Reports of Cases

ORDER OF THE COURT (Ninth Chamber)

6 February 2020*

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure of the Court of Justice – Public procurement – Directive 2014/24/EU – Article 12(3) – National legislation favouring public procurement procedures to the detriment of in-house contracts – Freedom of the Member States as to the choice of how services are to be provided – Limits – National legislation excluding the possibility for a contracting authority to acquire, in a body owned by contracting authorities, a shareholding which cannot guarantee control of that body or a power of veto)

In Joined Cases C-89/19 to C-91/19,

THREE REQUESTS for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decisions of 8 November 2018, received at the Court on 5 February 2019, in the proceedings

Rieco SpA

v

Comune di Lanciano,

Ecolan SpA (C-89/19),

Comune di Ortona,

Ecolan SpA (C-90/19),

Comune di San Vito Chietino,

Ecolan SpA (C-91/19),

interveners:

Comune di Ortona (C-89/19),

Comune di Treglio (C-89/19),

Autorità nazionale anticorruzione (ANAC),

* Language of the case: Italian.

THE COURT (Ninth Chamber),

composed of S. Rodin, President of the Chamber, D. Šváby (Rapporteur) and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Rieco SpA, by T. Marchese, S. Colombari and A. Ranieri, avvocati,

– Ecolan SpA, by M. Zoppolato, avvocato,

– the Comune di Lanciano, by V. Antonucci, avvocato,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the Spanish Government, by S. Jiménez García and M.J. García-Valdecasas Dorrego, acting as Agents,

– the Lithuanian Government, by K. Dieninis and R. Butvydytė, acting as Agents,

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

having decided, after hearing the Advocate General, to rule by reasoned order, in accordance with Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 These requests for a preliminary ruling concern the interpretation of Article 12(3) of Directive 2014/24/EU 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).

2 The requests have been made in three sets of proceedings between, firstly, Rieco SpA and Comune di Lanciano (Municipality of Lanciano, Italy) and Ecolan SpA, secondly, Rieco SpA and Comune di Ortona (Municipality of Ortona, Italy) and Ecolan and, thirdly, Rieco SpA and Comune di San Vito Chietino (Municipality of San Vito Chietino, Italy) and Ecolan, regarding the direct award to Ecolan of the contract for urban hygiene services in those municipalities.

Legal context

EU law

Directive 2014/24

3 Recitals 1, 5, 31 and 32 of Directive 2014/24 state:

‘(1) The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the [FEU] Treaty, and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

…

(5) It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive. The provision of services based on laws, regulations or employment contracts should not be covered. In some Member States, this might for example be the case for certain administrative and government services such as executive and legislative services or the provision of certain services to the community, such as foreign affairs services or justice services or compulsory social security services.

…

(31) There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules.

Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union. The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.

It should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors.

(32) Public contracts awarded to controlled legal persons should not be subject to the application of the procedures provided for by this Directive if the contracting authority exercises a control over the legal person concerned which is similar to that which it exercises over its own departments, provided that the controlled legal person carries out more than 80% of its activities in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority, regardless of the beneficiary of the contract performance.

The exemption should not extend to situations where there is direct participation by a private economic operator in the capital of the controlled legal person since, in such circumstances, the award of a public contract without a competitive procedure would provide the private economic operator with a capital participation in the controlled legal person [with] an undue advantage over its competitors. However, in view of the particular characteristics of public bodies with compulsory membership, such as organisations responsible for the management or exercise of certain public services, this should not apply in cases where the participation of specific private economic operators in the capital of the controlled legal person is made compulsory by a national legislative provision in conformity with the Treaties, provided that such participation is non-controlling and non-blocking and does not confer a decisive influence on the decisions of the controlled legal person. It should further be clarified that the decisive element is only the direct private participation in the controlled legal person. Therefore, where there is private capital participation in the controlling contracting authority or in the controlling contracting authorities, this does not preclude the award of public contracts to the controlled legal person without applying the procedures provided for by this Directive[,] as such participations do not adversely affect competition between private economic operators.

It should also be clarified that contracting authorities such as bodies governed by public law, that may have private capital participation, should be in a position to avail themselves of the exemption for horizontal cooperation. Consequently, where all other conditions in relation to horizontal cooperation are met, the horizontal cooperation exemption should extend to such contracting authorities where the contract is concluded exclusively between contracting authorities.'

