OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 9 September 2010[1]

1. In the present case, the Court is once again called upon to rule on the criteria for distinguishing a service concession from a public service contract.

2. The questions referred for a preliminary ruling by the Oberlandesgericht München (Higher Regional Court, Munich) (Germany) are worded as follows:

‘1. Is a contract relating to the supply of services (here, rescue services) under the terms of which the contracting authority does not make a direct payment of consideration to the contractor, but:

(a) the usage fee for the services to be provided is set by negotiation between the contractor and third parties who are contracting authorities (here, social security institutions),

(b) if agreement is not reached provision is made for a decision by an arbitration board established to this end, whose decision is subject to review by State courts, and

(c) the fee is paid to the contractor not directly by the users, but in regular payments on account by a central settlement office whose services the contractor is statutorily required to call upon,

to be regarded for that reason alone as a service concession within the meaning of Article 1(4) 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, [2] as distinct from a service contract for the purposes of Article 1(2)(a) and (d) of the Directive?

1 — Original language: French.

2 — OJ 2004 L 134, p. 114.

2. If the first question referred is to be answered in the negative, is there a service concession where the operating risk connected with the public services is limited because

(a) under a statutory provision, the usage fees for the provision of the services are to be based on the costs that can be estimated in accordance with economic principles applicable to undertakings and that are consistent with proper provision of services, economical and cost-efficient management and efficient organisation,

(b) the usage fees are due from solvent social security institutions,

(c) a certain exclusivity of exploitation is guaranteed in the contractually stipulated area,

but the contractor assumes this limited risk entirely?'

3. The Court's answers to the questions referred should assist the referring court to rule on an appeal brought by Privater Rettungsdienst und Krankentransport Stadler ('Stadler') against a decision of the Vergabekammer Südbayern (Public Procurement Board, Southern Bavaria) by which the latter dismissed an action brought by Stadler relating to the procedure for the award of service contracts in the field of rescue services followed by the Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau (Municipal Association for the Rescue Service and Fire Alarm, Passau; 'Passau municipal association') in accordance with the Bavarian Law on Rescue Services (Bayerisches Rettungsdienstgesetz; 'the BayRDG') as inadmissible on the ground that the task of supplying rescue services constitutes a service concession which is not covered by public procurement legislation.

4. According to Stadler, which carried out rescue services for the Passau municipal association until 31 December 2008, [3] the contract at issue constitutes not a service concession within the meaning of Article 1(4) of Directive 2004/18, but a public service contract within the meaning of Article 1(2)(a) and (d) of that directive.

5. By contrast, the Passau municipal association, as defendant in the main proceedings, and two parties intervening in the main proceedings, namely the Malteser Hilfsdienst e.V.

3 — The contracts concluded between Stadler, on the one hand, and Passau municipal association, on the other hand, were terminated on the initiative of Passau municipal association. It appears that the termination of the contracts was connected with the BayRDG, which entered into force on 1 January 2009, and, more specifically, with Article 13(1) thereof, containing a list of organisations which must be given priority in the assignment of the rescue services.

and the Bayerisches Rotes Kreuz (the Bavarian Red Cross),[4] consider that the contracts at issue constitute service concessions.

6. Written observations were submitted to the Court not only by the parties to the main proceedings, but also by the Federal Republic of Germany, the Czech Republic and the Commission of the European Communities. The Kingdom of Sweden and the latter, with the exception of the Czech Republic, presented oral argument at the hearing on 24 June 2010.

National legislation

7. In Germany, in the field of public rescue services, the local authorities, in their capacity as the authorities responsible for organising those services, conclude contracts with providers for the provision of such services to the entire population of the area within their remit.

8. With regard to the remuneration for the services in question, there are two different models in the various *Länder*. According to the first, so-called 'tender' model, remuneration is paid directly by the local municipality.[5] According to the second, so-called 'concession' model, the remuneration of the provider of the rescue services takes the form of the collection by it of payment from the patients or social security institutions.

9. The *Land* of Bavaria, in which the main proceedings take place, chose the concession model. The rescue services, covering emergency rescue, transport of patients accompanied by a doctor, transport of the sick, mountain and cave rescue and water rescue, are governed in Bavaria by the BayRDG, which entered into force on 1 January 2009.

