Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

4 June 2020 *

(Reference for a preliminary ruling – Public procurement – Directive 2004/18/EC – Central purchasing bodies – Small municipalities – Restriction to only two organisational models for central purchasing bodies – Prohibition on using a central purchasing body governed by private law and involving the participation of private entities – Territorial restrictions on the activities of central purchasing bodies)

In Case C-3/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy) by a decision of 20 September 2018, received at the Court on 3 January 2019, in the proceedings

Asmel Soc. cons. a r.l.

v

Autorità Nazionale Anticorruzione (ANAC),

with the intervention of:

Associazione Nazionale Aziende Concessionarie Servizi entrate (Anacap),

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, K. Lenaerts (Rapporteur), President of the Court, acting as a Judge of the Second Chamber, P.G. Xuereb, T. von Danwitz and A. Kumin, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 29 January 2020,

after considering the observations submitted on behalf of:

– Asmel Soc. cons. a r.l., by M. Chiti, A. Sandulli, L. Lentini and B. Cimino, avvocati,

* Language of the case: Italian.

– the Italian Government, by G. Palmieri, acting as Agent, C. Colelli and C. Pluchino, avvocatesse dello Stato,

– the European Commission, by G. Gattinara, P. Ondrůšek and L. Haasbeek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 April 2020,

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of Article 1(10) and Article 11 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), as amended by Commission Regulation (EU) No 1336/2013 of 13 December 2013 (OJ 2013 L 335, p. 17) ('Directive 2004/18'), and the principles of freedom to provide services and of opening up to competition as far as possible in the field of public service contracts. Directive 2004/18 was repealed by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (OJ 2014 L 94, p. 65).

2 This request was made in proceedings between Asmel Soc. cons. a r.l. ('Asmel') and the Autorità Nazionale Anticorruzione (National Anti-Corruption Authority, Italy) ('the ANAC') relating to the ANAC's decision No 32 of 30 April 2015 in which it prohibited Asmel from performing brokerage activities in the field of public procurement and declared the tendering procedures it had conducted to be unlawful, on the grounds that Asmel had not complied with the organisational models for central purchasing bodies established by Italian law ('the decision at issue').

Legal context

EU law

3 According to recital 2 of Directive 2004/18, which applied at the time of the facts at issue in the main proceedings:

'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.'

4 Recital 16 of that directive states:

‘In order to take account of the different circumstances obtaining in Member States, Member States should be allowed to choose whether contracting authorities may use framework agreements, central purchasing bodies, dynamic purchasing systems, electronic auctions or the competitive dialogue procedure, as defined and regulated by this Directive.’

5 Article 1(8) to (10) of that directive provides:

‘8. The terms “contractor”, “supplier” and “service provider” mean any natural or legal person or public entity or group of such persons and/or bodies 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, 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.

…

10. A “central purchasing body” is a contracting authority which:

– acquires supplies and/or services intended for contracting authorities, or

– awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities.’

6 Article 2 of that directive, entitled ‘Principles of awarding contracts’, provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

7 According to the first indent of Article 7(b) of Directive 2004/18, the directive applies, inter alia, to public supply and service contracts awarded by contracting authorities other than those listed in Annex IV to that directive and which have a value exclusive of value added tax equal to or greater than EUR 207 000. Under Article 7(c), that threshold is EUR 5 186 000 for public works contracts.

8 Article 11 of that directive, entitled 'Public contracts and framework agreements awarded by central purchasing bodies', reads as follows:

'1. Member States may stipulate that contracting authorities may purchase works, supplies and/or services from or through a central purchasing body.

2. Contracting authorities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(10) shall be deemed to have complied with this Directive insofar as the central purchasing body has complied with it.'

Italian law

Legislative Decree No 267/2000

9 The first paragraph of Article 30 of decreto legislativo n. 267 – Testo unico delle leggi sull'ordinamento degli enti locali (Legislative Decree No 267 – Consolidated Law on the rules governing local authorities) of 18 August 2000 (GURI No 227 of 28 September 2000; 'Legislative Decree No 267/2000') states:

'In order to discharge certain functions and to provide certain services in a coordinated manner, local bodies may enter into appropriate agreements with each other.'

