JUDGMENT OF THE COURT (Third Chamber)

22 December 2010 *

In Case C-215/09,

REFERENCE for a preliminary ruling under Article 234 EC, made by the Markkinaoikeus (Finland), by decision of 12 June 2009, received at the Court on 15 June 2009, in the proceedings

Mehiläinen Oy,

Terveystalo Healthcare Oy, formerly Suomen Terveystalo Oyj,

v

Oulun kaupunki,

* Language of the case: Finnish.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász (Rapporteur), G. Arestis, J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Mazák,
Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 17 June 2010,

after considering the observations submitted on behalf of:

— Mehiläinen Oy and Terveystalo Healthcare Oy (formerly Suomen Terveystalo Oyj), by A. Laine and A. Kuusniemi-Laine, asianajaja,

— Oulun kaupunki, by S. Rasinkangas and I. Korpinen, asianajaja,

— the Finnish Government, by A. Guimaraes-Purokoski and M. Pere, acting as Agents,

— the Czech Government, by M. Smolek, acting as Agent,

— the European Commission, by E. Paasivirta, C. Zadra and D. Kukovec, 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 the relevant provisions, in the light of the circumstances of the dispute in the main proceedings, 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 2001 L 134, p. 114).

2 The reference was made in the course of proceedings between Mehiläinen Oy and Terveystalo Healthcare Oy, formerly Suomen Terveystalo Oyj, limited companies incorporated under Finnish law, and Oulun kaupunki (City of Oulu), concerning the

legal classification, from the point of view of the European Union rules on public procurement, of a contract concluded between Oulun kaupunki and ODL Terveys Oy, a private company independent of Oulun kaupunki ('the private partner'), concerning the creation of a joint enterprise, ODL Oulun Työterveys Oy ('the joint enterprise').

Legal context

European Union legislation

3 In accordance with the definitions contained in Article 1(2) of Directive 2004/18:

'(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 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 Pursuant to Article 7 of that directive, entitled 'Threshold amounts for public contracts', as amended by 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), Directive 2004/18 applies to public service contracts awarded by contracting authorities other than central government authorities, which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than EUR 206 000.

6 In accordance with Annex II B of Directive 2004/18, health care services fall within Category 25 thereof entitled 'Health and social services'.

7 Under Article 21 of Directive 2004/18:

'Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).'

8 Article 23 of Directive 2004/18, in Chapter IV thereof, entitled 'Specific rules governing specifications and contract documents' relates to technical specifications in contract documentation, and Article 35(4), which appears in Chapter VI of that directive, entitled 'Rules on advertising and transparency', refers to the contracting authorities' obligations to give notice of the results of the award procedure.

National legislation

9 Finnish law 1383/2001 on occupational health care (Työterveyshuoltolaki) requires public and private employers to protect the health of their employees at work.

10 According to the first subparagraph of paragraph 3 of that law, occupational health care is the activity, carried out on the responsibility of the employer, by which occupational health professionals and experts promote the prevention of work-related

illness and accidents, ensure that work-stations do not imperil workers' health or safety, promote an adequate working environment and the correct functioning of the staff as a group and the workers' health, efficiency and performance.

11 Under the first subparagraph of Paragraph 4 of that law, the employer must arrange occupational health care at his own expense in order to prevent and control impairment of health and health risks caused by work and working conditions and to protect and ensure the safety, working capacity and health of his staff.

12 Under Paragraph 7 of Law 1383/2001, an employer may organise occupational health care services within the meaning of that law by acquiring the services he needs from a 'health centre', within the meaning of Law 66/1972 on Public Health (Kansanterveyslaki), arranging, himself or together with other employers, the occupational health care services needed or by acquiring the services in question from another entity or person entitled to provide occupational health care services.

13 In accordance with the first subparagraph of Paragraph 87a of Finnish Law 365/1995 on local government (Kuntalaki), as amended by Law 519/2007, which entered into force on 15 May 2007, a local authority or association of local authorities may set up a municipal entity for the purposes of business or a task to be discharged according to commercial principles. Such municipal entities are not independent legal persons, but are components of the local authority organisation and legislation on the activities of local authorities applies to the activity of a municipal entity.

14 Directive 2004/18 was transposed into Finnish law by Law 348/2007 on public procurement (Hankintalaki), the first subparagraph of Paragraph 5 thereof contains a definition of 'public contract' which corresponds to that in Article 1(2)(a) of that directive.

