Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 30 June 2016[1]

Case C-51/15

Remondis GmbH & Co. KG Region Nord
v
Region Hannover

(Request for a preliminary ruling from the Oberlandesgericht Celle (Higher Regional Court of Celle, Germany))

(Reference for a preliminary ruling — Article 4(2) TEU — Respect for the national identity of Member States inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government — Internal organisation of the Member States — Regional authorities — Legal instrument creating a new public-law entity and organising the transfer of powers and responsibilities for the performance of public tasks — Public procurement — Directive 2004/18/EC — Article 1(2)(a) — Concept of 'public contract')

In the present case, which concerns a request for a preliminary ruling made by the

1. Oberlandesgericht Celle (Higher Regional Court of Celle, Germany), the Court will have the opportunity to examine the delicate matter of the interaction between the Member States' power of reorganisation and EU rules on public procurement. More specifically, the Court will have to clarify whether, and possibly under what conditions, acts effecting transfers of powers between administrative authorities may constitute a public contract and thus be subject to the relevant EU rules. This is a matter of significant practical importance which has attracted interest in legal literature, particularly in Germany, and which the Court has not yet had an opportunity to examine directly.

2. The questions raised by the referring court in this case arise in a dispute between an undertaking which provides waste disposal services, Remondis GmbH & Co. KG Region Nord ('Remondis'), and Region Hannover (the Region of Hannover, Germany) regarding the lawfulness of the transfer by the Region of Hannover of waste treatment tasks that were its responsibility to a public body, the Zweckverband Abfallwirtschaft Region Hannover (a special-purpose association for waste management created by local authorities in the Region of Hannover; 'the Special-Purpose Association'), which it formed for that purpose with the Landeshauptstadt Hannover (capital of the *Land* of Hannover, Germany; 'the City of Hannover').

1 — Original language: French.

3. The referring court asks the Court, in essence, whether such an operation constitutes a public contract within the meaning of Article 1(2)(a) of Directive 2004/18/EC[2] and, if so, whether such an operation may fall outside the scope of EU public procurement law by virtue of the '*in house*' exception set out in *Teckal*[3] or the exception for contracts which establish cooperation between public entities set out in *Ordine degli Ingegneri della Provincia di Lecce and Others*.[4]

I – Legislative framework

A – *EU law*

4. Article 4(2) TEU provides:

'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. …'

5. Under Article 1(2)(a) of Directive 2004/18, public contracts are, for the purposes of that directive, contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of the directive.

6. Directive 2004/18 was repealed by Directive 2014/24,[5] which, in accordance with Article 90(1) thereof, must be transposed by the Member States by 18 April 2016 at the latest.

7. Recital 4 of Directive 2014/24 provides that '[t]he increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not, however, broaden the scope of this Directive compared to that of Directive 2004/18/EC. The Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract'.

8. Article 1(6) of Directive 2014/24 provides that '[a]greements, decisions or other legal instruments that organise the transfer of powers and responsibilities for the performance of public tasks between contracting authorities or groupings of contracting authorities and do not provide for remuneration to be given for contractual performance, are considered to be a matter of internal organisation of the Member State concerned and, as such, are not affected in any way by this Directive'.

2 — 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 corrigendum OJ 2004 L 351, p. 44).

3 — Judgment of 18 November 1999 in *Teckal*, C-107/98, EU:C:1999:562.

4 — Judgment of 19 December 2012 in *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817.

5 — Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

B – *National law*

9. In Germany, federal rules impose waste disposal obligations on the public-law corporations on which those obligations are incumbent under the law of the *Länder*.[6] For the *Land* of Lower Saxony, the Lower Saxony Law on waste designates rural districts and urban districts as the public authorities responsible for waste treatment and provides that they are to be supplemented by special-purpose associations formed by those authorities for purposes of waste treatment where the special-purpose association's articles of association so provide.[7]

10. Under the Lower Saxony Law on special-purpose associations, as it was in force on the date the Special-Purpose Association was formed,[8] municipalities are able, with a view to the joint performance of certain tasks which they are entitled or required to carry out, to form voluntary special-purpose associations or may be formed into compulsory special-purpose associations. Special-purpose associations are public authorities which are self-managed under their own responsibility. Where a special-purpose association is formed, the right and the obligation conferred on municipalities participating in a special-purpose association to perform the duty entrusted to the association are transferred to that association. In addition, the statutes of the special-purpose association must regulate coverage of needs in connection with the task such that, in so far as other revenue of the special-purpose association is not sufficient to cover the cost of its tasks, the members of the association are required to pay contributions, which are to be determined annually.

11. The Lower Saxony Law on inter-municipal cooperation, as it was in force when the order for reference was made,[9] provides, inter alia, that the transfer of a public task to a special-purpose association is to be accompanied by the transfer of all rights and obligations connected with the performance of the task and that the special-purpose association is to collect a contribution from its members in so far as other revenue is not sufficient to cover its financial needs.

II – Facts, national procedure and questions referred

A – *The formation of the Special-Purpose Association and its articles of association*

12. Before the Special-Purpose Association was formed, under the legislation on waste of the Federal Republic of Germany and of the *Land* of Lower Saxony, the Region of Hannover and the City of Hannover were entrusted with waste disposal and treatment tasks in the district of Hannover and the City of Hannover respectively.

13. Following certain legislative amendments concerning the Region of Hannover and in view of a reorganisation of that task, on 29 November 2002 the Region of Hannover and the City of Hannover concluded an agreement by which the latter transferred to the Region of Hannover the tasks incumbent on it as the public-law entity responsible for waste disposal.