4 Article 12 of that directive, headed 'Public contracts between entities within the public sector', provides:

'1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no direct private capital participation in the controlled legal person[,] with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

…

3. A contracting authority which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled[:]

(a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;

(b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and

(c) there is no direct private capital participation in the controlled legal person[,] with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;

(ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

…'

Italian law

5 Legge n. 221 – Conversione in legge, con modificazioni, del decreto-legge 18 ottobre 2012, n. 179, recante ulteriori misure urgenti per la crescita del Paese (Law No 221 converting into law, with amendments, Decree-Law No 179 of 18 October 2012 laying down further urgent measures for the growth of the country), of 17 December 2012 (Ordinary Supplement to GURI No 294 of 18 December 2012, p. 1), provides, in Article 34(20):

'For local public services of economic interest, in order to ensure compliance with European law, equality between operators and economy of management and in order to guarantee that appropriate information is provided to the entities concerned, contracts for services shall be awarded on the basis of a report drawn up for that purpose, published on the website of the entity making the award; that report shall set out the grounds for the award and state that the conditions laid down by European law for the form of award chosen are fulfilled and shall specify the precise content of the public service and universal service obligations, stating the financial compensation where applicable.'

6 Article 5 of decreto legislativo n. 50 – Codice dei contratti pubblici (Legislative Decree No 50 establishing the Public Procurement Code) of 18 April 2016 (Ordinary Supplement to GURI No 91 of 19 April 2016; 'the Public Procurement Code'), headed 'Common principles of exclusion for concessions, public contracts and agreements between public bodies and contracting authorities in the public sector', provides, in paragraphs 4 and 5:

'4. A contracting authority or entity may award a public contract or a concession without applying this code if the conditions laid down in paragraph 1 [which establishes the general framework for in-house awards] are fulfilled, including in cases where there is joint control.

5. Contracting authorities or entities exercise joint control over a legal person where all the following conditions are fulfilled:

(a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities or entities. Individual representatives may represent all or several of the contracting authorities or entities;

(b) those contracting authorities or entities are able to jointly exert decisive influence over the strategic objectives and significant decisions of that legal person;

(c) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities or entities.'

7 Article 192 of that code, headed 'Special regime for in-house awards', provides, in paragraph 2:

'For the purposes of the in-house award of a contract relating to services which are available on the market in a competitive environment, the contracting authorities shall carry out a prior assessment of the financial merits of the offerings of the in-house entities, in the light of the subject matter and the value of the services, and set out in the statement of reasons for the award decision the reasons for not having put the contract out to tender, as well as the benefits for society at large of the form of management chosen, by reference to, inter alia, the objectives of universality and social solidarity, efficiency, economy and quality of services and optimal use of public resources.'

8 Decreto legislativo n. 175 – Testo unico in materia di società a partecipazione pubblica (Legislative Decree No 175 establishing the Consolidated Law concerning companies in which all or a majority of the share capital is in public ownership) of 19 August 2016 (GURI No 210 of 8 September 2016; 'Legislative Decree No 175/2016') provides in Article 4, which is headed 'Objectives which may be pursued through the acquisition and management of public shareholdings':

'1. Public authorities may not, directly or indirectly, set up companies the object of which is to produce goods or provide services which are not strictly necessary for the pursuit of their statutory aims, or acquire or hold shareholdings, including minority shareholdings, in such companies.

2. Subject to the limits set out in paragraph 1, public authorities may, directly or indirectly, set up companies or acquire or hold shareholdings in companies, solely for the purposes of carrying out the following activities:

(a) providing a service of general interest, including putting in place and managing the networks and facilities used for those services;

…

4. The sole object of in-house companies shall be the conduct of one or more of the activities referred to in paragraph 2(a) … Subject to the provisions of Article 16, such companies shall work predominantly with the entities which set them up, own their share capital or decide [on contract awards].'

9 Article 16 of that legislative decree, headed 'In-house companies', provides:

'1. In-house companies shall be directly awarded public contracts by public authorities which exercise similar control over them, or by each of the public authorities which exercise joint similar control over them, only if there is no private capital participation, with the exception of that which is prescribed by legal rules and takes a form which does not involve control or a power of veto or the exercise of decisive influence over the controlled company.

…

7. The companies to which this article refers are obliged to acquire works, goods and services in accordance with the rules prescribed in the [Public Procurement Code] – without prejudice to the provisions of Articles 5 and 192 [of that code].'

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

Case C-89/19

10 Ecolan, which is engaged in urban waste disposal, is an in-house company whose share capital is wholly owned by 53 public authorities in the Province of Chieti (Italy), including the Municipality of Lanciano, which owns 21.69% of that share capital.

11 As an economic operator interested in obtaining the contract for the management of urban hygiene services in the Municipality of Lanciano, Rieco brought an action before the Tribunale amministrativo regionale per l'Abruzzo (Regional Administrative Court, Abruzzo, Italy) seeking the annulment of various measures, including the decision of the Municipal Council of Lanciano of 29 May 2017 ('the contested decision') directly awarding to Ecolan the contract for hygiene services, including the management of waste collection and reuse centres.

