (see, to that effect, *Stadt Halle and RPL Lochau*, paragraph 48).

62 Consequently, in the field of public service concessions, 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 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.

63 Since it is a matter of a derogation from the general rules of Community law, the two conditions stated in the preceding paragraph must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying the derogation to those rules lies on the person seeking to rely on those circumstances (see *Stadt Halle and RPL Lochau*, paragraph 46).

64 It is appropriate to examine, first, whether the concession-granting public authority exercises a control over the concessionaire which is similar to that which it exercises over its own departments.

65 That assessment must 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 enabling the concession-granting public authority to influence the concessionaire's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions.

66 It is clear from the order for reference that under Article 1 of the statutes of the special undertaking, Stadtwerke Brixen, it was a municipal body whose specific function was the uniform and integrated provision of local public services. The municipal council laid down the general guidelines, allocated the start-up capital, ensured that any social costs were covered, monitored the operating results and exercised strategic supervision, the undertaking being guaranteed the necessary independence.

67 By contrast, Stadtwerke Brixen AG became market-oriented, which renders the municipality's control tenuous. Militating in that direction are:

(a) the conversion of Stadtwerke Brixen — a special undertaking of the Gemeinde Brixen — into a company limited by shares (Stadtwerke Brixen AG) and the nature of that type of company;

(b) the broadening of its objects, the company having started to work in significant new fields, particularly those of the carriage of persons and goods, as well as information technology and telecommunications. It must be noted that the company retained the wide range of activities previously carried on by the special undertaking, particularly those of water supply and waste water treatment, the supply of heating and energy, waste disposal and road building;

(c) the obligatory opening of the company, in the short term, to other capital;

(d) the expansion of the geographical area of the company's activities, to the whole of Italy and abroad;

(e) the considerable powers conferred on its Administrative Board, with in practice no management control by the municipality.

68 In fact, as regards the powers conferred on the Administrative Board, it is clear from the decision of reference that the statutes of Stadtwerke Brixen AG, particularly Article 18 thereof, give the board very broad powers to manage the company, since it has the power to carry out all acts which it considers necessary for the attainment of the company's objective. In addition, the power, under the said Article 18, to provide guarantees up to EUR 5 million or to effect other transactions without the prior authority of the shareholders' meeting shows that the company has broad independence vis-à-vis its shareholders.

69 The decision of reference also states that the Gemeinde Brixen has the right to appoint the majority of the members of Stadtwerke Brixen AG's Administrative Board. However, the referring court notes that the control exercised by the municipality over Stadtwerke Brixen AG is limited, essentially, to those measures which company law assigns to the majority of shareholders, which considerably attenuates the relationship of dependence which existed between the municipality and the special undertaking Stadtwerke Brixen, in the light, above all, of the broad powers possessed by Stadtwerke Brixen AG's Administrative Board.

70 Where a concessionaire enjoys a degree of independence characterised by elements such as those noted in paragraphs 67 to 69 of this judgment, it is not possible for the concession-granting public authority to exercise over the concessionaire control similar to that which it exercises over its own departments.

71 In those circumstances, and without it being necessary to consider the question whether the concessionaire carries out the essential part of its activities with the concession-granting public authority, the award of a public service concession by a public authority to such a body cannot be regarded as a transaction internal to that authority, to which the rules of Community law do not apply.

72 It follows that the reply to the second question referred for a preliminary ruling must be as follows:

Articles 43 EC and 49 EC, and the principles of equal treatment, non-discrimination and transparency, are to be interpreted as precluding a public authority from awarding, without putting it out to competition, a public service concession to a company limited by shares resulting from the conversion of a special undertaking of that public authority, a company whose objects have been extended to significant new areas, whose capital must obligatorily be opened in the short term to other capital, the geographical area of whose activities has been extended to the entire country and abroad, and whose Administrative Board possesses very broad management powers which it can exercise independently.

Costs

73 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 award, by a public authority to a service provider, of the management of a public pay car park, in consideration for which that provider is remunerated by sums paid by third parties for the use of that car park, is a public service concession to which Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts does not apply.**

2. **Articles 43 EC and 49 EC, and the principles of equal treatment, non-discrimination and transparency, are to be interpreted as precluding a public authority from awarding, without putting it out to competition, a public service concession to a company limited by shares resulting from the conversion of a special undertaking of that public authority, a company whose objects have been extended to significant new areas, whose capital must obligatorily be opened in the short term to other capital, the geographical area of whose activities has been extended to the entire country and abroad, and whose Administrative Board possesses very broad management powers which it can exercise independently.**

[Signatures]