6 — See Paragraphs 17(1) and 20(1) of the Kreislaufwirtschaftsgesetz (KrWG — Law on closed cycle management) and Paragraphs 13 and 15 of the Kreislaufwirtschafts- und Abfallgesetz (KrW-/AbfG — Law on closed cycle management and waste), which were in force on the date the Special-Purpose Association was formed.

7 — See Paragraph 6 of the Niedersächsische Abfallgesetz (Lower Saxony Law on waste), in the version of 14 July 2003, and Paragraph 6(1) of the version of 14 October 1994, which was in force on the date the Special-Purpose Association was formed.

8 — Niedersächsisches Zweckverbandsgesetz of 7 June 1939. See in particular Paragraphs 1,2(1), 4 and 29(1) of that Law.

9 — Niedersächsisches Gesetz über die kommunale Zusammenarbeit of 21 December 2011. See in particular Paragraphs 1, 2, 7, 8, 9 and 16.

14. Shortly after, on 19 December 2002, the Region of Hannover and the City of Hannover jointly adopted the Verbandsordnung des Zweckverbandes Abfallwirtschaft Region Hannover (articles of association for the special-purpose association for waste management created by local authorities in the Region of Hannover; 'the articles of association of the Special-Purpose Association'). [10] By those articles of association, they formed the Special-Purpose Association, organised its operation and assigned various tasks to it.

15. Under the articles of association, the Special-Purpose Association is a public-law corporation (Article 2(3)), which takes the place of the Region of Hannover as the public-law entity responsible for waste disposal under the relevant legislation (Article 4(1)). Aside from waste disposal (type B task), the Special-Purpose Association is also assigned other functions, some of which relate only to the City of Hannover (type C tasks), while others are common to both its members (type A tasks). [11]

16. Under the articles of association, the Special-Purpose Association also disposes of waste for recovery and, for that purpose, may enter into dual system contracts ('*Duale Systeme*', Article 4(4)). It may have recourse to the services of third parties for the performance of its tasks and to that end acquire holdings in undertakings and entities (Article 4(5)). In addition, the Special-Purpose Association is to adopt statutes and regulations on the use of its public infrastructures and on the imposition of fees, contributions and cost reimbursements (Article 4(6)).

17. Under Article 5 of the articles of association of the Special-Purpose Association, the Region of Hannover and the City of Hannover are to transfer to the Special-Purpose Association, at no cost, their respective bodies which previously performed waste disposal, street cleaning and winter road maintenance tasks and 94.9% of the shares in Abfallentsorgungsgesellschaft Region Hannover mbH (Region of Hannover limited company for waste treatment; 'ARH'), a company providing waste treatment services for the Region of Hannover which was up to then wholly owned by the Region of Hannover.

18. The general meeting of the Special-Purpose Association involves the chief administrative officers of the Region of Hannover and of the City of Hannover, who are bound by the instructions given by the member territorial entity which they represent (Article 7(1) and (3)). In votes on type A tasks, representatives of the two Special-Purpose Association members are entitled to vote in the general meeting. On the other hand, in votes on type B or C tasks, either representatives of the Region of Hannover (for type B tasks) or representatives of the City of Hannover (for type C tasks) are entitled to vote (Article 7(2)). Under Article 8 of the articles of association, the general meeting has the power inter alia to amend the articles of association and to appoint the Special-Purpose Association's managing director (*Geschäftsführerin/führer*). [12]

19. Last, Article 16(1) of the articles of association of the Special-Purpose Association provides that the Special-Purpose Association must, in the long term, at least ensure that its expenditure is covered by its revenue. However, under Article 16(2), in so far as its revenue is not sufficient to cover the costs of its tasks, the two constituent entities are required to pay contributions to be determined annually.

20. It is apparent from the documents before the Court that in 2011 the Special-Purpose Association and ARH jointly generated a turnover of EUR 189 020 912, of which EUR 11 232 173 (approximately 6%) came from commercial transactions with third-party entities and that, according to forecasts for 2013, those amounts would be EUR 188670370.92 and EUR 13085190.85 respectively.

10 — ABl. für den Regierungsbezirk Hannover 2002, p. 766.

11 — More specifically, Article 4(2) of the articles of association of the Special-Purpose Association provides that type C tasks, which the Special-Purpose Association performs for the City of Hannover within its area, concern street cleaning, winter road maintenance and fleet management and that type A tasks, common to both members, also concern waste disposal and street cleaning.

12 — According to the order for reference, the general meeting of the Special-Purpose Association is also responsible, among other things, for electing its own chairman, for matters decided by the council or the management committee pursuant to Lower Saxony's municipal legislation and for matters not falling within the responsibility of the managing director under the articles of association.

B – *National procedure and questions referred*

21. Given the size of the turnover now derived by the Special-Purpose Association from activities involving third parties distinct from its two members, Remondis made an application for review (*Nachprüfungsantrag*) to the Vergabekammer (Public Procurement Board). In its application, Remondis claims that the conditions which permit a call for tenders not to be made on the basis of an '*in house*' award in accordance with the judgment in *Teckal*[13] are no longer met. Remondis asserts that the formation of the Special-Purpose Association and the concomitant transfer of tasks to the Special-Purpose Association should now therefore be regarded as a 'de facto unlawful award' and that, because of that invalidity, the role of public-law entity responsible for waste disposal reverted to the Region of Hannover. It follows, according to Remondis, that in so far as the Region of Hannover does not intend itself to provide the corresponding services for which it is responsible, it is required to organise a tendering procedure.