15 In accordance with the preparatory materials which led to the adoption of that law (Government Proposal 50/2006 vp), a public contract is normally a private-law contract between two separate legal persons. That is why, contracts within an organisation are not generally to be regarded as public contracts. A contract is not to be regarded as a public contract if its main object is other than the award of a contract. What needs to be examined in particular is whether the arrangement or bundle of agreements constitutes or constitute an indivisible whole, from which the contract in question cannot be separated.

16 Under Paragraph 10 of the law, the latter does not apply to contracts awarded by a contracting authority to an entity distinct from it in form and independent of it in terms of decision making, but over which it exercises, alone or with other contracting authorities, a control similar to that which it exercises over its own departments so long as that distinct entity carries out the essential part of its activities with those contracting authorities. That provision constitutes the adaptation of the national rules to the case-law of the Court (Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50).

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 On 21 April 2008, Oulu City Council decided to set up a joint venture with its private partner, to be governed by Law 624/2006 on limited companies, and to commence its activities on 1 June 2008. The capital of the joint venture is divided equally between the two partners and its management is shared.

18 The joint venture's activity was to consist in providing occupational heath care and welfare services and the two partners intended its activities to be chiefly and increasingly, focused on private clients. However, for a transitional period of four years ('the

transitional period'), they undertook to purchase from the joint venture the health services they are required, as employers, to provide for their staff in accordance with national law.

19 According to Oulun kaupunki, the joint venture's estimated turnover was approximately EUR 90 million during the transitional period, EUR 18 million of which represented the value of services that it was to provide to its staff.

20 The two partners were to transfer to the joint venture, as a capital contribution, their respective units responsible internally for providing occupational health care services to their employees in accordance with the applicable national law. Thus, Oulun kaupunki transferred to the joint venture the municipal entity Oulun Työterveys ('the municipal entity'), responsible internally for the supply of occupational health care services, the value of which was between EUR 2.5 and 3.4 million, while the private partner transferred its corresponding unit of an estimated value of between EUR 2.2 and 3 million.

21 According to Oulun kaupunki, the occupational health care services supplied to the city's employees represent about 38 % of the municipal entity's turnover. The remainder of the turnover is obtained by the supply of services to private clients.

22 The minutes of the Oulun kaupunki City Council meeting which led to the decision of 21 April 2008 state as follows:

'The parties have furthermore agreed to purchase occupational health and welfare services from the newly founded company over a four year transitional period. The

City shall purchase these services on the same scale as it has from the current Oulun Työterveys municipal entity. … The [Law on public procurement] requires the City to put out to tender its occupational health services once they have become the responsibility of the [joint venture]. During the transitional stage, however, the City is justified in continuing its customer relationship with the [joint venture] on account of at least the following:

— the arrangement will safeguard the position of staff transferring from the City

— the City's current contract is favourable and competitive

— the joint venture will begin its operations in favourable conditions.'

23 In accordance with those minutes, on 24 April 2008 Oulun kaupunki signed an agreement with the private partner, according to which it undertook to entrust to the future joint venture the task of providing municipal employees with occupational health and welfare services during the transitional period. When that transitional period expired, Oulun kaupunki intended, according to its statement, to make the award of the services concerned subject to a procedure for the award of a procurement contract.

24 Thus, it is clear from those minutes that Oulun kaupunki, as the contracting authority, failed to invite tenders during the transitional period for the provision of occupational health care and welfare services which it had a duty to provide for its employees

in accordance with national law. It is also common ground that the choice of private partner was not made following a competitive procedure.

25 The referring court, hearing an action brought by competing undertakings interested in providing occupational health care and welfare services for the employees of Oulun kaupunki temporarily restrained the latter, on pain of a EUR 200 000 fine, from implementing, in any way whatsoever, the City Council's decision of 21 April 2008 in so far as it concerns the occupational health care and welfare services for the City's staff. Pending the final decision of the court hearing the proceedings, on 26 August 2008 Oulun kaupunki decided to transfer the municipal entity's activities to the joint venture, excluding, however, from that transfer the occupational health care services provided to its staff.

26 Having regard to the arguments put forward by the parties to the main proceedings concerning the nature of the contested transaction, in the light of European Union law on public procurement, the Markkinaoikeus decided to stay its proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is an arrangement by which a municipal contracting authority concludes with a private undertaking in the form of a company which is separate from it a contract establishing a new undertaking in the form of a share company, on an equal share basis both in terms of ownership and of power of control, from which the municipal contracting authority commits itself, when setting up the company, to purchasing occupational health and welfare services for its own staff, on an overall assessment, an arrangement which must be put out to tender, on the ground that the bundle of agreements amounts to the award of a public service contract for the purposes of Directive 2004/18/EC … or is the arrangement to be regarded as the establishment of a joint venture and the transfer of the business activity of a municipal entity to which that directive and the consequent obligation to put out to tender are not applicable?