10 Under the first paragraph of Article 31 of that legislative decree, entitled 'Consortia (*Consorzi*)':

'Local bodies for the associated management of one or more services and for the associated exercise of functions may form a consortium (*consorzio*) in accordance with the rules laid down for special undertakings provided for in Article 114, in so far as they are compatible. Other public bodies may participate in the consortium, when they are authorised to do so, in accordance with the laws to which they are subject.'

11 The first paragraph of Article 32 of that legislative decree defines an 'association of municipalities' as 'a local body formed of two or more municipalities, usually contiguous, for the associated exercise of functions and provision of services'.

Legislative Decree No 163/2006

12 Article 3(25) of decreto legislativo n. 163 – Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 establishing the Public Works Contracts, Public Supply Contracts and Public Service Contracts Code implementing Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006; 'Legislative Decree No 163/2006') defines 'contracting authorities' as 'State administrative authorities; regional or local authorities; other non-economic public bodies; bodies governed by public law; associations, unions, consortia, however named, established by those entities'.

13 Under Article 3(34) of Legislative Decree No 163/2006, 'central purchasing body' means:

'A contracting authority which:

– acquires supplies or services intended for contracting authorities or other contracting entities, or

– awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities or other contracting entities.'

14 Article 33(3a) of that legislative decree, inserted by decreto-legge n. 201 – Disposizioni urgenti per la crescita, l'equità e il consolidamento dei conti pubblici (Decree Law No 201 on urgent provisions relating to growth, fairness and the consolidation of public accounts) of 6 December 2011 (Ordinary Supplement to GURI No 284 of 6 December 2011), converted into a law and amended by legge n. 214 (Law No 214) of 22 December 2011 (Ordinary Supplement to GURI No 300 of 27 December 2011), states:

'Municipalities with a population not exceeding 5 000 inhabitants situated within the territory of each province shall compulsorily entrust to a single central purchasing body the acquisition of works, services and supplies within the framework of the associations of municipalities, as provided for in Article 32 of [Legislative Decree No 267/2000], where they exist, or by establishing a special consortium agreement between those municipalities and relying on the support of the relevant departments.'

15 Article 9(4) of decreto-legge n. 66 – Misure urgenti per la competitività e la giustizia sociale (Decree Law No 66 on urgent measures to promote competitiveness and social justice) of 24 April 2014 (GURI No 95 of 24 April 2014), converted into a law and amended by Law No 89 of 23 June 2014 (GURI No 143 of 23 June 2014), amended Article 33(3a) as follows:

'Municipalities that are not the provincial capital shall acquire works, goods and services within the framework of the associations of municipalities provided for in Article 32 of Legislative Decree [No 267/2000], where they exist, or by establishing a special consortium agreement between those municipalities and relying on the support of the relevant departments, or using an aggregator or the provincial authorities, pursuant to Law No 56 of 7 April 2014. …'

The main proceedings and the questions referred for a preliminary ruling

16 Asmel, a limited liability consortium company established on 23 January 2013, is owned by the municipality of Caggiano (Italy) (51%), the private association Asmel, whose members include the Associazione nazionale piccoli comuni italiani (National Association of Small Italian Municipalities) (25%), and the Consorzio Asmel (Asmel Consortium), a consortium of private undertakings and municipalities (24%).

17 In the past, Asmel has carried on activities as a central purchasing body for various local authorities. Specifically, it arranged an invitation to tender for framework agreements to provide the service for collecting and overseeing municipal property taxes and enforcing tax debts, and 152 e-tender procedures to award various kinds of public contracts.

18 According to Asmel's operating arrangements, the local authorities became members of the Asmel Association by a decision of the municipal council, and, subsequently, by a decision of the municipal board, entrusted their procurement responsibilities to Asmel. Asmel was remunerated for the services supplied via an e-platform at a rate of 1.5% of the contract price, payable by the successful tenderer.

19 Following several complaints, the ANAC began an investigation which found that Asmel did not conform to the organisational models for central purchasing bodies established in Article 33(3a) of Legislative Decree No 163/2006.