10. With regard to emergency rescue services, transport of patients accompanied by a doctor and transport of the sick, Article 13(1) and (2) of the BayRDG provide that the municipal association for the rescue service and fire alarm is to entrust their implementation to aid organisations, such as the Bayerisches Rotes Kreuz, the Arbeiter-Samariter-Bund (Workers' Samaritan Federation), the Malteser-Hilfsdienst (Maltese Aid Service), or the Johanniter-Unfall-Hilfe (St. John's Accident

4 — These are the organisations with which, after the termination of the contracts concluded with Stadler, Passau municipal association concluded contracts for the provision of rescue services.

5 — It is clear from the order for reference that the Bundesgerichtshof (the Federal Court of Justice) has already held the tender model to be a service contract. In the light of Case C-160/08 *Commission* v *Germany* [2010] ECR I-3713, it can be concluded that the Court is of the same opinion.

Assistance). It is only where the aid organisations are not prepared or in a position to take on the task that the municipal association for the rescue service and fire alarm entrusts the carrying out on land of the services at issue to third parties or carries them out itself or through its members.

11. Under Article 13(4) of the BayRDG, the legal relationship between the municipal association for the rescue service and fire alarm and the person entrusted with running the rescue service is to be governed by a public law contract.

12. Article 21 of the BayRDG provides that any person who engages in emergency rescue, transport of patients accompanied by a doctor or transport of the sick requires authorisation. Under Article 24(2) of the BayRDG, that authorisation must be granted if a public law contract pursuant to Article 13(4) of that law is submitted.

13. Article 32 of the BayRDG provides that usage fees must be charged for the provision of rescue services, including the involvement of doctors, which must be based on the costs that can be estimated in accordance with economic principles applicable to undertakings and are consistent with proper provision of services, economical and cost-efficient management and efficient organisation.

14. Usage fees of operators for emergency rescue, the transport of patients accompanied by a doctor and transport of the sick are governed by Article 34 of the BayRDG, which is worded as follows:

'...

(2) The social security institutions shall agree the usage fees to be paid by them for emergency rescue, the transport of patients accompanied by a doctor and transport of the sick in a uniform manner with the persons running the rescue service or their *Land* federations...

(3) The usage fee agreement shall be concluded annually in advance.

(4) The costs of emergency rescue, of the transport of patients accompanied by a doctor and of transport of the sick shall be allocated in accordance with uniform standards to the users. The usage fees agreed with the social security institutions shall also be charged by the operators to all other persons

and bodies which call upon the services of the public rescue service.

(5) The usage fees shall in each case be based on the estimated allowable costs under the second sentence of Article 32 of providing the services in the service areas of emergency rescue, transport of patients accompanied by a doctor and transport of the sick and on the estimated operation numbers in the operational period. The costs of providing the services shall also include in particular the costs of the involvement of doctors in the rescue service, … and the costs in respect of the activity of the Central Settlement Office for the Rescue Service in Bavaria in accordance with paragraph 8. The social security institutions shall agree in each case separately with the individual operators, with the operators of the integrated head offices and with the Central Settlement Office for the Rescue Service in Bavaria their estimated costs in the fee period. The costs can be agreed as a budget.

(6) If a usage fee agreement under paragraph 2 or an agreement under paragraph 5 does not materialise by 30 November in the financial year preceding the fee period, arbitration proceedings before the fee arbitration board … shall be held regarding the amount of the estimated costs and of the usage fees … Usage fees shall not be adjusted retroactively.

(7) The estimated costs agreed with the social security institutions or determined with binding force shall be met from the fees received for emergency rescue, for transport of patients accompanied by a doctor and in transporting the sick (revenue settlement). After a fee period has ended, every operator, every operator of an integrated head office and the Central Settlement Office for the Rescue Service in Bavaria shall prove the costs actually incurred in a final statement of account and compare them with those in the costs agreement (rendering of accounts). If a difference arises between the actual costs and the estimated costs recognised by the social security institutions for the costs agreement, the result of the rendering of accounts shall be dealt with at the next possible fee negotiations; this carrying forward is precluded if the costs of the operator … or the Central Settlement Office … have been agreed as a budget.