2. Should any significance in this case also be attached:

(a) to the fact that Oulun kaupunki, as a municipal contracting authority, has undertaken to acquire in return for consideration the services referred to above over a four-year transitional period, after which the municipal contracting authority intends, according to its decision, once again to put out to tender the occupational health care services it requires;

(b) to the fact that, prior to the arrangement in question, most of the turnover of the municipal enterprise that was part of Oulun kaupunki's organisation came from occupational health care services other than those produced for the City's own employees;

(c) to the fact that the new undertaking has been created by the transfer, by way to a contribution in kind, of the activity of the municipal entity, which comprises the production of occupational health care services both for the City's employees and for private customers?'

The questions referred for a preliminary ruling

27 By its two questions, which it is appropriate to examine together, the national court asks essentially whether Directive 2004/18 must be interpreted as meaning that it applies to an arrangement by which a municipal contracting authority concludes with a private undertaking independent of it, a contract establishing a joint venture in the form of a share company, from which the municipal contracting authority commits

itself, when setting up the company, to purchasing occupational health and welfare services for its own staff.

28 It is clear from the wording of those questions and the context in which they arise that they relate more specifically to the supply by the joint venture, to Oulun kaupunki of occupational health care and welfare services for its staff, since that supply corresponds to the undertaking entered into by the City to purchase from the joint venture, during a transitional period of four years, such services which were previously provided to it by a municipal entity which is a component of its organisation.

29 As a preliminary point, it must be noted that it is common ground in the case in the main proceedings that Oulun kaupunki has the status of a contracting authority within the meaning of Article 1(9) of Directive 2004/18, and that the services concerned fall within the definition of 'health care … services' for the purpose of Category 25 of Annex II B to that directive. The undertaking by Oulun kaupunki to purchase the services concerned for its staff from the joint venture implies the existence of a contract for pecuniary interest between the City and that joint venture. Moreover, it is clear from the information provided by the national court that the estimated value of the contract of EUR 18 million exceeds the relevant threshold for the application of Directive 2004/18.

30 It should also be recalled that Directive 2004/18 makes no distinction between public contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting of public interest needs and those which are unrelated to that task, such as the need to fulfil an obligation imposed on it, as in the present case, as an employer with respect to its employees (see, in particular, Case C-271/08 *Commission* v *Germany* [2010] ECR I-7091, paragraph 73 and the case-law cited).

31 After making that point clear, it should be recalled that a public authority may perform the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities not forming part of its own departments, and that it may do so in cooperation with other public authorities (see Case C-480/06 *Commission* v *Germany* [2009] ECR I-4747, paragraph 45). Similarly, as stated in point 1 of the Commission's Interpretative Communication on the Application of Community law on Public Procurement and Concessions to Institutionalised (PPPI) (OJ 2008 C 91, p. 4), public authorities are free to pursue economic activities themselves or to assign them to third parties, such as mixed capital entities founded in the context of a public-private partnership.

32 Furthermore, the application of European Union law on public procurement is excluded if the control exercised by the contracting authority over the contracting entity is similar to that exercised by the contracting authority over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling local authority (see *Teckal*, paragraph 50). However, the holding, even a minority holding, of a private undertaking in the capital of a company in which the contracting authority in question also has a holding too means that, on any view, it is impossible for that contracting authority to exercise over that company control similar to that which it exercises over its own departments (see, in particular, Case C-573/07 *Sea* [2009] ECR I-8127, paragraph 46, and Case C-196/08 *Acoset* [2009] ECR I-9913, paragraph 53).

33 As regards, more specifically, the national court's question whether or not Oulun kaupunki's undertaking to purchase health care and welfare services for its staff from the joint venture during the transitional period falls outside the scope of the rules in Directive 2004/18 on account of the fact that that undertaking forms part of a contract setting up a joint venture, it must be observed that the creation of a joint venture by a contracting authority and a private economic operator is not covered as such by Directive 2004/18. That finding is also set out in point 66 of the Green Paper on

public-private partnerships and Community law on public contracts and concessions (COM(2004) 327 final).

34 However it should be observed, as is clear from point 69 of that Green Paper, that it is necessary to ensure that such a capital transaction does not in reality conceal the award to a private partner of contracts which might be considered to be public contracts or concessions. Furthermore, as stated at paragraph 2.1 of the Commission Interpretative Communication, the fact that a private entity and a contracting entity cooperate within a mixed-capital entity cannot justify failure to observe the provisions on public procurement when awarding such a contract to that private entity or to that mixed capital entity (see, to that effect, *Acoset*, paragraph 57).

