OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 12 January 2006 [1]

I — Introduction

1. This reference for a preliminary ruling concerns the circumstances under which the award of a public contract is to be regarded as a 'quasi-in-house' procurement procedure which, as such, does not fall within the scope of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public service contracts [2] ('Directive 93/36'). It is therefore another case concerning the interpretation and application of the criteria developed in the judgment in *Teckal* [3] and — at least to some extent — clarified in *Stadt Halle.* [4]

2. It is also another in a list of cases — some of which have already been decided [5] — concerning energy supply or waste disposal contracts awarded by Italian municipalities.

II — Legal framework: Community law

3. Article 1 of Directive 93/36 lays down basic rules concerning the scope of the directive.

4. Article 1, opening phrase and paragraph (a), reads:

'For the purposes of this Directive:

(a) "public supply contracts" are contracts for pecuniary interest concluded in

1 — Original language: German.

2 — OJ 1993 L 199, p. 1.

3 — Judgment in Case C-107/98 *Teckal* [1999] ECR I-8121.

4 — Judgment in Case C-26/03 *Stadt Halle* [2005] ECR I-1.

5 — See, for example, the order in Case C-310/01 *Comune di Udine* (OJ 2003 C 55, p. 20); judgment in Case C-108/98 *RI.SAN.* [1999] ECR I-5219.

writing involving the purchase, lease rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations.'

5. In paragraphs 49 and 50 of the judgment in *Teckal*, the Court of Justice laid down principles for excluding certain procedures from the scope of the directives:

'49 As to whether there is a contract, the national court must determine whether there has been an agreement between two separate persons.

50 In that regard, 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.'

6. The Court clarified the first of those two conditions in its judgments in *Stadt Halle* [6] and *Parking Brixen*.[7]

7. Council Directive 93/38/EEC of 14 June 1993 concerning the coordination of the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors[8] ('Directive 93/38') contains a provision, since amended by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors,[9] concerning the award of contracts to undertakings with some form of close connection with the contracting entity.

8. Article 13(1) of Directive 93/38 provides:

'1. This Directive shall not apply to service contracts which:

(a) a contracting entity awards to an affiliated undertaking;

6 — Judgment in Case C-26/03, cited in footnote 4.

7 — Judgment in Case C-458/03 *Parking Brixen* [2005] ECR I-8612.

8 — OJ 1993 L 199, p. 84.

9 — OJ 2004 L 134, p. 1.

(b) are awarded by a joint venture formed by a number of contracting entities for the purpose of carrying out a relevant activity within the meaning of Article 2 (2) to one of those contracting entities or to an undertaking which is affiliated with one of these contracting entities,

provided that at least 80% of the average turnover of that undertaking with respect to services arising within the Community for the preceding three years derives from the provision of such services to undertakings with which it is affiliated.

Where more than one undertaking affiliated with the contracting entity provides the same service or similar services, the total turnover deriving from the provision of services by those undertakings shall be taken into account.'

III — Facts and main proceedings

9. On 22 September 2003, the Municipality of Busto Arsizio issued a call for tenders to supply energy for, and to maintain, modify and technically upgrade, the heating appliances in the municipal buildings (the value of the contract, EUR 8 450 000 + VAT, was broken down into EUR 5 700 000 for the supply of fuel — 4/5 diesel oil and 1/5 methane —, EUR 1 000 000 for maintenance, and EUR 1 175 000 for upgrading and modification to comply with the relevant rules).

10. By municipal council resolution No 804 of 21 November 2003, the Municipality of Busto Arsizio ('the Municipality') ordered that the tender procedure be suspended until 10 December 2003, pending a decision, if any, to award the contract directly. The claimant Carbotermo SpA ('Carbotermo') submitted its tender on 22 November 2003. Consorzio Alisei ('Alisei') did prepare a technical tender but did not submit it within the original deadline of 24 November 2003, having been informed by the Municipality, on 21 November 2003, that the tender procedure had been suspended until 10 December 2003, and, subsequently, that the call for tenders had been withdrawn.

11. By resolution No 857 of 10 December 2003, the Municipality withdrew the call for tenders and reserved the right subsequently to award the contract directly to AGESP SpA ('AGESP').

12. AGESP is wholly controlled by AGESP Holding SpA, [10] it too a public company limited by shares, 99.98% of whose capital is owned by the Municipality. [11] The remaining shares are held by a number of adjoining municipalities in the same province.

13. On 18 December 2003, the contract in question was awarded directly to AGESP.

14. Carbotermo and Alisei brought actions against those resolutions before the Tribunale Amministrativo Regionale (Regional Administrative Court) della Lombardia (Italy), which joined the two cases and, by order of 27 May 2004, received on 9 August 2004, referred the following question to the Court of Justice for a preliminary ruling:

'(1) Is the direct award of a contract for the supply of fuel for heating appliances in buildings owned by or within the competence of the Municipality, and relating to operation, supervision and maintenance (the main value of which lies in supply), to a joint stock company whose capital is, at present, held entirely by another joint stock company, of which the awarding Municipality is, for its part, the major shareholder (with 99.98% of the shares), or to a company (AGESP) in which a direct holding is owned not by the public authority but by another company (AGESP Holding), 99.98% of whose capital is presently owned by the public administration, compatible with Directive 93/36/EEC?

(2) Must the requirement that the undertaking to which the supply contract is awarded directly carry out the essential part of its activities with the controlling authority be ascertained by applying Article 13 of Directive 93/38/EEC and can it be concluded that it has been satisfied where that undertaking derives the majority of its turnover from the controlling public authority or, alternatively, in the territory of that authority?'