(8) In implementing paragraphs 2 to 7 and Article 35 the services of a Central Settlement Office for the Rescue Service in Bavaria shall be called upon, which shall in particular:

1. participate as an adviser in relation to agreeing the usage fees pursuant to paragraph 2 and in relation to the agreements under paragraph 5;

2. on the basis of the estimated costs of the parties involved and of the number of public rescue service operations to be anticipated, calculate the necessary usage fees and propose them for agreement to the parties involved; this shall also apply to the necessary adjustment of usage fees in the course of the current financial year;

3. collect the usage fees for the services of the public rescue service … from the persons liable to pay the costs;

4. conduct the revenue settlement …;

5. make [payments in respect of the] costs of providing the services to the operator of the service …;

6. examine the operators' … rendering of accounts with regard to plausibility and the correctness of the calculations;

7. draw up an audited overall final statement of account for the public rescue service.

The Central Settlement Office for the Rescue Service in Bavaria shall provide its services in this regard on a non-profit-making basis. All parties involved shall be obliged to support the Central Settlement Office for the Rescue Service in Bavaria in the performance of its tasks and to give to it the information and written documentation necessary for that purpose.'

15. The composition of the fee arbitration board with jurisdiction concerning usage fees is set out in Article 48 of the BayRDG. According to that article, in disputes concerning land rescue usage fees, it comprises three members for the land rescue operators and three members for the social security institutions together with the chairman who is appointed jointly by the operators of the public rescue service, the Bavarian Association of Health-Insurance Doctors, the persons responsible for ensuring the presence of doctors to accompany transported patients and the social security institutions.

16. With regard to the Central Settlement Office for the Rescue Service in Bavaria,

Article 53 of the BayRDG authorises the highest-level rescue service authority, namely the Bavarian Ministry of Internal Affairs, to establish it by regulation.

Assessment

17. The referring court is called upon to determine whether the contracts concluded according to the concession model must be classified as a service concession or, notwithstanding the name of the model in question, as a service contract. In that regard, it should be noted that that question must be considered exclusively in the light of European Union law, [6] in this case, in the light of the definitions of the concepts 'public contracts', 'public service contracts' and 'service concession' set out in Article 1(2)(a) and (d) and (4) of Directive 2004/18, and in the light of the relevant case-law of the Court.

18. Since Article 17 of Directive 2004/18 precludes the application of that directive to service concessions, the classification of the contracts at issue influences the procedure for the conclusion thereof. None the less, even though, as European Union law now stands, service concession contracts are not governed by any of the directives by which the European Union legislature has regulated the field of public procurement, the public authorities concluding them are nevertheless bound to comply with the fundamental rules of the EC Treaty, including Articles 43 EC and 49 EC, and with the consequent obligation of transparency. [7]

19. In that regard, it should be pointed out that it is not for the Court in preliminary ruling proceedings, but for the national court, to classify contracts concluded according to the concession model. The task of the Court, in response to the two questions referred for a preliminary ruling, which are closely connected and which should, in my opinion, be examined together, is to explain and clarify the criteria which are useful for the purposes of that classification. [8]

20. It should be noted at the outset that the questions referred in the present case are similar to those referred in *Eurawasser*. [9] In both cases, the referring courts raised the question, in essence, whether, first, the fact that the service provider is not remunerated directly by the public authority with which it

6 — See Case C-382/05 *Commission* v *Italy* [2007] ECR I-6657, paragraph 31, and Case C-196/08 *Acoset* [2009] ECR I-9913, paragraph 38.

7 — See Case C-91/08 *Wall* [2010] ECR I-2815, paragraph 33 and case-law cited.

8 — See, to that effect, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 32.

9 — Case C-206/08 *Eurawasser* [2009] ECR I-8377.

has a contractual relationship means, in itself, that the contract must be classified as a service concession and, second, whether, for the purposes of that classification, it is decisive that the operating risk connected with the service which is the subject of the contract at issue and is borne by the service provider be limited from the outset, that is to say even where the service is provided by the public authority concerned.