22. After the application was dismissed by the Public Procurement Board,[14] Remondis brought the matter to the referring court and sought the annulment of the decision dismissing its application. Before that court, Remondis claimed, inter alia, that the formation of the Special-Purpose Association and the concomitant transfer of tasks to it constitute a public contract within the meaning of Article 1(2)(a) of Directive 2004/18. The Region of Hannover and the Special-Purpose Association assert that the creation of the Special-Purpose Association and the transfer of tasks to it do not fall within the scope of public procurement law, as the creation and the transfer were based on a statutory decision and not on an administrative contract or agreement.

23. The referring court states that the outcome of the dispute before it hinges on the response to Remondis' argument mentioned in the preceding point. It states that, according to the strongly predominant view in German legal literature, the formation of special-purpose associations and the transfer of tasks to them are exempt from the requirement to call for tenders, since such operations do not constitute a public contract, but give rise only to a reallocation of powers which constitutes a measure of internal State organisation that is constitutionally guaranteed. However, the referring court has doubts that this view is consistent with the Court's case-law, according to which agreements concluded by several public bodies to perform a public task within the context of inter-municipal cooperation also come, in principle, within the scope of public procurement law, unless specified exceptions obtain.

24. In the present case, the formation of the Special-Purpose Association and the concomitant transfer of tasks to it were based on the agreement of its members pursuant to a contract governed by public law. If it transpired that that formation and that transfer constitute a public contract within the meaning of Directive 2004/18, that directive would be applicable in so far as all the other conditions required for its application are met. In particular, on account of the provisions contained in Articles 5 and 16 of the articles of association, the referring court considers that the public contract is one 'for pecuniary interest'.

13 — Judgment of 18 November 1999 in *Teckal*, C-107/98, EU:C:1999:562. According to paragraph 50 of that judgment, EU law on public procurement is not applicable in the case where a public entity exercises over the entity which provides it supplies or services a control which is similar to that which it exercises over its own departments and, at the same time, the latter entity carries out the essential part of its activities with the controlling public entity or entities.

14 — The Public Procurement Board ruled that turnover from transactions with third parties of the Special-Purpose Association did not exceed the threshold above which it would no longer be acting mainly for the contracting authority in accordance with the judgment in Teckal, C-107/98, EU:C:1999:562.

25. The referring court also considers that in the event that the operation at issue constitutes a public contract within the meaning of Directive 2004/18, it must be determined whether the principles of 'in house award' in accordance with the judgment in *Teckal*[15] should be applied to that contract or those of cooperation between public entities in accordance with the judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others*.[16]

26. In these circumstances, by order of 17 December 2014, the referring court deemed it necessary to stay the proceedings pending before it and to refer the following questions to the Court for a preliminary ruling:

'(1) Does an agreement between two regional authorities — on the basis of which the regional authorities form, by constituting statutes, a common special-purpose association with separate legal personality, which from that point on carries out, under its own responsibility, certain tasks which hitherto were incumbent on the regional authorities concerned — constitute a "public contract" within the meaning of Article 1(2)(a) of Directive 2004/18 … in the case where that transfer of tasks concerns services within the meaning of that directive and is effected for consideration, the special-purpose association carries out activities going beyond the ambit of the exercise of tasks previously incumbent on the regional authorities concerned and the transfer of tasks does not belong to "the two types of contracts" which, although entered into by public entities, do not, according to the case-law of the Court of Justice …, come within the scope of European Union public procurement law?

(2) If the answer to Question 1 is in the affirmative: Does the question whether the creation of a special-purpose association and the related transfer of tasks to that association exceptionally do not come within the scope of European Union public procurement law depend on the principles which the Court of Justice has developed with regard to contracts concluded by a public entity with a person legally distinct from that entity — principles in accordance with which the application of European Union public procurement law is excluded — in the case where, at the same time, that entity exercises over the person concerned a control which is similar to that which it exercises over its own departments and where that person carries out the essential part of its activities with the entity or with the entities which control it (see, to that effect, inter alia, judgment in *Teckal*, C-107/98, EU:C:1999:562, paragraph 50), or, by contrast, do the principles which the Court of Justice has developed concerning contracts which establish cooperation between public entities with the aim of ensuring that a task in the public interest that they all have to perform is carried out apply (in that respect, see judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11 EU:C:2012:817, paragraph 34 and following)?'

III – Procedure before the Court

27. The order for reference was received at the Court Registry on 6 February 2015. Observations were submitted by Remondis, the Region of Hannover, the Special-Purpose Association, the French and Austrian Governments and the European Commission. Remondis, the Region of Hannover, the Special-Purpose Association and the Commission took part in the hearing, which was held on 20 April 2016.

15 — Judgment of 18 November 1999 in *Teckal*, C-107/98, EU:C:1999:562.

16 — Judgment of 19 December 2012 in *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817.

IV – Legal assessment

A – *The first question*

28. By its first question, the referring court asks, in essence, whether an agreement, such as that at issue in the main proceedings, between two regional authorities on the basis of which they created, by constituting statutes, a common special-purpose association with separate legal personality, which carries out, under its own responsibility, certain tasks which hitherto were incumbent on the regional authorities concerned, constitutes a public contract within the meaning of Article 1(2)(a) of Directive 2004/18 and, as such, is subject to the provisions of that directive.