10 — Under Article 7 of the statutes of AGESP, 'no shareholder, with the exception of the controlling company AGESP Holding SpA, may hold a share greater than one tenth of the total capital of the company'.

11 — Under Article 6 of the statutes of AGESP Holding SpA, the majority of the shares are reserved for the Municipality. Under Article 7 of the statutes of AGESP Holding SpA, 'no private shareholder may hold a share greater than 10% of the total capital of the company'.

IV — The questions referred

15. In essence, the two questions concern the two cumulative conditions under which certain quasi-in-house procurement procedures do not fall within the scope of Directive 93/36 (the '*Teckal* exception' or '*Teckal* criteria'): control similar to that which the contracting entity exercises over one of its own departments; and activities carried out essentially for the controlling contracting entity. If those conditions are met, the provisions of the directive, such as compliance with certain rules of procurement procedure, will not be applicable.

16. For the sake of clarity, it should be stressed that it is the old legislation, that is to say not the new 'legislative package', which is relevant to these proceedings.

V — Preliminary remark

17. This case, like those before it, shows that the *Teckal* criteria comprise a number of imprecise concepts which have raised a raft of legal questions and caused numerous problems of differentiation. In the light of that experience, the question arises as to how the Court of Justice can best clarify the law and thus secure legal certainty for the persons concerned. One possibility would be for the Court not only to refine its case-law in relation to specific circumstances but also to clarify it in a more general way than it has done previously. Another solution would be to eliminate the uncertainties created by the *Teckal* exception by conducting a comprehensive revision of the case-law. Through its judgment in *Teckal* in November 1999, the Court opened the way for exceptions to the directive. How wide that opening is, however, is still unclear.

18. This case in particular shows that the situation described above also has an impact on national supreme courts, such as the Consiglio di Stato (Council of State) (Italy). Thus, according to the order for reference, the principles relating to quasi-in-house procurement established by the Consiglio di Stato are based on a decision of the Court of Justice. [12] However, according to the national court, the question whether that case-law is consistent with the Court's own case-law does not need to be resolved in this case. In any event, the main proceedings here, like other cases in other Member States, show that the case-law of the Court manifestly does not contain any clear guidance for the relevant economic sectors and courts of the Member States.

12 — Decision in Case C-310/01, cited in footnote 5.

19. In order to give the Court a choice of more than one alternative, I shall, despite the misgivings I have expressed, clarify the *Teckal* exception in a more general fashion. That way, the Court can always choose the other option.

VI — First criterion: control similar to that which the contracting entity exercises over one of its own departments

20. This case exhibits a number of specific characteristics which, taken together, set it apart from other cases concerning 'public-private partnerships' ('PPPs') which are pending before, or have already been decided by, the Court.

21. The documents before the Court show that, in this instance, in contrast to the procurement at issue in *Stadt Halle*, there is no shareholding by private undertakings. Furthermore, the legal structure in question here, that is to say a public company limited by shares, is different from that in *Stadt Halle*. For its part, the contract in this case, unlike in *Parking Brixen* [13] or *Teckal*, was not awarded to a subsidiary but to a sub-subsidiary of the local authority.

13 — Judgment in Case C-458/03, cited in footnote 7.

A — *Legal assessment of indirect shareholdings*

22. As in *Stadt Halle*, the first characteristic of the procedure at issue in this case has to do with the fact that the contract was not awarded directly to the entity in which the local authority has a direct shareholding.

23. In this connection, the question is whether the *Teckal* criteria are also applicable in principle to situations in which there is an indirect shareholding, that is to say whether the procurement directives also exclude procedures in which the public authority for which the service is provided has an interest in the entity concerned only through another company.

24. Both the Commission and the Polish Government reject such an interpretation outright on grounds of principle.

25. The case-law of the Court of Justice does not provide any clear guidance in this regard.

This remains the case following the judgment in *Parking Brixen*.

26. In support of the argument that the *Teckal* criteria are also applicable in principle to cases of indirect shareholdings is the fact that, in *Stadt Halle*, the Court of Justice actually carried out an examination of those shareholdings to determine whether the conditions for the two *Teckal* criteria had been fulfilled. This could be interpreted as tacit recognition of that principle.

27. On the other hand, the wording of the judgment in *Stadt Halle* appears to point more in the other direction. Thus, paragraph 49 reads: '... where that entity carries out the essential part of its activities with the controlling public authority or authorities'. It could be inferred from this that the services have to be exchanged directly between the public contracting authority as shareholder and the entity whose shares are owned by the public contracting authority.

28. However, since that wording refers expressly to the second criterion, that is to say that concerning the essential part of the supplier's activities, it could of course be concluded that the judgment in *Teckal* does not contain any express finding on whether it is possible for indirect shareholdings too to be capable of satisfying the first criterion.

29. On the other hand, the fact that *Teckal* concerned a situation involving a number of public entities and that the Court implicitly recognised such situations by introducing the '*Teckal* criteria' indicates that indirect shareholdings are also capable in principle of falling within the scope of those criteria. The condition for this, however, is that the control criterion must be fulfilled at all levels of participation.

30. According to the judgment in *Parking Brixen*, the important point in relation to the control criterion is that there should be 'a power of decisive influence over both strategic objectives and significant decisions'. All the legal provisions and relevant circumstances must be taken into account in this regard. [14] That such influence should also be exercised in fact, does not, however, seem to be necessary, according to that judgment.