20 According to the ANAC, Asmel was an entity governed by private law, whereas Italian law requires central purchasing bodies to behave as public bodies acting through public entities or associations of local authorities, such as associations or consortia of municipalities established under agreements concluded pursuant to Article 30 of Legislative Decree No 267/2000. The ANAC also highlighted that, while private entities may be used, they must, under all circumstances, be in-house bodies that operate only within the territory of the founding municipalities, whereas in the case under analysis the requirements that there be comparable oversight and that the activities be performed in a restricted area were not met.

21 The ANAC also found that the local authorities were only indirectly involved in the central purchasing body, given that they initially became members of the Asmel association and then, under a decision of the municipal board, entrusted responsibility for procurement to Asmel.

22 In terms of Asmel's legal nature, the ANAC held that it could not be classed as a 'body governed by public law' because it operated only indirectly to meet the needs of its member local authorities and therefore did not directly serve the public interest needs that those authorities are required to satisfy.

23 The ANAC therefore made the decision at issue.

24 Asmel challenged the decision at issue before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy). It argued that, although it was a body governed by ordinary law, it had legal personality, met public interest needs, was non-industrial and non-commercial in nature, and was funded by its local authority members and operated under their dominant influence. It was therefore a body governed by public law and, accordingly, a contracting authority that satisfied the requirements to be classed as a 'central purchasing body'.

25 By a judgment of 22 February 2016, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) dismissed Asmel's action. In view of the way in which it was financed and how the company's management was supervised, that court found that it could not be classed as a 'body governed by public law' since it did not satisfy the requirement of operating under the dominant influence of public bodies. It also found that Asmel did not comply with the organisational models laid down for central purchasing bodies by Legislative Decree No 163/2006 and that its operating area should be restricted to the territory of the founding municipalities.

26 Asmel appealed that judgment to the Consiglio di Stato (Council of State, Italy), advancing, among other claims, that, first, it is incorrect to find the operational model consisting of a consortium (*consorzio*) governed by private law in the form of a company to be incompatible with the

provisions of Legislative Decree No 163/2006 relating to central purchasing bodies and, secondly, that Legislative Decree No 163/2006 does not impose any territorial restriction on the activities of central purchasing bodies.

27 The Consiglio di Stato (Council of State) states that although, under the provisions of Legislative Decree No 163/2006 on central purchasing bodies, any contracting authority can act as a central purchasing body, Article 33(3a) of that legislative decree derogates from that rule to provide that small municipalities can only use central purchasing bodies configured in accordance with two specific organisational models, that is to say, the association of municipalities under Article 32 of Legislative Decree No 267/2000 or the consortium (*consorzio*) of local authorities under Article 31 of that legislative decree. In the opinion of the Consiglio di Stato (Council of State), that obligation on small municipalities seems to be at odds with the fact that under Directive 2004/18 central purchasing bodies can be used without any restrictions on the forms of cooperation.

28 The Consiglio di Stato (Council of State) also harbours doubts in relation to the obligation imposed on small municipalities to use public-law organisational models, excluding participation by private entities, in so far as concerns consortia (*consorzi*) of municipalities. That exclusion is potentially contrary to the principles of freedom to provide services and of opening up procurement procedures to competition as far as possible, enshrined in EU law, in that the provision of services which can be classed as 'economic activities' and which, as such, could be better provided under a system of free competition within the internal market, is reserved solely to Italian public-law bodies as specified in an exhaustive list.

29 The Consiglio di Stato (Council of State) also states that, while the domestic legislation does not define an operating area for central purchasing bodies, it does provide that their operating area must be the same as the territory of the small municipalities that use the services of those central purchasing bodies. The operating area is therefore restricted to the territory of the municipalities that are members of the association or consortium (*consorzio*). According to the Consiglio di Stato (Council of State), that restriction may be contrary to the principles of freedom to provide services and of opening up procurement procedures to competition as far as possible, since in its view it establishes exclusive operating zones for central purchasing bodies.