29. In its question, the referring court also highlights four aspects which, in its view, characterise the operation in question: first, the transfer of tasks concerns services within the meaning of Directive 2004/18; second, that transfer is effected for consideration; third, the special-purpose association carries out activities going beyond the ambit of the exercise of tasks previously incumbent on the regional authorities concerned; fourth, the transfer of tasks does not belong to 'the two types of contracts' which, although entered into by public entities, do not, according to the Court's case-law, come within the scope of EU public procurement law.

30. The first question thus seeks to enable the national court to assess whether the operation challenged before it by Remondis, namely the creation of the Special-Purpose Association by the Region of Hannover and the City of Hannover and the concomitant transfer to it of the tasks initially assigned to them must be classified as a public contract within the meaning of Directive 2004/18.

31. The parties which submitted observations to the Court take opposing stances in this regard. On the one hand, the Region of Hannover, the Special-Purpose Association and the French and Austrian Governments take the view that a transfer of powers such as that which took place in the operation at issue is not, in principle, a matter of public procurement. On the other, the Commission and Remondis adopt the opposite view, that a situation such as that at issue in the main proceedings falls within the scope of Directive 2004/18.

32. The Court has not yet had the opportunity to examine specifically whether, and possibly under what conditions, a transfer of powers between public authorities may constitute a public contract. Nevertheless, the existence of a transfer of powers has been mentioned in several judgments, in particular in *Commission* v *France*[17] and *Piepenbrock*,[18] which provide useful points of analysis. Reference will therefore be made to that guidance in answering the first question asked by the referring court.

1. The relationship between the concept of a public contract and transfers of powers between public authorities

33. Article 1(2)(a) of Directive 2004/18 defines a public contract as a contract for pecuniary interest concluded in writing between an economic operator and a contracting authority and having as its object the execution of works, the supply of products or the provision of services within the meaning of the directive itself.

17 — Judgment of 20 October 2005 in *Commission* v *France*, C-264/03, EU:C:2005:620. See specifically paragraph 54.

18 — Judgment of 13 June 2013 in *Piepenbrock*, C-386/11, EU:C:2013:385.

34. Of the various principles developed by the Court with regard to the definition of public contract, it must first be borne in mind, for the purposes of the present case, that, according to case-law, the legal classification of an operation as a public contract falls under EU law and any classification given to an operation under national law is not decisive for that purpose. [19] It follows that, in this case, even if the operation at issue is not classified as a public contract in German law, that fact does not preclude such classification in EU law.

35. It is also clear from the case-law that where a public contract was awarded within the framework of a legal arrangement comprising a number of operations, in order to safeguard the effectiveness of the EU rules on public procurement, the award of the contract must be examined taking into account all those stages as well as their purpose. [20] Accordingly, an operation such as that in the main proceedings which is conducted in several stages and involves, among other things, the creation of a legal entity, must be assessed globally in order to determine whether or not it gives rise to the award of a public contract which falls under EU rules.

36. In addition, it is clear from the very wording of the abovementioned definition of public contract in Directive 2004/18, which refers to 'a contract for pecuniary interest', that an essential element of that concept is the creation of legally binding reciprocal obligations. A public contract is characterised by an exchange of services between the contracting authority, which pays a price, and the contractor, who, in exchange for that price, undertakes to execute a work or works or to provide services. [21] The concept of public contract therefore presupposes and applies to operations involving the acquisition by the contracting authority of works, supplies or services for consideration. [22]

37. With specific regard to whether there is pecuniary interest, as is rightly stated by the referring court, according to the case-law a contract cannot fall outside the concept of a public contract merely because there is remuneration which is limited to reimbursement of the expenditure incurred to provide the agreed service. [23]

38. It is nevertheless clear from the case-law that the internal organisation of the State does not fall under EU law. The Court has recognised on several occasions that each Member State is free to delegate powers internally as it sees fit [24] and that the question of how the exercise of public powers is organised within the State is solely a matter for the constitutional system of each Member State. [25]

39. Moreover, that case-law is consistent, first, with the second sentence of Article 4(2) TEU, under which the Union must respect essential State functions, which undoubtedly include what might be defined as the State's internal self-organisation. Second, it is consistent with the principle of conferral of powers laid down in Article 5(1) and (2) TEU, no provision having conferred on the Union the power to intervene in the internal organisation of its Member States.

19 — Judgment of 29 October 2009 in *Commission* v *Germany*, C-536/07, EU:C:2009:664, paragraph 54 and the case-law cited.

20 — See, to that effect, judgment of 10 November 2005 in *Commission* v *Austria*, C-29/04, EU:C:2005:670, paragraph 41 *et seq*.

21 — See judgment of 25 March 2010 in *Helmut Müller*, C-451/08, EU:C:2010:168, paragraph 62, and point 77 of my Opinion in the same case (EU:C:2009:710). See also Opinion of Advocate General Jääskinen in *Commission* v *Spain* (C-306/08, EU:C:2010:528, points 84 and 87) and Opinion of Advocate General Trstenjak in *Commission* v *Germany*, C-536/07, EU:C:2009:340, point 47.

22 — See explicitly, in this regard, recital 4 of Directive 2014/24/EU. With regard to its relevance to the present case, see points 45 and 46 of this Opinion.

23 — See judgments of 19 December 2012 in *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 29; of 13 June 2013 in *Piepenbrock*, C-386/11, EU:C:2013:385, paragraph 31, and of 11 December 2014 in *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 37.