B — *Legal assessment of public-public undertakings*

1. Principle

31. The facts of the main proceedings exhibit a further characteristic that distin-

14 — Judgment in Case C-458/03, cited in footnote 7, paragraph 65.

guishes them from the situation at issue in *Stadt Halle*. This case does not concern a semi-public entity, but an entity, or more precisely its parent company, in which no private undertakings hold shares. This is not apparent from the order for reference itself, but from the other documents before the Court. Furthermore, the shares owned by other parties amount to only 0.02% of the capital. Since those residual shares are held by other municipalities, i.e. public bodies, the entity in question is a public-public undertaking or a 'public-public partnership'.

32. If the circumstances of this case are compared with the Court's previous case-law, the following picture emerges. On the one hand, there is a fundamental difference between this case and *Stadt Halle*, which concerned a semi-public entity; on the other hand, there is a clear parallel with *Teckal*, which concerned a public-public entity. In the latter case, the entity which was to perform the procurement contract, namely AGAC, did have its own legal personality but had been set up by a number of municipalities.

33. Further support for the application of the *Teckal* exception to public-public entities, in addition to the judgment in *Teckal*, as already explained, is the fact that, in the judgment in *Stadt Halle*, [15] the deciding factor for the Court was that private undertakings pursue different interests from local authorities.

34. However, this case is concerned only with the participation of municipalities and not with the interests of private parties. Since municipalities pursue objectives in the public interest, it could be assumed, at least on first sight, that the control criterion, even on a strict reading of it, is satisfied. That is certainly the case if the condition in respect of identity of interests [16] is understood as meaning that such identity obtains automatically in the absence of private interests. Of course, the possibility cannot be discounted, and is confirmed by their activities as economic operators, that local authorities may represent a variety of interests. In such cases there is no longer identity of interests.

35. Also, finally, it should not be overlooked in this regard that *Teckal* concerned an 'azienda municipalizzata' (municipal undertaking) and not, as in this case, a public company limited by shares. The significance of the legal structure will be discussed later.

15 — Judgment in Case C-26/03, cited in footnote 4, paragraph 50.

16 — See the approach adopted by Advocate General Kokott in her Opinion in Case C-458/03, judgment cited in footnote 7, point 74 et seq.

36. On the other hand, the question of how public-public entities are to be treated must also be answered in the light of the principle of interpretation expressly confirmed in the judgment in *Stadt Halle*, which states that any exception to the obligation to apply the Community rules must be interpreted strictly. [17]

37. However, even in *Stadt Halle*, which did not concern the participation of more than one shareholder, the Court confirmed that the *Teckal* exception is applicable in principle to entities with more than one shareholder. This is evident from the fact that the Court [18] not only reiterated the *Teckal* exception word for word, but also pointed out that, in *Teckal*, the entity was owned by 'public authorities'. The Court therefore used the plural in that judgment not only in relation to the second criterion of the *Teckal* exception.

38. It therefore follows that even entities which have more than one shareholder are in principle capable of falling within the scope of the exception.

39. However, for it to be possible to apply the *Teckal* exception in this case, it would be necessary to go one step further, because these proceedings also involve an indirect shareholding. In my opinion, the applicability of the *Teckal* exception to a situation such as this as well cannot be ruled out a priori in a general, abstract manner.

40. Here too, it must be examined *in concreto* whether the control criterion is satisfied. Regard is to be had in this respect to the criterion established by the Court in *Parking Brixen*. This requires that the controlled entity should enjoy only a certain degree of independence, [19] that is to say vis-à-vis its shareholders. [20]

41. Since, in this case, the possibility of private participation is provided for in the statutes, it must be examined, with regard to the control criterion, whether a future opening-up of the share capital to private investors has any legal significance.

42. As far as opening up the share capital to private investors is concerned, a distinction could be drawn according to whether private participation is merely possible in law or is mandatory in law. In the first case, a further

17 — Judgment in Case C-26/03, cited in footnote 4, paragraph 46.

18 — Judgment in Case C-26/03, cited in footnote 4, paragraph 49.

19 — Judgment in Case C-458/03, cited in footnote 7, paragraph 70.

20 — Judgment in Case C-458/03, cited in footnote 7, paragraph 68.

distinction could be drawn according to whether or not that possibility was in fact subsequently taken up — cases in which the share capital has already been opened up, as in *Stadt Halle*, are automatically excluded in this regard.

43. In this connection, the Commission has taken the view that even the potential participation of private parties, as provided for, for example, in the statutes of a capital company, indicates that the control criterion is not satisfied.

44. There are, in the first place, a number of fundamental considerations which argue against that extreme view taken by the Commission. If that were the case, the legal classification of PPP projects would depend purely on *potential* future developments. Whether these then *actually* materialised would, however, be irrelevant. In terms of the regime operated by the public procurement directives, this is a new approach. Moreover, under the law of the Member State concerned, it might even be illegal for the statutes to prohibit the transfer of shares to private parties.

45. On the other hand, however, the principle of protection against circumvention which underpins the public procurement directives requires that certain events occurring after the transfer of tasks, that is to say after the contract has been awarded, must none the less be taken into account. This applies in particular to cases in which the share capital had not been opened up at the time when the contract was awarded, but specific plans for this to proceed were already in place.

46. The question is whether the judgment in *Parking Brixen* alters that assessment at all. The fact that, in that case, in contrast to this one, the opening-up of the company to other capital was obligatory and represented only one of five essential characteristics taken into account in the assessment would indicate not.[21] It is none the less true that this still does not rule out the possibility that even the potential opening-up of the share capital may mean — albeit only when considered in conjunction with other specific characteristics of the situation in the main proceedings — that the minimum degree of control is not satisfied in that situation. It is therefore necessary to examine those other specific characteristics and their significance from the point of view of control.

47. Regard must also be had in this connection to the situation which gave rise to an action for failure to fulfil obligations brought against the Republic of Austria[22] and the recent legal assessment made by the Court of Justice in that matter.