30 In those circumstances, the Consiglio di Stato (Council of State) stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Does a provision of national legislation, such as Article 33(3a) of Legislative Decree No 163 of 12 April 2006, which restricts the autonomy of municipalities to entrust [procurement] to a central purchasing body to only two organisational models (the union of municipalities, if it already exists, or a consortium to be established between municipalities), infringe EU law?

(2) In any event, does a provision of national legislation, such as Article 33(3a) of Legislative Decree No 163 of 12 April 2006 which, read in conjunction with Article 3(25) thereof, regarding the organisational model based on consortia of municipalities, excludes the possibility of creating entities governed by private law, such as a consortium under ordinary law whose members include private entities, infringe EU law, in particular the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts?

(3) Does a provision of national legislation, such as Article 33(3a) which, if interpreted in the sense of allowing consortia of municipalities that are central purchasing bodies to operate in a territory corresponding to that of the participating municipalities as a whole, and so, at most, to the provincial territory, limits the scope of operation of those central purchasing bodies, infringe EU law, in particular the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts?'

Admissibility

31 In the first place, the Italian Government argues that the request for a preliminary ruling is inadmissible because it is hypothetical.

32 That government contends that the referring court relies on a twofold premiss to the effect that, first, the procurement of goods and services on behalf of a contracting authority is an economic activity, namely a service within the meaning of Article 57 TFEU, and that, secondly, Asmel, which does not satisfy the requirements under EU law and Italian law to be classed as a 'central purchasing body', must by definition be classed as an 'economic operator'. According to that government, even if the Court found that EU law does preclude the provisions of Italian law at issue in the main proceedings, that finding would not enable the referring court to uphold the appeal brought before it, since the procurement services at issue in the main proceedings were not entrusted to Asmel on completion of a competitive procedure in accordance with EU law.

33 It should be noted here that, according to settled case-law, questions on the interpretation of EU 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 request for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU 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 (judgment of 27 November 2019, *Tedeschi and Consorzio Stabile Istant Service*, C-402/18, EU:C:2019:1023, paragraph 24 and the case-law cited).

34 According to equally consistent case-law, the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 28 and the case-law cited).

35 In the case under analysis, it is clear from the request for a preliminary ruling that the dispute in the main proceedings being heard by the referring court concerns whether Asmel was lawfully prevented from being among the entities that may act as central purchasing bodies for small local authorities. According to the referring court, the reason for that exclusion lies in the restrictions imposed by the provisions of Legislative Decree No 163/2006 relating to central purchasing bodies. By the questions it has referred for a preliminary ruling, the referring court invites the Court to rule on precisely whether EU law precludes those restrictions.

36 Under those circumstances, it is not 'quite obvious' that the interpretation of EU law sought by the referring court bears no relation to the actual facts of the main action or its purpose or that the questions referred relate to a hypothetical issue.

37 The presumption that the questions referred are relevant cannot be rebutted, in the present case, by the Italian Government's argument that the Court's answer would not enable the referring court to uphold Asmel's appeal – on the grounds that the procurement of goods and services was not entrusted to that company following a competitive procedure in accordance with EU law – because it is apparent from the order for reference that the decision at issue prohibits Asmel from acting as a central purchasing body for local authorities, in general, as opposed to for a specific contract, even though, according to Asmel, that prohibition is contrary to EU law.

38 In the second place, in its written observations, the European Commission expressed doubts as to whether the questions referred are relevant to resolution of the dispute in the main proceedings on the ground that Article 33(3a) of Legislative Decree No 163/2006, mentioned in the wording of the questions referred, was subsequently repealed by the Italian legislature, and that the dispute in the main proceedings may therefore have become devoid of purpose.

39 It must be observed in that respect that, in proceedings brought under Article 267 TFEU, it is not for the Court to specify the relevant provisions of national law applicable to the main proceedings. That is the prerogative of the referring court which, while setting out the internal legal framework, leaves it open to the Court to provide all the criteria for interpreting EU law so as to permit the court making the reference to assess the compatibility of national legislation with EU rules (see to that effect, judgment of 19 June 2019, *Meca*, C-41/18, EU:C:2019:507, paragraph 22 and the case-law cited).

