JUDGMENT OF THE COURT (Grand Chamber)

21 July 2005 *

In Case C-231/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Lombardia (Italy), by decision of 14 February 2003, received at the Court on 28 May 2003, in the proceedings

Consorzio Aziende Metano (Coname)

v

Comune di Cingia de' Botti,

intervener:

Padania Acque SpA,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur), A. Rosas, R. Silva de Lapuerta and A. Borg Barthet, Presidents of Chambers, R. Schintgen, S. von Bahr, J.N. Cunha Rodrigues, G. Arestis, M. Ilešič, J. Malenovský and J. Klučka, Judges,

* Language of the case: Italian.

Advocate General: C. Stix-Hackl,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 March 2005,

after considering the observations submitted on behalf of:

— Consorzio Aziende Metano (Coname), by M. Zoppolato, avvocato,

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

— the Netherlands Government, by D.J.M. de Grave, acting as Agent,

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

— the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

— the Commission of the European Communities, by X. Lewis, K. Wiedner and C. Loggi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 April 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 43 EC, 49 EC and 81 EC.

2 That reference has been made in proceedings between Consorzio Aziende Metano ('Coname') and the Comune di Cingia de' Botti (municipality of Cingia de' Botti) concerning the award by the latter to Padania Acque SpA ('Padania') of service covering the management, distribution and maintenance of methane gas distribution installations.

Law

3 Under Article 22(3) of Law No 142 of 8 June 1990 on the organisation of local self-government (Legge no 142, recante ordinamento delle autonomie locali) (ordinary supplement to GURI No 135 of 12 June 1990, 'Law No 142/1990'), a service such as that covering the management, distribution and maintenance of methane gas distribution installations may be provided by the public authority itself, by concession to third parties through recourse to outside undertakings or, in

accordance with Article 22(3)(e), 'by means of companies limited by shares or limited-liability companies with predominantly local public capital, established by, or with the participation of, the body responsible for the public service and, if it is found to be appropriate due to the nature or extent of the territory covered by the service, with the participation of a number of public or private operators'.

The main proceedings and the question referred for a preliminary ruling

4 Coname had concluded with the Comune di Cingia de' Botti a contract for the award of the service covering the maintenance, operation and monitoring of the methane gas network for the period from 1 January 1999 to 31 December 2000.

5 By letter of 30 December 1999, that municipality informed Coname that, by decision of 21 December 1999, the municipal council had entrusted the service covering the management, distribution and maintenance of the methane gas distribution installations for the period from 1 January 2000 to 31 December 2005 to Padania. The latter company's share capital is predominantly public, held by the province of Cremona and almost all the municipalities of that province. The Comune di Cingia de' Botti holds a 0.97% share in the capital of that company.

6 The service at issue in the main proceedings was entrusted to Padania by direct award pursuant to Article 22(3)(e) of Law No 142/1990.

7 Coname, which claims that the referring court should, inter alia, annul the decision of 21 December 1999, submits that the award of that service should have been made following an invitation to tender.

8 As it took the view that the outcome of the proceedings before it hinges on the interpretation of certain provisions of the EC Treaty, the Tribunal amministrativo regionale per la Lombardia (Lombardy Regional Administrative Court) decided to stay those proceedings and to refer the following question to the Court for a preliminary ruling:

'Do Articles 43 [EC], 49 [EC] and 81 EC, in so far as they prohibit, respectively, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State and on freedom to provide services within the Community in respect of nationals of Member States, as well as commercial and corporate practices which are liable to prevent, restrict or distort competition within the European Union, preclude provision for the direct award, that is to say without an invitation to tender, of the management of the public gas-distribution service to a company in which a municipality has a holding, whenever that holding is such as to preclude any direct control over the management itself, and must it therefore be declared that, as is the case in these proceedings, where the holding amounts to 0.97%, the essential preconditions for "in-house" management are not met?'

The question referred for a preliminary ruling

9 It must be observed at the outset that the case in the main proceedings appears to relate, as follows from the reply given by the referring court to a request for clarification made by the Court under Article 104(5) of its Rules of Procedure, to a

service described as a concession, which does not fall within the scope of either 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) or 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) (see, to that effect, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 56, and the order in Case C-358/00 *Buchhändler-Vereinigung* [2002] ECR I-4685, paragraph 28).

10 The present judgment is therefore based on the premiss that the main proceedings concern the award of a concession, a premiss which it is for the referring court to verify.

11 That having been made clear, the referring court seeks, by its question, an interpretation of Articles 43 EC, 49 EC and 81 EC.

Article 81 EC

12 It must be recalled that Article 81 EC, which applies, according to its wording, to agreements 'between undertakings', does not, in principle, apply to contracts for concessions concluded between municipalities acting in their capacity as public authorities and concessionaires entrusted with responsibility for a public service (see, to that effect, Case 30/87 *Bodson* [1988] ECR 2479, paragraph 18).