21 — Judgment in Case C-458/03, cited in footnote 7, paragraph 67.

22 — Judgment in Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705

48. *Commission* v *Austria* concerned the transfer of responsibility for waste disposal by the town of Mödling to a Gesellschaft mit beschränkter Haftung (private company limited by shares), that is to say by a municipality to a wholly-owned subsidiary. Some two weeks after the transfer of that task, the municipality decided to transfer 49% of the shares to a private undertaking. The sale took place a further two weeks or so later. The company began to carry out the activity which had been transferred a further few weeks after that.

49. In its judgment in that case, the Court held that all the stages in the course of events had to be taken into account as a whole and in the light of their objectives, and could not be assessed in isolation. [23] This indicates that developments which occur after the transfer of tasks must likewise be taken into account, as the Court also expressly held in that judgment. [24] That case, however, unlike this one, concerned developments which had *actually* occurred, the act of opening up the company to private participation having already been carried out. At the time when the overall course of events was assessed, the opening-up was a fait accompli.

23 — Judgment in Case C-29/04, cited in footnote 22, paragraph 41.

24 — Judgment in Case C-29/04, cited in footnote 22, paragraph 38.

50. In contrast, the documents in this case do not make it clear whether, and, if so, when, any shares were transferred to private parties or whether any plans to that effect were in place. From that point of view, neither the judgment in *Parking Brixen* nor the judgment in *Commission* v *Austria* provides a clear indication that the mere *possibility* that a company may be opened up to private persons is sufficient.

51. It can thus be assumed that the existing case-law does not in principle exclude the award of contracts to public-public entities from the *Teckal* exception. It is therefore necessary now to set out the conditions which such procedures must satisfy.

2. The individual conditions

52. The conditions under which the award of contracts to public-public entities is capable of falling within the scope of the *Teckal* exception concern the relationship between the entity concerned and the public authorities which directly or indirectly own the shareholding.

53. First of all, the argument put forward during the proceedings that the *Teckal* exception covers only 'inter-organic or inter-organisational delegations' or divisions of the organisational apparatus of a local authority must be rejected. There is nothing in the case-law of the Court to indicate that the *Teckal* exception is restricted to such categories of entity.

54. In general, and in particular in the judgment in *Parking Brixen*, the Court of Justice adopts a material rather than a formal approach to such matters. The decisive factor, therefore, as I shall demonstrate in more detail at length, is the embodiment of the relationship between the parties concerned. In particular, regard is had in this respect to general, abstract provisions, such as national company law, and the material embodiment of the relationship, such as, for example, the statutes of the entity concerned. [25]

55. In this case, unlike in *Stadt Halle*, the entity which is to provide the service is not a private company limited by shares under German law but a public company limited by shares under Italian law (SpA).

56. In this instance, the relevant provisions of the Codice civile (Italian Civil Code) ('C.C.') are applicable.

57. There is also a difference in regard to the entity at issue in *Teckal*. While that case related to an undertaking in the form of an 'azienda municipalizzata', this case actually concerns an entity, AGESP, which, although originally operating as a municipal undertaking, was converted to a public company limited by shares by Resolution No 148 of 24 September 1997.

58. Under Italian law, as under other legal systems, public companies limited by shares in principle have greater autonomy than private companies limited by shares.

59. In my view, an abstract examination of the possibilities open to shareholders under the C.C. for exerting influence over public companies limited by shares and the possibilities open to the latter for influencing their subsidiaries is not sufficient. As I have already said, what matters is more the material embodiment of the relationship between 'grandparent' and parent company, and that between parent company and subsidiary. [26]

25 — See the judgment in Case C-458/03, cited in footnote 7, paragraph 66 et seq.

26 — See my Opinion in Case C-26/03, judgment cited in footnote 4, point 65.

60. Consequently, the fact that the undertaking concerned is in the form of a public company limited by shares, under Italian law for example, does not matter per se. Moreover, this is also clear from the judgment in *Parking Brixen*, which likewise concerned a public company limited by shares under Italian law. The mere fact that the Court of Justice did not consider that circumstance to be sufficient to support the conclusion that the company was independent, and that there was therefore no control, indicates that the organisation of that undertaking as an Italian public company limited by shares does not in itself preclude adequate control.

61. However, the conversion of a dedicated [municipal] undertaking into a public company limited by shares is at least one of several factors which must be taken into account in the assessment of independence. [27]

62. As regards the examination of the material embodiment of the relationship, it is the specific powers of the respective shareholders that count, rather then whether those powers are exercised in practice. [28] The Court of Justice has since confirmed that view in *Parking Brixen*, in which it examined the statutes of the public company limited by shares in that case. [29]

63. Furthermore, the rights of control enjoyed by the shareholder(s) must extend not only to procurement decisions in general or the specific procurement decision in particular, [30] but also to the running of the business as a whole.

64. With respect to the means of control, regard is usually had to rights to give instructions, supervisory powers and rights to make appointments. The guiding principle in this regard must be that what is conclusive is the power of influence and not, therefore, legislative provisions alone. [31]

65. Finally, we must also consider the argument put forward during the proceedings to the effect that the assessment of a procurement procedure and the application of the *Teckal* exception depend on the conduct of the parties concerned, that is to say the controlling entity and the controlled entity, during the procurement procedure itself.

66. It could thus be concluded from the conduct of the parties involved in the procurement procedure, in particular that

27 — Judgment in Case C-458/03, cited in footnote 7, paragraph 67.

28 — See my Opinion in Case C-26/03, judgment cited in footnote 4, point 76.