40 The admissibility of the questions referred cannot, therefore, be called into question on the grounds that the provision of national law that the referring court found to be applicable to the main proceedings has subsequently been repealed.

41 Furthermore, when examined on the point of view expressed by the Commission that the questions referred may not be relevant to resolution of the dispute in the main proceedings, the Italian Government stated at the hearing that the new rules on central purchasing bodies, which have repealed and replaced Article 33(3a) of Legislative Decree No 163/2006, will not take effect until 31 December 2020, meaning that the dispute in the main proceedings is still governed by that article, a situation that the Commission also acknowledged at the hearing.

42 In the light of the foregoing, the request for a preliminary ruling cannot be dismissed as inadmissible.

43 The Italian Government and the Commission also expressed doubts as to whether the third question referred is admissible, on the grounds that, according to information provided in the order for reference, the territorial restriction on the area of operation of central purchasing bodies created by local authorities, on which the referring court seeks a ruling, may amount to an advantage for a central purchasing body. Specifically, the Italian Government points to a contradiction in that order regarding whether such a territorial restriction amounts to a disadvantage or an advantage for such a body. Those issues can appropriately be addressed as part of examination of the third question.

The questions referred

Preliminary observations

44 In its questions, the referring court looks in general to EU law and to the principles of freedom to provide services and of opening up to competition as far as possible in the field of public service contracts. However, it is apparent from the request for a preliminary ruling that the referring court's uncertainties concern specifically Article 56 TFEU, which enshrines the freedom to provide services, and Article 1(10) and Article 11 of Directive 2004/18 on central purchasing bodies.

45 As regards which provisions of primary or secondary law should be interpreted in order to provide the referring court with a reply of use, it should be noted, first, that the questions referred are intended to enable that court to determine whether Legislative Decree No 163/2006 is compatible with EU law. It is clear from the title itself of that decree that it implements Directive 2004/18.

46 Secondly, it is apparent from the request for a preliminary ruling that the concept of 'central purchasing body' established in Article 1(10) and Article 11 of Directive 2004/18 is crucial to the dispute in the main proceedings.

47 Thirdly and lastly, the thresholds for Directive 2004/18 to apply, laid down in Article 7, have been reached. It can be seen from documents in the case file before the Court that in a number of the 152 tendering procedures arranged by Asmel between May 2013 and February 2014, vitiated by unlawfulness as a result of the decision at issue, the contract price exceeds the relevant thresholds under that article. Moreover, the decision at issue prohibits Asmel from carrying on any brokerage activities in public procurement procedures irrespective of the amount involved.

48 Under those circumstances, the questions referred should be examined only in the light of Directive 2004/18, and of Article 1(10) and Article 11 thereof in particular.

Substance

First and second questions

49 By its first and second questions, which must be examined together, the referring court asks, in essence, whether Article 1(10) and Article 11 of Directive 2004/18 must be interpreted as precluding a provision of national law which restricts the autonomy of small municipalities to use the services of a central purchasing body to only two exclusively public organisational models with no participation by private persons or undertakings.

50 To answer those questions, it should be noted, in the first place, that the concept of 'central purchasing body' is defined in Article 1(10) of Directive 2004/18 and denotes a contracting authority which acquires supplies and/or services intended for contracting authorities, or awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities.

51 The concept of 'central purchasing body' is thus defined in Directive 2004/18 by reference to the concept of 'contracting authority'.

52 The concept of 'contracting authority', in turn, is defined in Article 1(9) of Directive 2004/18 and, according to the first subparagraph thereof, 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.

53 Under the second subparagraph of Article 1(9) of Directive 2004/18, 'body governed by public law' means any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, 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.

54 The Court has already had occasion to indicate that Article 1(9) of that directive defines the concept of 'contracting authority' broadly and in functional terms, in order to secure the objectives of that directive which seeks to exclude both the risk of preferring national tenderers or bidders in any contract award made by the contracting authorities and the possibility that a body financed or controlled by the State, regional authorities or other bodies governed by public law may be guided by considerations other than economic ones (see, to that effect, judgment of 5 October 2017, *LitSpecMet*, C-567/15, EU:C:2017:736, paragraph 31 and the case-law cited). Furthermore, there is no requirement under that article to adhere to any specific organisational models in order to fall within the definition of 'contracting authority'.