21. The questions referred for a preliminary ruling therefore relate to the two criteria which the Court uses to distinguish a service concession from a service contract. At issue are, first, the 'lack of direct remuneration' of a service provider, that is to say the situation where the remuneration is paid not by the public authority assigning the service in question but by third parties, and, second, the 'assumption of the risk of operating the service at issue'.

22. The Court explained the relationship between those two criteria in *Parking Brixen* [10] by holding that the fact that the service provider is not paid directly means that the provider assumes the risk of operating the services in question and is characteristic, therefore, of a public service concession.

23. In *Commission* v *Italy*, [11] the Court, in accordance with the definition of the concept 'service concession' given by Directive 2004/18, replaced the criterion of lack of direct remuneration with that of 'remuneration consisting of the right of the provider to exploit its own service'. In application of that criterion, the Court then held that a service concession exists where the agreed method of remuneration consists in the right to exploit the service and the provider assumes the risk of operating the services in question. The Court subsequently confirmed that judgment in *Acoset*. [12]

24. In *Eurawasser*, [13] the Court returned to the criterion of lack of direct remuneration by explaining that the fact that the service provider is remunerated by payments from third parties is one means of exercising the right, granted to the provider, to exploit the service.

25. In my view, the Court's findings cited above allow it to be concluded that the criterion of lack of direct remuneration is decisive for the purposes of classifying a contract relating to the supply of services as a service concession, since, according to the Court, the lack of direct remuneration of the service

10 — Cited in footnote 8 above, paragraph 40.

11 — Cited in footnote 6 above, paragraph 34.

12 — Cited in footnote 6 above, paragraph 39.

13 — Cited in footnote 9 above, paragraph 53.

provider is one means of exercising the right, granted to the provider, to exploit the service and at the same time means that the provider assumes the risk of operating the services in question. [14]

26. I come to the same conclusion if I take into consideration the relationship between the definition of the concept of public service contract and of service concession set out in Directive 2004/18. Those definitions cover all contracts relating to services concluded by public authorities. It follows that if the contract at issue is not a public service contract, it must necessarily be a service concession, and vice-versa. Consequently, since the Court has repeatedly held that consideration paid directly by the contracting authority to the service provider constitutes the criterion for the definition of a public service contract, [15] the lack of such a method of remuneration necessarily means that a service concession is at issue.

27. In summary, as is shown by the case-law cited above, the lack of direct remuneration of the service provider means that the service contract at issue should be classified as a service concession.

28. However, the existence of direct remuneration of the service provider by the public authority concerned does not necessarily imply that there is a public service contract. It follows from the finding of the Court that indirect remuneration is 'one means of' exercising the right, granted to the provider, to exploit the service, [16] that there are also other means of exercising that right. That explains why, in *Contse and Others*, [17] *Commission* v *Italy* [18] and *Hans & Christophorus Oymanns*, [19] the Court examined whether the contracts at issue could constitute service concessions, even though the service providers had been remunerated directly by the public authorities concerned.

29. In those judgments, the Court established 'subsidiary criteria' allowing it to be concluded, where there is direct remuneration, that the service provider assumed the

14 — In the Court's case-law, there are also judgments in which the indirect nature of the remuneration has sufficed, in itself, for the Court to hold that the contract at issue was a service concession. That was the case, for example, in Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 16, and in Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 24.

15 — See, to that effect, *Parking Brixen* (cited in footnote 8 above, paragraph 39); *Eurawasser* (cited in footnote 9 above, paragraph 51) and *Acoset* (cited in footnote 6 above, paragraph 39).

16 — *Eurawasser* (cited in footnote 9 above, paragraph 53).

17 — Case C-234/03 *Contse and Others* [2005] ECR I-9315.

18 — Cited in footnote 6 above.

19 — Case C-300/07 *Hans & Christophorus Oymanns* [2009] ECR I-4779.

risk of exploiting the service at issue, such as the criterion of the delegation of liability for all harm suffered on account of a failure of the service at issue, [20] or the criterion of the existence of a certain economic freedom to determine the conditions under which a particular service is exploited. [21] Furthermore, the Court has also set out, evidently without claiming that they are exhaustive, the characteristics which are not decisive for the purposes of classifying the agreements at issue, such as the length of the agreements at issue, the significant initial investment for which the service provider is responsible, or a large degree of independence of performance on the part of the service provider. [22]

30. It must nevertheless be noted that the 'subsidiary criteria' were used only where the service provider was remunerated directly. That could establish that the lack of direct remuneration of the service provider is a sufficient criterion for classifying a contract at issue as a service concession.