29 — Judgment in Case C-458/03, cited in footnote 7, paragraph 66 et seq.

30 — See my Opinion in Case C-26/03, judgment cited in footnote 4, point 77.

31 — Judgment in Case C-458/03, cited in footnote 7, paragraph 65.

of the public-public entity, that the latter is independent of the contracting body.

67. In these proceedings, the focus in this regard has essentially been centred on the content of the contract. In particular, it has been said that the penalty laid down in the contract for failure to achieve certain objectives is to be regarded as an indication of AGESP's autonomy.

68. Since the control criterion relates to influence over the running of the business as a whole, the conduct of the entity at issue within a particular procurement procedure cannot be decisive. If that were the case, the same entity could fall within the scope of the *Teckal* exception in one procurement procedure but not in another. However, there is nothing in the case-law of the Court to support a view which would have such an outcome. On the contrary, the Court classifies the relationship, and thus determines compliance with the control criterion, by reference to the circumstances of the persons concerned.

69. The examination as to whether the general, abstract provisions of national law and the material embodiment of the relationship in the statutes of the company concerned, in this case Article 19 in particular, do in fact ensure an adequate degree of control involves an assessment of a specific situation. However, in accordance with the provisions on jurisdiction in Article 234 EC, such an assessment and the interpretation of national law are matters not for the Court of Justice but for the national court.

C — *Interim conclusion*

70. The criterion of control similar to that which the contracting authority exercises over one of its own departments is also capable in principle of being satisfied in the case of public-public undertakings. It is for the national court to assess the facts of the main proceedings. In this case, it has to take the following factors into account:

— the interests of the shareholders;

— the conversion of the 'azienda municipalizzata' into a public company limited by shares;

— the fact that there is non-mandatory provision for the company to be opened up to other capital, but this has not been put into effect;

— the possibility for AGESP to set up establishments even abroad;

— the extent of the power of influence over the appointment of members of the board of directors and the running of the business;

— the powers of the board of directors of AGESP; and

— the fact that the Municipality has an indirect shareholding in AGESP through AGESP Holding.

71. The Court could of course, in this case — as in *Stadt Halle* and *Parking Brixen* —, itself make a definitive assessment of a situation such as that in the main proceedings. Since the factors for consideration set out above are largely the same as those in *Parking Brixen*,[32] with the addition of the indirect shareholding, it may be concluded, on the basis of the existing case-law — which many consider to be too strict —, that the first criterion, that is to say adequate control similar to that which the contracting authority exercises over one of its own departments, is not satisfied in the circumstances of the main proceedings.

72. If, on the other hand, the Court were to take the opportunity to clarify its existing case-law to the effect that at least some public-public partnerships are capable of satisfying the control criterion, and came to the conclusion that this is also the case in the main proceedings, the Court would afford itself the further opportunity to clarify — for the first time — the second *Teckal* criterion, in other words that concerning the essential part of the supplier's activities.

VII — Second criterion: the supplier must carry out the essential part of its activities for the controlling contracting entity

73. In contrast to the first *Teckal* criterion, the Court has not, since that judgment, delivered a decision which clarifies the second *Teckal* criterion. These proceedings now offer the Court the opportunity to do so.

74. Moreover, the main proceedings concern a situation involving an almost 100% share-

32 — Judgment in Case C-458/03, cited in footnote 7, paragraph 67.

holding at the first level, i.e. between the Municipality and AGESP Holding, and a 100% shareholding at the second level, i.e. between AGESP Holding and AGESP.

75. Like *Stadt Halle*, this case too concerns an indirect shareholding. It is therefore necessary to examine whether the activities of a 'sub-subsidiary' for its 'grandparent' are in principle also capable in certain circumstances of satisfying the second *Teckal* criterion.

A — *The working hypothesis*

76. Since, in its judgment in *Stadt Halle*, the Court did not need to give further consideration to the interpretation of the second criterion, in view of its chosen interpretation of the first criterion, it is only logical that I should repeat at this point the view on this issue which I expressed in my Opinion in *Stadt Halle*.

77. The second criterion established in *Teckal*, concerning the essential part of the supplier's activities, concerns a certain minimum proportion of the overall activities carried out by the controlled entity. It is therefore necessary to determine the volume of activities carried out overall and the volume of those carried out for the shareholder in the broad sense.

78. It must be pointed out in this connection, however, that the fact that the term 'shareholder' is not to be interpreted too strictly does not for that matter support the conclusion that activities carried out for the shareholder also include those performed for third parties which the shareholder would otherwise have to carry out itself. In practice, this exception applies primarily to services in the general economic interest and, as far as this case is concerned, to municipalities (local authorities) with an obligation to provide certain services for certain persons.

79. It must also be made clear that the activities to be taken into account are those actually carried out and not those which may be carried out under the law or under an undertaking's statutes, or those which the controlled entity has an obligation to carry out. [33]

80. The central question is what proportion marks the threshold for satisfying the second *Teckal* criterion. There are various views on this. They extend from over 50%, through 'significantly', 'predominantly' and 'almost exclusively', to 'exclusively'.

33 — See, following my Opinion, that of Advocate General Kokott in Case C-458/03, judgment cited in footnote 7, point 81.

81. The approach to establishing the threshold is not only positive, in the sense that it involves determining the volume of services provided for the shareholder, but also negative. The negative approach would be based on a calculation of the proportion of services provided for persons other than the shareholder. The latter view can be found in the Opinion of Advocate General Léger in *ARGE*. He considered that 'the Directive is applicable if that entity carries out the essential part of its activity with operators or local authorities *other than* those of which the contracting authority is made up'. [34] However, in view of the positive approach adopted with respect to the second criterion in *Teckal*, the negative approach will not be pursued any further here.