24 — See judgments of 3 April 2014 in *Cascina Tre Pini*, C-301/12, EU:C:2014:214, paragraph 42; of 4 October 2012 in *Commission* v *Belgium*, C-391/11, EU:C:2012:611, paragraph 31, and of 16 July 2009 in *Horvath*, C-428/07, EU:C:2009:458, paragraph 50.

25 — See, to that effect, judgment in *Horvath*, C-428/07, EU:C:2009:458 paragraph 49, and, specifically with regard to the Federal Republic of Germany, judgment of 12 June 2014 in *Digibet and Albers*, C-156/13, EU:C:2014:1756, paragraph 33.

40. In that regard, in a case which, like this one, concerned the Federal Republic of Germany, the Court expressly stated that EU law cannot call into question the division of competences between regional authorities, since it benefits from the protection conferred by Article 4(2) TEU, according to which the Union must respect the national identity of Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. [26]

41. As acts of secondary legislation, such as Directive 2004/18 in this case, must be in conformity with primary law, such acts cannot be interpreted as permitting interference in the institutional structure of the Member States. Accordingly, acts of internal reorganisation of the powers of the State remain outside the scope of EU law and, more specifically, EU rules on public procurement.

42. An act by which a public authority, unilaterally in the context of its institutional powers, or several public authorities, in the context of an agreement governed by public law, make a transfer of certain public powers from one public entity to another public entity constitutes an act of internal reorganisation of the Member State. Such an act therefore, in principle, falls outside the scope of EU law and, more specifically, the EU rules on public procurement. [27]

43. Furthermore, it is clear from the very wording of the abovementioned definition of public contract that that concept does not relate to acts by which public authorities transfer powers, in particular for the performance of public service tasks in the context of a reorganisation of those tasks. Such transfers of powers do not concern 'acquisitions for pecuniary interest' of goods or services, but go beyond that, giving rise to a transfer of the obligations and rights to perform the tasks in question, including official authority to establish the regulatory framework for the performance of those tasks. Such acts do not therefore come under the principal objective of the rules of EU law on public procurement, that is, the opening-up of undistorted competition in all the Member States with regard to the execution of works, the supply of products or the provision of services. [28]

44. That interpretation is now expressly confirmed by Article 1(6) of Directive 2014/24, which excludes from the scope of that directive, as acts which are a matter of internal organisation of the Member State, legal instruments that organise, without remuneration given for contractual performance, the transfer of powers and responsibilities for the performance of public tasks between contracting authorities.

45. It should be noted that it certainly cannot be inferred from the fact that Directive 2014/24 is not applicable *ratione temporis* in the present case and that Directive 2004/18 did not contain any similar provision that the principle set forth in Article 1(6) of Directive 2014/24 was not applicable to the concept of public contract within the meaning of Directive 2004/18.

46. Not only is it consistent with the Court's interpretation of primary law in its case-law prior to the adoption of Directive 2014/24, as has been explained, that acts of internal organisation of Member States making transfers of powers should fall outside the scope of the EU rules on public procurement, but it is also clear from recital 4 of Directive 2014/24 that the clarification given by that directive of the concept of public contract does not broaden the scope compared to that of Directive 2004/18. It follows that Article 1(6) of Directive 2014/24 merely clarifies the concept of a public contract without altering its scope compared to that which existed under Directive 2004/18.

26 — Judgment in *Digibet and Albers*, C-156/13, EU:C:2014:1756, paragraph 34.

27 — It should be noted in this regard that the Commission has already closed infringement proceedings brought against the Federal Republic of Germany, taking the view that the complete transfer of a public task from one public entity to another, to be performed by the transferee in full independence and under its own responsibility, constitutes an act of internal organisation of the public administration of the Member State in question and as such is not subject to the application of EU law. See Press release of 21 March 2007, IP/07/357.

28 — Judgment of 8 May 2014 in *Datenlotsen Informationssysteme*, C-15/13, EU:C:2014:303, paragraph 22 and the case-law cited. See also, in this regard, judgment of 9 June 2009 in *Commission* v *Germany*, C-480/06, EU:C:2009:357, paragraph 47.

47. Although it is clear from the foregoing that acts of internal organisation of the Member States do not fall within the scope of EU rules on public procurement, this does not alter the fact that, as is evident from the Court's settled case-law, public authorities may not contrive to circumvent the rules on public procurement in order to avoid the obligations stemming from those rules.[29] Accordingly, operations which relate in essence to the acquisition of goods or services for consideration by one or more contracting authorities fall under the EU rules on public procurement because the conditions governing the application of those rules are met, even if they might have been formally classified as an act of internal reorganisation,[30] such an approach also being consistent with the case-law mentioned in point 34 of this Opinion.

2. The essential features of transfers of powers

48. Although the concept of a legal instrument that organises the transfer of powers is now explicitly mentioned in Article 1(6) of Directive 2014/24/, it is not circumscribed by any rule of EU law. The reason is that, since it is for each Member State to determine the internal organisation of the State, the definition of the conditions and procedures for transfers of powers is a matter for national law. In these circumstances, I am not sure that the concept of a legal instrument that organises a transfer of power should be circumscribed as an autonomous concept in EU law. Nevertheless, the essential features of transfers of powers should be outlined in order to be able to identify the circumstances in which a legal instrument gives rise to such a transfer and ought therefore to be considered to fall outside the scope of the rules of EU law, in particular the rules on public procurement.