55 It needs to be said, in the second place, that, according to recital 16 of Directive 2004/18, 'in order to take account of the different circumstances obtaining in Member States, Member States should be allowed to choose whether contracting authorities may use … central purchasing bodies, … as defined and regulated by this Directive'. Accordingly, under Article 11(1) of Directive 2004/18, Member States may stipulate that contracting authorities may purchase works, supplies and/or services from or through a central purchasing body. Under Article 11(2), contracting authorities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(10) of that directive are to be deemed to have complied with Directive 2004/18 in so far as the central purchasing body has complied with it.

56 It is apparent from Article 11 of Directive 2004/18, in conjunction with Article 1(9) and (10) and recital 16 thereof, that the only restriction which the directive places on the choice of a central purchasing body is that requiring the purchasing body to be classed as a 'contracting authority'. That wide margin of discretion also applies to how the Member States may define the organisational models for central purchasing bodies, provided the measures that they take to implement Article 11 of Directive 2004/18 comply with the restriction laid down by that directive to the effect that the entity that the contracting authorities wish to use as a central purchasing body must be classed as a contracting authority. That means that a national rule cannot recognise an entity as being classed as a 'central purchasing body', and therefore one to which Directive 2004/18 applies, where it is not classed as a contracting authority within the meaning of Article 1(9) of that directive.

57 In the third place, the foregoing interpretation of Directive 2004/18 is, moreover, consistent with its underlying principles, namely the principles of the freedom to provide services and of the opening up to undistorted competition in all the Member States, set out in recital 2 thereof.

58 Although under Article 11(2) of Directive 2004/18 contracting authorities that use a central purchasing body are themselves not subject, in the situations to which that article refers, to the public procurement procedures laid down by that directive, under the same article that central purchasing body is subject to the obligation on contracting authorities to comply with the procedures laid down by the directive. The main objective of the rules of EU law in the field of public contracts, namely freedom to provide services and the opening up of undistorted competition in all the Member States (see, to that effect, judgment of 8 December 2016, *Undis Servizi*, C-553/15, EU:C:2016:935, paragraph 28 and the case-law cited), is thereby secured.

59 The Court's judgment of 20 October 2005, *Commission* v *France* (C-264/03, EU:C:2005:620), does not preclude that conclusion, holding as it does that the agency agreement of delegated project contracting, governed by the French town planning legislation, which reserved the role of agent to certain exhaustively listed categories of legal persons under French law, was a public service contract for the purposes 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, in so far as it prescribes no procedure for putting the choice of agent out to competition, infringed that directive.

60 That judgment does not concern the provisions of Directive 2004/18 that expressly prescribe that contracting authorities may use central purchasing bodies. In any event, it emerges from that judgment that the agent's responsibilities included various tasks constituting provisions of services that had been entrusted to it without reference to any competitive procedure prescribed by Directive 92/50 (judgment of 20 October 2005, *Commission* v *France*, C-264/03, EU:C:2005:620, paragraphs 46, 51 and 55).

61 In view of the Member States' broad margin of discretion, referred to in paragraph 56 of this judgment, there is likewise nothing in Directive 2004/18 or in its underlying principles that precludes the Member States from tailoring the organisational models of those central purchasing bodies to their own needs and the particular circumstances pertaining in a Member State and for that purpose stipulating purely public organisational models, with no participation by private persons or undertakings.

62 Against that background, the Italian Government has stated that the Italian legislature, by initially encouraging local authorities to use central purchasing bodies, created in accordance with defined organisational models, and then requiring small local authorities to use the services of those bodies, sought not only to guard against the risk of infiltration by the mafias but to provide a means of controlling expenditure.

63 In any event, as the Advocate General indicated in essence in points 70 to 72 of his Opinion, since the concept of 'contracting authority' is closely linked to that of 'central purchasing body', as expounded in paragraphs 51 to 58 of this judgment, central purchasing bodies cannot be regarded as offering services on a market open to competition by private undertakings.