13 Consequently, as the Finnish Government and the Commission rightly point out, that provision does not apply to the case in the main proceedings, as it is described in the order for reference.

14 There is therefore no need to answer the question in that regard.

Articles 43 EC and 49 EC

15 By its question, the referring court seeks, in essence, to ascertain whether Articles 43 EC and 49 EC preclude the direct award, that is to say without an invitation to tender, by a municipality of a concession for the management of the public gas-distribution service to a company with predominantly public capital in which that municipality holds a 0.97% share.

16 It must be remembered that the award of such a concession is not governed by any of the directives by which the Community legislature has regulated the field of public contracts. In the absence of any such legislation, the consequences in Community law of the award of such concessions must be examined in the light of primary law and, in particular, of the fundamental freedoms provided for by the Treaty.

17 In that regard, it must be pointed out that, in so far as the concession in question may also be of interest to an undertaking located in a Member State other than the Member State of the Comune di Cingia de' Botti, the award, in the absence of any transparency, of that concession to an undertaking located in the latter Member State amounts to a difference in treatment to the detriment of the undertaking located in the other Member State (see, to that effect, *Telaustria and Telefonadress*, paragraph 61).

18 In the absence of any transparency, the latter undertaking has no real opportunity of expressing its interest in obtaining that concession.

19 Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 EC and 49 EC (see in particular, to that effect, Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 17, Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 27, and Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447, paragraph 33 and the case-law cited).

20 With regard to the case in the main proceedings, it is not apparent from the file that, because of special circumstances, such as a very modest economic interest at stake, it could reasonably be maintained that an undertaking located in a Member State other than that of the Comune di Cingia de' Botti would have no interest in the concession at issue and that the effects on the fundamental freedoms concerned should therefore be regarded as too uncertain and indirect to warrant the conclusion that they may have been infringed (see, to that effect, Case C-69/88 *Krantz* [1990] ECR I-583, paragraph 11; Case C-44/98 *BASF* [1999] ECR I-6269, paragraph 16; and the order in Case C-431/01 *Mertens* [2002] ECR I-7073, paragraph 34).

21 In those circumstances, it is for the referring court to satisfy itself that the award of the concession by the Comune di Cingia de' Botti to Padania complies with transparency requirements which, without necessarily implying an obligation to hold an invitation to tender, are, in particular, such as to ensure that an undertaking

located in the territory of a Member State other than that of the Italian Republic can have access to appropriate information regarding that concession before it is awarded, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession.

22 If that is not the case, it must be concluded that there was a difference in treatment to the detriment of that undertaking.

23 With regard to the objective circumstances that could justify such a difference in treatment, it must be pointed out that the fact that the Comune di Cingia de' Botti has a 0.97% holding in the share capital of Padania does not, by itself, constitute one of those objective circumstances.

24 Even if the need for a municipality to exercise control over a concessionaire managing a public service may constitute an objective circumstance capable of justifying a possible difference in treatment, it must be pointed out that the 0.97% holding is so small as to preclude any such control, as the referring court itself observes.

25 At the hearing, the Italian Government submitted, in essence, that, in contrast to some large Italian cities, most municipalities lack the resources to provide, through in-house structures, public services such as that of gas distribution within their territory, and are therefore obliged to resort to structures, such as that of Padania, in the share capital of which several municipalities have holdings.

26 In that regard, it must be held that a structure such as that of Padania may not be treated in the same way as a structure through which a municipality or a city manages, on an in-house basis, a public service. As is apparent from the file, Padania is a company open, at least in part, to private capital, which precludes it from being regarded as a structure for the 'in-house' management of a public service on behalf of the municipalities which form part of it.

27 The Court has not been made aware of any other objective circumstance capable of justifying any difference in treatment.

28 In those circumstances, the answer to the question referred must be that Articles 43 EC and 49 EC preclude, in circumstances such as those at issue in the main proceedings, the direct award by a municipality of a concession for the management of the public gas-distribution service to a company in which there is a majority public holding and in which the municipality in question has a 0.97% holding, if that award does not comply with transparency requirements which, without necessarily implying an obligation to hold an invitation to tender, are, in particular, such as to enable an undertaking located in the territory of a Member State other than that of the municipality in question to have access to appropriate information regarding that concession, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession.

Costs

29 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:

Articles 43 EC and 49 EC preclude, in circumstances such as those at issue in the main proceedings, the direct award by a municipality of a concession for the management of the public gas-distribution service to a company in which there is a majority public holding and in the capital of which the municipality in question has a 0.97% holding, if that award does not comply with transparency requirements which, without necessarily implying an obligation to hold an invitation to tender, are, in particular, such as to enable an undertaking located in the territory of a Member State other than that of the municipality in question to have access to appropriate information regarding that concession, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession.

[Signatures]