82. The passage cited from the Opinion of Advocate General Léger none the less raises another important issue, which must be taken into account in determining the proportion of services provided for the shareholder.

83. That issue is whether the second *Teckal* criterion can be assessed in quantitative terms alone or whether qualitative factors must also be taken into consideration. The wording and spirit of the exception, which, moreover, contains no indication as to how the activities are to be assessed, indicate that the latter is the case. The authentic language version of the relevant passage in the judgment in *Teckal*, that is to say the Italian, likewise does not preclude an additional or alternative qualitative assessment ('la parte piu importante dell propria attività').

84. Furthermore, the judgment in *Teckal* likewise does not contain any indication of how the proportion of services provided for the shareholder is to be calculated. It is not therefore axiomatic that turnover alone is decisive.

85. In my view, the national court must therefore determine the 'essential part of the supplier's activities' by reference to quantitative and qualitative factors.

86. It should be recalled at this point that Opinions are authentic in the original language chosen by the Advocate General. In this regard, the Opinion of Advocate General Léger presents the following picture. On the one hand, he talks about the 'quasi-exclusivité' ('almost all') of the services provided, whereas the German text reads 'sämtliche Dienstleistungen' ('all services'). [35] On the other hand, he relies on the version

34 — Opinion of Advocate General Léger in Case C-94/99 *ARGE Gewässerschutz* (judgment of 7 December 2000) [2000] ECR I-11037, point 93 (my emphasis).

35 — Opinion of Advocate General Léger in Case C-94/99 (cited in footnote 34), point 74.

of the second *Teckal* criterion contained in the language of the case, Italian, and refers to 'en grande partie' ('largely'), which, in German, is rendered as 'im Wesentlichen' ('essentially'), [36] or to 'la plus grande partie de leur activité' ('den größten Teil ihrer Tätigkeit') ('the biggest part of their activities'). [37]

87. For the sake of greater clarity, however, legal commentators apply the 80% criterion laid down in Article 13 of Directive 93/38, even in the context of proceedings before the Court. The reason they give for doing so is that that criterion is 'objective' or 'appropriate'.

88. It must be pointed out in this respect that a different fixed percentage might be equally objective or appropriate. As some of the interested parties in these preliminary ruling proceedings have pointed out, I made it clear in my Opinion in *Stadt Halle* that the rigidity of a fixed percentage may also be an obstacle to an appropriate solution. Moreover, a fixed percentage permits only quantitative factors to be taken into account.

89. The arguments against the transposability of the 80% criterion laid down in Article 13 of Directive 93/38 are, first, that this is a provision creating an exception in a directive applicable only to certain sectors. The Community legislature intended that percentage to be confined to Directive 93/38. While the basic principle may also be applicable in practice outside those sectors, the decisive fact remains that such a provision was not included in the directive applicable in this case.

90. Secondly, to find in favour of the transposability of the 80% threshold is to disregard the fact that Article 13 of Directive 93/38 applies only to services. As an exception, its application to the supply of goods within the sectors concerned is by definition prohibited. Such an extension to the supply of goods came about only with the amendments introduced as part of the legislative package in this field. [38]

91. Thirdly, even when the directives were amended in the legislative package, the legislature retained the 80% threshold only for the sectors concerned, and refrained from transposing it to the so-called 'classic' directive. At the time of those amendments, however, the second *Teckal* criterion was

36 — Opinion of Advocate General Léger in Case C-94/99 (cited in footnote 34), point 81.

37 — Opinion of Advocate General Léger in Case C-94/99 (cited in footnote 34), point 83.

38 — Article 23 of Directive 2004/17/EC (directive cited in footnote 9).

already well-known and, furthermore, was the subject of discussions during the legislative procedure.

92. Fourthly, there is yet a further reason why Article 13 of Directive 93/38 should not be relied on. Paragraph 2 of that article requires the contracting entity to provide the Commission, at its request, with certain information. That provision acts as the procedural counterbalance to the exception provided for in Article 13. In the case of the *Teckal* exception, however, the Court followed a different route.

93. Fifthly, the mere fact that the Court of Justice did not define the second *Teckal* criterion by reference to Directive 93/38, of which it was certainly aware, would in itself be sufficient to preclude transposability. Instead, the Court, in derogation from Article 13, confined itself to two material conditions, the abovementioned two *Teckal* criteria. Those conditions, however, precisely because of the lack of a procedural rule comparable with that in Article 13, must be interpreted strictly.

94. All in all, therefore, it is appropriate to adhere to the view that the 80% threshold deriving from Directive 93/38 is not a suitable criterion for assessing whether the supplier carries out the essential part of its activities for the controlling contracting authority. [39]

B — *Further development of the above proposition in the light of recent case-law*

95. As a condition for applying an exception, the criterion concerning the essential part of a supplier's activities must be interpreted strictly. The Court has confirmed this, in so far as it held, in paragraph 63 of the judgment in *Parking Brixen*:

'[s]ince 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

39 — As regards the academic commentary on this issue, which has since become the prevailing legal opinion, see: Meinrad Dreher, 'Public Private Partnerships und Kartellvergaberecht-Gemischtwirtschaftliche Gesellschaften, In-house-Vergabe, Betreibermodell und Beleihung Privater', *NZBau* 2002, p. 245 (253); Wolfram Krohn, '"Aus" für In-house-Vergaben an gemischtwirtschaftliche Unternehmen', *NZBau* 2005, p. 92 (95); Opitz, *Zeitschrift für Vergaberecht* 2000, p. 97 (105); Ulf-Dieter Pape/Henning Holz, 'Die Voraussetzungen vergabefreier In-house-Geschäfte', *NJW* 2005, p. 2264 (2265 et seq.); Wolfgang Jaeger, 'Verträge kommunaler Körperschaften sowie ihrer eigenen und gemischtwirtschaftlicher Gesellschaften über Energiebezug und Kartellvergaberecht', in: Büdenbender/Kühne/Baur (Ed.), *Das neue Energierecht in der Bewährung; Bestandsaufnahme und Perspektiven, Baur-FS*, 2002, p. 455 (464); Christoph Riese/Andreas van den Eikel, 'Neues zum In-House-Geschäft — Das Ende für gemischt-wirtschaftliche Unternehmen?', *Vergaberecht* 2005, p. 590 (601); Kurt Weltzien, 'Avoiding the Procurement Rules by Awarding Contracts to an In-House Entity: The Scope of Procurement Directives in the Classical Sector', *Public Procurement Law Review* 2005, p. 237 (249), who rightly points out that Directive 93/38 also applies to private undertakings; Jan Ziekow/Thorsten Siegel, 'Die Vergaberechtspflichtigkeit von Partnerschaften der öffentlichen Hand', *Vergaberecht* 2005, p. 145 (148), who cast doubt on whether the 80% formula is in conformity with Community law.

of proving the existence of exceptional circumstances justifying the derogation to those rules lies on the person seeking to rely on those circumstances.'

96. Those requirements must be satisfied in this case too.

97. I continue to take the view — as previously expressed in my Opinion in *Stadt Halle* — that the 'essential part of a supplier's activities' must be determined by reference not only to quantitative criteria but also to qualitative factors. [40] [41]

98. With respect to the *qualitative* factors, it would have to be ascertained how and for whom the controlled entity in question carries out its activities. It makes a difference in this regard whether a market for the activities carried on by the entity actually exists in the first place, and whether the entity offers on the market some of the services which it provides for persons other than the controlling authority. [42]

99. However, this must not be taken to mean that the services provided by the entity in question must also be in demand from persons other than public institutions. For, even if a product or service is in demand from only public *consumers*, this does not in itself mean that there is no market. There may be other *suppliers*. Consequently, the qualitative assessment would depend not only on the relationship between the supplier and the controlling entity, but also, and fully in keeping with the competitive objectives of the procurement legislation, on the supplier's economic position on the market. The situation would thus be similar to that in cases where the directives permit a negotiated procedure without competitive tender, that is to say where only one economic operator is capable of performing the contract. [43]

40 — See, following my Opinion, that of Advocate General Kokott in Case C-458/03, judgment cited in footnote 7, point 83.

41 — See to the same effect: Marc Gabriel/Bernd Joachimsmeier, *Vergaberecht* 2005, p. 103 et seq.; Holger Schroder, 'In-House-Vergaben zwischen Beteiligungsunternehmen der offentlichen Hand?', *NZBau* 2005, p. 127 et seq.; Kurt Weltzien, 'Avoiding the Procurement Rules by Awarding Contracts to an In-House Entity: The Scope of Procurement Directives in the Classical Sector', *Public Procurement Law Review* 2005, p. 237 (248).

42 — See in this connection the legal definition contained in the first subparagraph of Article 1(8) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), and the first subparagraph of Article 1(7) of Directive 2004/17, cited in footnote 9.
The directive applicable here does not contain such a definition making express reference to the market.

43 — See the new Article 31(1)(b) of Directive 2004/18 and Article 40(3)(c) of Directive 2004/17.

100. It is also necessary, in principle, to clarify whether the activity actually carried out is alone relevant, or whether account must also be taken of the purpose of the entity, such as the objects provided for in its statutes, that is to say every activity the entity could ever pursue. However, although reliance on the purpose of an entity is not unknown in procurement law, such an approach would make it even more difficult to assess whether a supplier carries out the essential part of its activities for the contracting authority, because it is impossible to supply reliable, up-to-date information on potential — indefinite, future — activities.

101. A further question is whether account should be taken of only some of the entity's activities or of all of them. Thus, the criterion concerning the essential part of a supplier's activities could also be understood as meaning that regard is to be had only to that type of activity which is carried out for both the controlling entity and other contracting bodies, such as energy supplies, for example, other activities carried out by the entity, such as waste disposal, being left out of account and the relative proportion of the sector-specific activities being alone decisive.

102. However, in my view, the mere fact that we are dealing with an exception to the rules of the directive argues against such an interpretation of the second *Teckal* criterion. For this could lead to an increase in the number of procedures covered by the exception in cases where the criterion concerning the essential part of a supplier's activities is satisfied in relation to a particular type of activity but not in relation to all the activities carried out by the entity.

103. As the wording of the judgment in *Teckal* and the facts of the proceedings suggest, the criterion concerning the essential part of a supplier's activities can be satisfied not only where the activities carried out for one shareholder exceed the 'essential part' threshold, but also by adding together all the services provided for all the shareholders and comparing that figure with the totality of the activities carried out.

104. In paragraph 50 of the judgment in *Teckal*, the Court also used the plural in relation to the second criterion, holding that:

'... [t]he 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*'. [44]

105. If that wording is taken literally, it is not only the services provided for the controlling entity, that is to say the Municipality of Busto Arsizio, which are relevant. Services provided for the other shareholders could also be taken into account.

106. As regards the *quantitative* factors, turnover cannot be the only consideration. Other business indicators surely have to be taken into account as well. Thus, as the second question states, the proportion of total income derived from activities carried out for shareholders can, in principle, also be taken into account. However, determination of the proportion of total income derived from activities for shareholders is subject to the same principle that applies when determining the proportion of total turnover derived from such activities, that is to say that it is not sufficient for the income from those activities simply to exceed other income. It should be noted that these are both only quantitative indicators.