35 Having regard to those general guidelines, it must be established whether, and to what extent, Directive 2004/18 may be applicable in the case in the main proceedings.

36 In that connection, it is clear from the case-law of the Court that, as regards a mixed contract, the different aspects of which are inseparably linked and thus form an indivisible whole, that contract must be examined as a whole for the purposes of its legal classification in the light of the rules on public contracts, and must be assessed on the basis of the rules which govern the aspect which constitutes the main object or predominant feature of the contract (Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki and Others* [2010] ECR I-4165, paragraphs 48 and 49 and the case-law cited).

37 It follows that, for the purposes of the application of Directive 2004/18, it must be ascertained whether the aspect constituted by the health care services for Oulun kaupunki's staff, which fall in principle within the scope of that directive, is severable from that contract.

38 In that connection, reference should be made to the minutes of the municipal council meeting of Oulun kaupunki of 21 April 2008, which sets out the reasons for the undertaking entered into by it when the joint venture was set up. Furthermore, it is clear from the explanations provided by Oulun kaupunki at the hearing that it regards that aspect of the contract as indivisible, on account of the fact that the value of the undertaking to purchase health care services from the joint venture during the transitional period was part of its capital contribution to that venture and that that contribution was, economically, a condition of the creation of that venture.

39 It should be pointed out that the expressed or presumed intentions of the contracting parties to regard the various aspects making up a mixed contract as indivisible are not sufficient, but must be supported by objective evidence capable of justifying them and of establishing the need to conclude a single contract.

40 As far as concerns Oulun kaupunki's argument that the situation of the City Council's employees transferred to the joint venture is guaranteed by the undertaking entered into, it must be observed that such a guarantee could also have been made under a procedure for the award of a public contract in accordance with the principles of non-discrimination and transparency, in which the requirement relating to that guarantee would be part of the conditions to which the award of the contract would be subject.

41 As regards Oulun kaupunki's arguments that 'the current contract is advantageous and competitive' and that, by that undertaking, 'the joint venture will commence its activities in favourable conditions', it must be recalled that, according to the case-law of the Court, 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

(*Acoset*, paragraph 56 and the case-law cited). Such arguments do not support the conclusion that the aspect constituted by the health care services for the staff of Oulun kaupunki is indissociable from the rest of the contract.

42 Furthermore, it must be held that the alleged but unsubstantiated inclusion of the value of the undertaking entered into by Oulun kaupunki with respect to its capital contribution to the joint venture constitutes, in those circumstances, a legal technicality which does not justify the view that that aspect of the mixed contract is indivisible from the latter.

43 In addition, as the Czech Government and the Commission argue, the fact that, in the case in the main proceedings, the contracting authority expressed its intentions to launch a call for tenders for the purchase of health care services for its staff at the end of the transitional period also constitutes evidence to support the severable nature of that aspect from the remainder of the mixed contract.

44 Similarly, the fact that the joint venture has operated since August 2008 without that aspect tends to show that the two partners appear to be in a position to deal with any impact that that absence might have on the financial position of that venture, which is further relevant evidence as the divisible nature of that aspect.

45 Accordingly, unlike the circumstances which gave rise to the judgment in *Loutraki and Others*, the abovementioned findings fail to demonstrate objectively the need to conclude that mixed contract with a single partner (see, to that effect, *Loutraki and Others*, paragraph 53).

46 Since the component of the mixed contract consisting in the undertaking by Oulun kaupunki to purchase health care services for its staff from the joint venture is severable from that contract, it follows that in a context such as that in the main proceedings, the relevant provisions of Directive 2004/18 are applicable to the award of that aspect.

47 In the light of the foregoing considerations, the answer to the questions referred is that Directive 2004/18 must be interpreted as meaning that, where a contracting authority concludes with a private company independent of it a contract establishing a joint venture in the form of a share company, the purpose of which is to provide occupational health care and welfare services, the award by the contracting authority of the contract relating to the services for its own staff, the value of which exceeds the threshold laid down by that directive, and which is severable from the contract establishing that company, must be made in accordance with the provisions of that directive applicable to the services in Annex II B thereof.

Costs

48 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:

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 a contracting authority concludes with a private company independent of it a contract establishing a joint venture in the form of a share company, the purpose of which is to provide occupational health care and welfare services, the award by the contracting authority of the contract relating to the services for its own staff, the value of which exceeds the threshold laid down by that directive, and which is severable from the contract establishing that company, must be made in accordance with the provisions of that directive applicable to the services in Annex II B thereof.

[Signatures]