49. Legal instruments that organise transfers of powers between public authorities can take very different forms, varying according to the specific characteristics of each Member State and/or authority concerned. Such instruments may include, for example, legislative or regulatory acts, decisions by an authority, or agreements governed by public law concluded between several authorities. A transfer of powers may be 'vertical', where it relates to a transfer from the State to a regional authority at a lower level. It may also be 'horizontal', where several regional authorities create a common structure on which are conferred powers previously exercised by those regional authorities. In addition, a horizontal transfer of powers may take place 'voluntarily', on the basis of a joint decision of the regional authorities concerned, or can be 'compulsory', that is to say, imposed by an authority at a higher level.[31]

50. In *Commission* v *France*[32] the Court provided some useful guidance for identifying the essential features of transfers of powers. In that case an action was brought by the Commission seeking a declaration by the Court that the French Republic had failed to fulfil some of its obligations under the EU rules on public procurement in force at the time. In its judgment, in response to an argument put forward by the Member State to justify the national legislation at issue, the Court held that the legislation did not give rise to a transfer of public powers.[33]

29 — See, inter alia, judgments of 9 June 2009 in *Commission* v *Germany*, C-480/06, EU:C:2009:357, paragraph 48, and of 10 September 2009 in *Sea*, C-573/07, EU:C:2009:532, paragraph 71.

30 — That was the case in *Piepenbrock* (C-386/11, EU:C:2013:385). See point 64 and footnote 44 of this Opinion.

31 — Thus, under the Lower Saxony Law on special-purpose associations mentioned in point 10 of this Opinion, the creation of the special-purpose association may be 'voluntary' or 'compulsory'.

32 — Judgment of 20 October 2005 in *Commission* v *France*, C-264/03, EU:C:2005:620.

33 — Judgment of 20 October 2005, *Commission* v *France* (C- 264/03, EU:C:2005:620). See specifically paragraph 54 of that judgment and point 41 of the Opinion of Advocate General Poiares Maduro in that case (C-264/03, EU:C:2004:747).

51. In reaching that conclusion, the Court relied on three considerations.[34] First, the public authority that was originally competent could not relinquish its power, as the relevant national rules did not permit it to do so. Second, the entity on which the power was conferred could act only after the authority that was originally competent had given its approval, so that it did not have autonomy in the execution of the tasks connected with that power. Third, the performance of the task was financed by the public authority that was originally competent, and consequently the entity on which the power was conferred had no discretion in that regard.

52. An analysis of the statements made by the Court in that judgment allow certain elements to be identified which characterise transfers of powers, in particular horizontal transfers, the category that may be relevant in the present case.

53. First, it is clear, from the requirement highlighted by the Court that the transferring authority must relinquish its power, that if a transfer of powers is to be genuine, it must be *comprehensive*.[35] The entity to which powers are transferred must thus hold all the powers and responsibilities necessary to perform fully and autonomously the public task for which the powers have been conferred on it. It must, inter alia, have the power to determine the regulatory framework and procedures for the performance of that task. Following the transfer, the transferring authority must, in contrast, completely relinquish the powers relating to the public service task in question.

54. In this regard, however, I do not think that for a genuine transfer of powers to have taken place, it is necessary to provide for the irreversibility of the transfer. Nevertheless, a restoration of powers to the transferring authority cannot depend on the exercise of a unilateral power of termination conferred on that authority in the event of improper implementation of the task. Such a possibility is a feature of contractual arrangements that seems to me to be alien to transfers of powers. On the other hand, a restoration of powers may result from a further reorganisation of the public tasks in question.

55. Second, it is clear, from the requirement highlighted by the Court that the entity to which powers are transferred is not to act after the transferring authority has given its approval, that, if the transfer is to be genuine, that entity must be able to carry out the task for the performance of which powers have been conferred on it *in full autonomy*. The transferring authority no longer having any power in the field in question, it must no longer be able to interfere in the performance of the task for which the entity to which powers are transferred is now fully competent.

56. However, in the case of a transfer of powers relating to the performance of a public service task, that requirement does not necessarily mean that a regional authority which transfers such powers to a new entity should not have any relationship with that entity. Because of the regional authority's political responsibility to citizens for the performance of the public service remit in its area, it seems to me that it should be able to retain a degree of influence over the new entity, which could be described as 'political' control.[36] For the transfer of power to be genuine, however, the transferring authority must not retain powers in connection with the actual performance of the public task.

57. Third, the Court highlighted the requirement that the entity to which powers are transferred has *financial autonomy* in the performance of the public task for which powers are transferred to it. It thus must not depend financially on the transferring authority in the performance of that task. That authority, or any other authority involved in the internal reorganisation of the public powers in

34 — In the Working Paper of 4 October 2011 (SEC(2011) 1169 final) concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation'), the Commission gives an interpretation of that judgment (see point 4.1, p 19).

35 — See, also, page 20 of the Commission document mentioned in the preceding footnote.

36 — In the document mentioned in footnote 34, the Commission similarly considers that this possibility of influence may, for example, take the form of officials of the body which transfers the competence being members of the executive or management bodies of the authority to which the competence is transferred or the transferring authority retaining the right to receive certain information (see page 20).

question, must provide it with the necessary resources to perform the task. Such provision constitutes the necessary corollary of the transfer of powers. On the other hand, it must not correspond to the remuneration to be given for contractual performance in the context of a relationship entailing reciprocal obligations. [37]

58. It will be necessary to determine, on the basis of an overall assessment of the structure of the operation and taking into account the above considerations, whether an operation such as that at issue in the main proceedings gave rise to a genuine transfer of powers which, as such, does not fall under the rules on public procurement or whether, instead, it gave rise to a relationship entailing reciprocal obligations involving the acquisition of services by the regional authorities concerned.