44 — My emphasis.

107. Finally, the Court has not made it clear, in connection with the criterion concerning the essential part of a supplier's activities, at what point in time that condition must be satisfied or what period of time is relevant for making the assessment.

108. Under the scheme of the procurement directives, this would be the point at which the awarding authority acts, that is to say, in this case, the point at which it transfers the relevant task. This, however, gives only a snapshot of the situation, unless, as we have already seen — in Article 13 of Directive 93/38 —, account is taken of a longer period.

109. Since AGESP provides services not only directly for the Municipality, but also in many cases directly for third parties within the Municipality, and, more specifically, for business and residential consumers, the further question arises whether, and, if so, under what conditions, services which are not provided directly for the Municipality must also be regarded as services for the Municipality, that is to say for the controlling entity within the meaning of the second *Teckal* criterion.

110. At this point, the vagueness of the second *Teckal* criterion and the corresponding lack of legal clarity for the entities concerned become apparent once again.

For the sake of legal certainty, some clarification should therefore be provided.

111. For the question has been raised in this regard whether the deciding factor is the area in which the services are provided. On that proposition, only services in the area of the Municipality of Busto Arsizio would be relevant in the main proceedings. A satisfactory territorial reference is at least a suitable criterion for classification. This has to do with the fact that such a point of reference also plays an essential role in the determination of the jurisdiction of public bodies, and in particular municipalities. The view that only services for persons resident in the Municipality are to be included would certainly be too restrictive. It *would*, however, be possible also to include services which, although provided outside the Municipality, none the less benefit persons from within the Municipality, perhaps because the service is not offered by the authority itself — for reasons of cost, for example — but is provided by an entity in which several municipalities and/or one or more regions have shareholdings.

112. It must also be emphasised that, for the purposes of classification as an activity for the Municipality, it does not matter who is charged for the service or who pays for it. In fact, in the case of services of general economic interest provided in the form of concessions, at least part of the payment typically comes from the users of the service. I am thinking in particular in this regard of the concessions, included in the directives, concerning the construction of motorways for which a toll is charged. More significant in the everyday life of the Municipality are, above all, transport services, energy supplies, waste disposal and the construction and, where appropriate, operation of educational and leisure facilities or car parks. In cases such as these, however, consideration would have to be given first of all to whether these are service concessions, to which the rules laid down in the directives are for that very reason not applicable.

113. The Court should clarify the second *Teckal* criterion by laying down the conditions under which services for third parties are also included. Regard must be had first and foremost to the nature of the relationship between the third parties and the controlling entity, that is to say, in this case, the Municipality. Classification as an activity carried out for the Municipality is appropriate in particular in cases where the Municipality has an obligation to provide a service for third parties. This does not necessarily have to be an obligation to provide a service arising under public law, such as the relevant regional laws, for example. Obligations under private law, such as those arising under a contract between private persons and the Municipality, could also, conceivably, count as such. It should

further be made clear whether contractual relations between third parties and the entity providing the service are likewise relevant. Here too, the determinative factor should be that, in addition to the actual provision of the service, there must also be a legal relationship between the Municipality and the entity providing the service.

114. In any event, the view that any service for the population of the local authority in question, that is to say, in this case, the Municipality of Busto Arsizio, is to be included must be rejected. For then, all other services to private persons, notwithstanding that they do not involve a relationship with the Municipality, would also be included, because the nature of the commercial activity would in that event be irrelevant. For example, if an entity not only supplied energy or provided waste disposal services, but also sold certain goods, such as heating equipment or refuse containers, the latter activities would also be included, even though they relate to goods which any consumer can also obtain from other sources. The effect of an interpretation based solely on the status of the third party consumer would be to include any service to consumers merely because the consumers are resident in the Municipality.

115. Taking everything into consideration, it must therefore be concluded that regard is to be had not only to the status of the third party consumer but also to the substance of the commercial activity.

C — *Interim conclusion*

116. The criterion to the effect that the controlled entity must carry out the essential part of its activities for the local authority or authorities which hold(s) its shares is also capable of being satisfied in the case of public-public undertakings and in the case of an indirect shareholding. In this connection, certain services provided for third parties should also be classified as being performed for the controlling entity.

117. In this case, the national court must take into account a number of factors in this regard, which include the income derived from activities carried out for the shareholders, but not the 80% criterion laid down in Article 13 of Directive 93/38.

VIII — Conclusion

118. In the light of the foregoing, I propose that the Court answer the questions referred as follows:

Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public service contracts is to be interpreted as precluding the direct award of a contract in a procedure such as that in the main proceedings, unless the following conditions are fulfilled:

First, the local authority must exercise over the other entity a control similar to that which it exercises over its own departments. The national court should examine the following factors in this regard:

— the interests of the shareholders;

— the conversion of the 'azienda municipalizzata' into a public company limited by shares;

— the fact that there is non-mandatory provision for the company to be opened up to other capital, but this has not been put into effect;

— the possibility for AGESP to set up establishments even abroad;

— the extent of the power of influence over the appointment of members of the board of directors and running of the business;

— the powers of the board of directors of AGESP; and

— the fact that the Municipality has an indirect shareholding in AGESP through AGESP Holding.

Secondly, that entity must also have carried out the essential part of its activities for the local authority or authorities which hold(s) its shares. In this regard, the national court must take into account the factors referred to in points 76 to 115, which include the income derived from activities carried out for the shareholders, but not the 80% criterion laid down in Article 13 of Directive 93/38/EEC.