64 A central purchasing body acts in fact as a contracting authority, in order to satisfy the needs of a contracting authority, not as an economic operator in its own commercial interests.

65 National legislation that restricts the freedom of choice of small local authorities when using a central purchasing authority, by stipulating two exclusively public organisational models with no participation by private persons or undertakings, is therefore not contrary to the objective pursued by Directive 2004/18 of freedom to provide services and opening up to undistorted competition in all the Member States, since it does not place any private undertaking at an advantage over its competitors.

66 Furthermore, the national legislation at issue does not give preference to any national tenderer. On the contrary, it furthers the objective referred to in the preceding paragraph because it protects small local authorities from the risk of a cartel consisting of a central purchasing body and a private undertaking that holds capital in that central purchasing body.

67 In the light of the foregoing, the answer to the first and second questions is that Article 1(10) and Article 11 of Directive 2004/18 must be interpreted as meaning that they do not preclude a provision of national law which restricts the autonomy of small municipalities to use the services of a central purchasing body to only two exclusively public organisational models with no participation by private persons or undertakings.

Third question

68 By its third question the referring court asks, in essence, whether Article 1(10) and Article 11 of Directive 2004/18 must be interpreted as precluding a provision of national law which restricts the operating area of the central purchasing bodies created by local authorities to the territory of those local authorities.

69 It should be noted, first, that, since Directive 2004/18 contains no express provision governing any territorial limits on the operating area of a central purchasing body, that question relates to the implementation of the provisions of that directive on central purchasing bodies, in respect of which, as can be seen from paragraph 56 of the present judgment, the Member States have a wide margin of discretion.

70 A measure by which a Member State restricts the geographical operating area of central purchasing bodies to the respective territories of the local authorities that created them, to ensure that those central purchasing bodies act in the public interest of those authorities instead of in their own commercial interests, further afield than those territories, must be found to be consistent with Article 1(10) of Directive 2004/18, which provides that a central purchasing body must be classed as a contracting authority and must, as such, satisfy the conditions under Article 1(9) of that directive. As the Court has already stated, according to Article 1(9), a contracting authority is an entity not having an industrial or commercial character which performs a task in the general interest. As a general rule, such a body does not pursue gainful activity on the market (see, to that effect, judgment of 23 December 2009, *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 38). A provision of national law such as that at issue in the main proceedings must, therefore, be considered to fall within the bounds of the margin of discretion available to the Member States when implementing Directive 2004/18.

71 Secondly, as regards the referring court's uncertainty as to whether the territorial restriction at issue in the main proceedings is compatible with the principles of the freedom to provide services and the opening up to competition as far as possible in the field of public service contracts which underlie Directive 2004/18, which that court believes may give rise to exclusive operating zones for central purchasing bodies, mindful of the reasons set out in the examination

of the first and second questions, it must be held that a provision of national law that limits the operating area of central purchasing bodies to the respective territories of the local authorities that created them does not, as such, place any private undertaking at an advantage over its competitors and thereby infringe those principles.

72 In the light of the foregoing, the answer to the third question is that Article 1(10) and Article 11 of Directive 2004/18 must be interpreted as meaning that they do not preclude a provision of national law which restricts the operating area of the central purchasing bodies created by local authorities to the territory of those local authorities.

Costs

73 Since these proceedings are, for the parties to the main action, a step in the proceedings 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:

1. **Article 1(10) and Article 11 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, as amended by Commission Regulation (EU) No 1336/2013 of 13 December 2013, must be interpreted as meaning that they do not preclude a provision of national law which restricts the autonomy of small municipalities to use the services of a central purchasing body to only two exclusively public organisational models with no participation by private persons or undertakings.**

2. **Article 1(10) and Article 11 of Directive 2004/18, as amended by Regulation No 1336/2013, must be interpreted as meaning that they do not preclude a provision of national law which restricts the operating area of the central purchasing bodies created by local authorities to the territory of those local authorities.**

[Signatures]