59. In that regard, whilst the national court, which has exclusive jurisdiction to assess the facts of the dispute in the main proceedings, must ultimately assess whether the operation at issue falls within the concept of a public contract or gave rise to a genuine transfer of powers, the Court of Justice, which is called on to provide answers that may be of use to the national court, may provide guidance in order to enable it to give judgment. [38] With this in mind, on the basis of the information in the file, I will simply make the following points.

3. Classification of an operation like that at issue in the main proceedings as a public contract or as a transfer of powers

60. As regards the classification of an operation like that challenged by Remondis in the main proceedings, it should be stated, first, that it is clear from the order for reference that in this case the creation of the Special-Purpose Association gave rise to a genuine transfer of powers which resulted in the Region of Hannover relinquishing its powers and responsibilities in relation to waste disposal.

61. This assessment follows from the wording of the question referred itself, which states that the Special-Purpose Association acts ‘under its own responsibility’, and is expressly confirmed by the referring court in the order for reference. It also follows from the wording of Article 4(1) of the articles of association of the Special-Purpose Association, mentioned in point 15 of this Opinion, and the relevant provisions of national law mentioned in points 10 and 11 of this Opinion.

62. The Special-Purpose Association thus performs the waste disposal task under its own responsibility. It is vested, under Article 4(6) of the articles of association of the Special-Purpose Association, with the power to enact statutes necessary to perform that task and under Article 4(5) of the articles of association it may have recourse to the services of third parties, in which case it acts as the contracting authority.

63. Second, with regard specifically to whether the operation at issue is for pecuniary interest, the national court, referring to the case-law mentioned in point 37 of this Opinion, considers that it is able to make inferences from Articles 5 and 16(2) of the articles of association of the Special-Purpose Association. However, for reasons I will explain in the following points, I do not think that those provisions can form the basis for a finding that the operation is for pecuniary interest in the sense that it involves remuneration being given for contractual performance.

37 — See, in this regard, the wording of Article 1(6) of Directive 2014/24/EU and points 44 to 46 of this Opinion.

38 — Judgment of 1 October 2015 in *Trijber and Harmsen*, C-340/14 and C-341/14, EU:C:2015:641, paragraphs 54 and 55.

64. As regards the transfer, at no cost, to the Special-Purpose Association of the bodies which previously performed the tasks covered by the transfer of powers — as provided for by Article 5 — it is clear that, such a transfer is consistent with the requirement, referred to in point 57 of this Opinion, that, in a transfer of powers, the new competent entity should be provided with the material and human resources necessary to perform the task for which powers are conferred on it. Furthermore, such a transfer constitutes proof that the two regional entities concerned wholly relinquished the public tasks in question.

65. The obligation to pay contributions under Article 16 of the articles of association of the Special-Purpose Association constitutes a statutory financial guarantee of the solvency of the Special-Purpose Association. [39] It would seem that the contribution could be defined as 'subsidiary' and is made only if the Special-Purpose Association is unable to cover the costs of the public service performed by it from its revenue. [40] Such a contribution cannot call into question the financial autonomy of the Special-Purpose Association, which, on the contrary, under Article 4(6) of the articles of association, has the power to adopt statutes and regulations on fees, contributions and cost reimbursements connected with the tasks performed by it. Moreover, the Court has ruled that the mere fact that funding arrangements exist as between two public bodies in respect of the exercise of a public service task performed under specific powers does not imply that the services provided by one of those entities must be regarded as having been performed pursuant to a public contract. [41]

66. In any event, the transfer and the guarantee under the two provisions mentioned by the referring court (Article 5 and Article 16 of the articles of association of the Special-Purpose Association) cannot, in my view, be construed in any manner as remuneration for the Special-Purpose Association for the services it provides to its members.

67. In fact, the operation at issue, as presented to the Court, does not seem at all to involve the acquisition of services by the two members of the Special-Purpose Association in return for remuneration. The reciprocal aspect, which, as I mentioned in point 36 of this Opinion, characterises the concept of a public contract appears to be absent in this case.

68. Third, it would appear prima facie from the information available in the file that the Special-Purpose Association has not only financial autonomy, but also full autonomy in the performance of the public tasks entrusted to it, in particular in waste disposal activities. It is true, as was highlighted by Remondis and by the Commission, that under Article 7 of the articles of association of the Special-Purpose Association the Region of Hannover is represented in the general meeting of the Special-Purpose Association and, in votes on tasks relating solely to waste disposal activities, only representatives of that Region are entitled to vote. However, Article 8 of the articles of association of the Special-Purpose Association seems to indicate that the powers of the general meeting do not apply to the actual performance of public services, but are limited to institutional matters or matters connected with legal compliance. Such influence seems to be more a question of the 'political' control mentioned in point 56 of this Opinion than of exerting influence over strategic objectives or significant decisions of the Special-Purpose Association in the performance of the public

39 — See Paragraph 29 of the Lower Saxony Law on special-purpose associations mentioned in point 10 of this Opinion and Paragraph 16 of the Lower Saxony Law on inter-municipal cooperation mentioned in point 11 of this Opinion. In addition, according to the observations submitted to the Court, under the Niedersächsisches Gesetz über die Insolvenzunfähigkeit juristischer Personen des öffentlichen Rechts (Lower Saxony Law on exemption from insolvency of public-law corporations) 'insolvency proceedings may not be brought in respect of the assets of public-law corporations over which the *Land* exercises control'.