31. In the present case, it is clear that the provider of the rescue service at issue is remunerated not by the public authority which assigned to it the service in question, but by third parties, namely by social security institutions, privately insured persons and uninsured persons. [23]

32. Subject to verification by the referring court, it seems to me that, even if the social security institutions themselves could be considered as the contracting authority within the meaning of the definition in Article 1(9) of Directive 2004/18, they represent persons who are sufficiently distinct from and independent of the public authority which assigned the service in question in order to justify the finding that the service provider was remunerated 'by third parties'. [24]

33. The peculiar feature of the present case is that the entities which enjoy the right of use, namely the social security institutions, privately insured persons and uninsured persons, pay for that right not the rescue service provider directly, but the Central Settlement Office for the Rescue Service in Bavaria. It remains therefore to be established whether that fact can affect the finding that the lack of direct remuneration of the service provider

20 — *Contse and Others* (cited in footnote 17 above, paragraph 22).

21 — *Hans & Christophorus Oymanns* (cited in footnote 19 above, paragraph 71).

22 — *Commission* v *Italy* (cited in footnote 6 above, paragraphs 42 and 44).

23 — The parties to the main proceedings agree that approximately 10% of the usage fees are due to be paid by privately insured persons and uninsured persons.

24 — Social security institutions were also central to the case leading to the judgment in *Hans & Christophorus Oymanns* (cited in footnote 19 above). Although in that case they were characterised as public authorities which assigned the service in question while having paid the remuneration due for that service, they restrict themselves, in the present case, to paying the remuneration due for the services provided.

constitutes a sufficient criterion for the purposes of classifying the contract at issue as a service concession.

34. In my opinion, that question should be answered in the negative. The fact that some 'intermediary' comes between the service provider and the party paying for that service in no way calls into question the other finding, namely that the service provider is not remunerated directly by the public authority which assigned to it the service in question, in particular where the public authority concerned has no influence over the remuneration.

35. That leads me to the conclusion that the lack of direct remuneration of the service provider by the public authority which assigned to it the service in question represents a sufficient criterion for the purposes of classifying the contract at issue as a service concession. In that regard, it is not important to know, first, who pays the remuneration due in respect of the services provided, assuming that it is a body which is sufficiently distinct from and independent of the public authority which assigned the service in question, or, second, what the procedures for collection of the remuneration are.

36. With regard to the question whether it is decisive, for the purposes of classifying such a service contract as a service concession, that the operating risk connected with the service at issue assumed by the service provider be limited from the outset, that is even where the service is provided by the contracting authority, I consider that the answer should be based on *Eurawasser*. [25]

37. It is true that, in the present case, the question of the degree of operating risk connected with the rescue service is open to debate. However, those are findings of fact which, so far as necessary, are to be undertaken by the referring court.

38. The degree of operating risk connected with the service in question is not decisive. What is decisive is the transfer to the service provider of the risk to which the public authority assigning the service in question would itself be exposed if it had to perform the service itself. [26]

25 — Cited in footnote 9 above.

26 — In her Opinion of 29 October 2009 in the case leading to the judgment in Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki and Others* [2010] ECR I-4165, Advocate General Sharpston reached a similar conclusion, considering the decisive factor to be not the fact that the operating risk is itself significant, but that the operating risk, whatever it is, previously assumed by the contracting authority, be transferred to the successful tenderer, fully or to a significant extent.

Conclusion

39. In the light of the foregoing considerations, I propose that the Court should answer as follows the questions referred by the Oberlandesgericht München:

The lack of direct remuneration of the service provider by the public authority which assigned to it the service in question constitutes a sufficient criterion for the purposes of classifying a contract as a service concession within the meaning of Article 1(4) 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. In that regard, it is not important to know, first, who pays the remuneration due in respect of the services provided, assuming that it is a body which is sufficiently distinct from and independent of the public authority which assigned the service in question, second, what the procedures for collection of the remuneration are or, third, whether the operating risk connected with the service at issue is limited from the outset.