40 — In this regard the Region of Hannover stated in its observations that such contributions were never actually made.

41 — Judgment of 18 December 2007 in *Commission* v *Ireland*, C-532/03, EU:C:2007:801, paragraph 37.

services tasks falling within its competence.[42] The referring court must nevertheless determine whether this is the case and whether the Special-Purpose Association actually has full autonomy in the performance of the public services at issue, without requiring the approval of the Region of Hannover.

69. The above considerations demonstrate the substantial differences between the present case and *Piepenbrock*[43] mentioned by the referring court. In that case, the Court had made clear that the public authority (the Kreis Düren, that is, the district of Düren) which had assigned to another regional authority (the Stadt Düren, the city of Düren) the task of cleaning certain of its buildings had reserved the right to supervise the proper execution of that task and unilaterally to terminate the contract governed by public law at issue in the event of improper performance. Although the contract was described as a delegating agreement, in essence that contractual relationship between the two local entities did not constitute a genuine transfer of powers, but a reciprocal relationship consisting in the simple provision of services for the Kreis Düren in return for financial compensation. It is thus wrong, in my view, to interpret that judgment, as has been done by some of the German legal literature mentioned in the order for reference and as Remondis claims, to the effect that the Court confirmed that transfers of powers were subject to the EU rules on public procurement.[44]

70. In the light of all the above considerations, the factual accuracy of which must be verified by the referring court, it would seem that, in this case, the operation at issue in the main proceedings gave rise to a genuine transfer of powers between public authorities which, as an act of internal organisation of the Member State, falls outside the scope of the EU rules on public procurement.

71. In this connection, I think that some remarks are needed on the fact that, in this case, the conditions required for the existence of a public contract are not met. First, I do not believe that, as the Commission claims, the concept of a contract in written form should be extended to include an operation such as that undertaken in this case. The Commission seems to have proposed such an extension based on a fear of circumvention of the competitive tendering obligation imposed by the EU rules on public procurement. Although, as is clear from point 47 of this Opinion, such fears may prove to be perfectly relevant in some circumstances, it should nevertheless be stated that there is nothing in the documents before the Court to justify such fears in this case. Accordingly, there does not seem to be any justification in the present case for extending the concept of an agreement in written form as proposed by the Commission when there is no such agreement between the Region of Hannover and the Special-Purpose Association.

72. Second, whilst it is true, as the referring court and the Commission note, that waste disposal services do not come under the prerogatives of a public authority and may constitute services in category 16 of Annex II A of Directive 2004/18, it must be stated that the object of the operation at issue is not the mere provision of services but concerns the genuine transfer of the power to perform the public service task that consists in waste disposal.

73. Third, the fact that the Special-Purpose Association carries out activities going beyond the ambit of the tasks previously incumbent on the regional authorities concerned does not seem to me to be relevant to the classification of the operation at issue as a public contract.

42 — This fact distinguishes the present case from *Coditel Brabant* (C-324/07, EU:C:2008:621, see, inter alia, paragraph 34), to which the national court refers. It should also be noted in this regard that in *Coditel Brabant* the regional authority concerned had not envisaged any transfer of powers. That case concerned the conclusion of a standard service concession contract and the factual background was completely different from that of the present case.

43 — Judgment of 13 June 2013 in *Piepenbrock*, C-386/11, EU:C:2013:385.

44 — In my view, *Piepenbrock* is, implicitly, in the line of the case-law mentioned in point 47 of this Opinion prohibiting public authorities from contriving to circumvent the rules on public procurement (in this case by a classification) in order to avoid the obligations stemming from those rules. In this regard, see the doubts expressed by the referring court itself in paragraph 24 of that judgment.

74. In the light of the above, I consider that the first question referred should be answered to the effect that an agreement between two regional authorities on the basis of which they create, by constituting statutes, a public-law entity with separate legal personality, to which they transfer the powers for the performance of service tasks which hitherto were incumbent on the regional authorities concerned, without providing for remuneration to be given for contractual services, does not constitute a public contract within the meaning of Article 1(2)(a) of Directive 2004/18, but constitutes an act which is a matter of internal organisation of the Member State concerned, which, as such, falls outside the scope of the EU rules on public procurement.

B – *The second question*

75. Since the referring court puts its second question to the Court only in the event that the Court answers the first question in the affirmative and in view of my suggested answer to that first question, I consider that there is no need to answer that second question.

76. So far as is relevant, I would simply state that in the case of a genuine transfer of power there is neither an *in house* award of a contract, as the legal instrument that organises the transfer of powers does not provide for the performance of services for consideration, nor cooperation between public entities in accordance with *Ordine degli Ingegneri della Provincia di Lecce and Others* case-law,[45] given that that instrument effects a transfer of public powers and does not involve cooperation between authorities.

V – Conclusion

77. On the basis of the foregoing, I propose that the Court answer the questions referred by the Oberlandesgericht Celle (Higher Regional Court of Celle, Germany) as follows:

An agreement between two regional authorities on the basis of which they form, by constituting statutes, a public-law entity with separate legal personality, to which they transfer the powers for the performance of service tasks which hitherto were incumbent on the regional authorities concerned, without providing for remuneration to be given for contractual services, does not constitute a public contract within the meaning of Article 1(2)(a) 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 but constitutes an act which is a matter of internal organisation of the Member State concerned, which, as such, falls outside the scope of the EU rules on public procurement.

45 — Judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817.