12 Rieco maintained that the direct award to Ecolan of the contract for urban hygiene services in the Municipality of Lanciano breached the conditions of in-house award or award in cases of joint similar control.

13 By judgment of 12 January 2018, the Tribunale amministrativo regionale per l'Abruzzo (Regional Administrative Court, Abruzzo) dismissed the action brought by Rieco, which appealed against that judgment to the Consiglio di Stato (Council of State, Italy).

14 In the first place, Rieco claims that the Tribunale amministrativo regionale per l'Abruzzo (Regional Administrative Court, Abruzzo) infringed Article 192(2) of the Public Procurement Code by failing to penalise the failure, in the contested decision, to effectively assess the merits of awarding the contract in-house and not by means of a public procurement procedure involving a call for tenders, before directly awarding the contract at issue in the main proceedings.

15 The Consiglio di Stato (Council of State) takes the view, first of all, that the contested decision infringes Article 192(2) of the Public Procurement Code, which is also applicable to Ecolan by virtue of Article 16(7) of Legislative Decree No 175/2016, inasmuch as it does not correctly set out the grounds for awarding the contract in-house. Article 192(2) of the Public Procurement Code requires that the in-house award of contracts for services available on the market be subject to two conditions, which is not the case as regards other methods of awarding contracts for the provision of those services, including calls for tenders and the other forms of horizontal cooperation between public authorities. First, the contracting authority is obliged to explain the circumstances which led to its decision not to use a public procurement procedure. That condition arises from what has become the secondary and residual nature of in-house award, to which recourse may be had only if it is demonstrated, on the one hand, that there is a 'market failure' on the relevant market, relating to foreseeable failures to meet the 'objectives of universality and social solidarity, economy and quality of services and optimal use of public resources' and, on the other, that the in-house entity would remedy that failure. Secondly, the contracting authority must indicate the benefits which it would derive from the in-house award, whereas that is not necessary where a public procurement procedure is used.

16 Moreover, in order to restrict even further the exceptions to the public tendering rule, a judgment delivered on 17 November 2010 by the Corte costituzionale (Constitutional Court, Italy) allows the Italian legislature to make provision for 'more extensive limitations on direct award than those provided for by [EU] law'. In a judgment of 20 March 2013, that court also held that award by means of inter-departmental delegation constitutes 'an exception to the general rule that contracts are to be awarded to third parties by means of a public procurement procedure'.

17 The Consiglio di Stato (Council of State) is doubtful whether that restrictive stance, which has prevailed for more than ten years in Italy with regard to in-house awards, is compatible with EU law, in particular with the principle of freedom of organisation for public authorities set out in Article 2 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1). In that regard, the principles of freedom and self-determination for public persons, on the one hand, and the principle of fully opening up public tendering procedures and concessions to market competition, on the other, may come into conflict with one another.

18 If it were accepted that in-house award is by its nature one of the characteristic forms of internalisation and self-supply, such a form of award would represent not a residual exception, but a core option in the same way as award to third parties by means of a public procurement procedure involving a call for tenders. It would follow that the award of a contract by means of a call for tenders should not therefore enjoy any a priori preference.

19 The referring court takes the view that, under EU law, in-house awards are not subordinate to awards by means of public procurement procedure. On the contrary, they represent a form of logical antecedent in any choice by a public authority as to whether to self-supply or outsource the services for which it is responsible, since a public authority may outsource the provision of goods, services or supplies only once the internal option of self-supply or internalisation has proved to be not viable or not capable of being usefully employed.

20 The principle of free administration by public authorities must, consequently, be of general application, which precludes the introduction of measures that confer on one of the forms of awarding contracts for the provision of services of general interest by public authorities, such as in-house award, a status that is legally subordinate to that of the others.

21 In the second place, Rieco claims that the Tribunale amministrativo regionale per l'Abruzzo (Regional Administrative Court, Abruzzo) failed to take into consideration the conditions laid down by Italian law with regard to the ownership of Ecolan's share capital by public persons which do not exercise over Ecolan a control which is similar to that which they exercise over their own departments.

22 In that regard, the Consiglio di Stato (Council of State) indicates that Ecolan's statutes provide for two categories of shareholder, namely, on the one hand, 'decision-making shareholders' which exercise joint similar control over Ecolan and may, consequently, award contracts to it directly and, on the other, 'non-decision-making shareholders' which own shareholdings in Ecolan with a view to contracts being awarded to it directly in future, but may not do so for the time being, and which, until such time as they may do so, have no management or veto powers affecting the internal functioning of Ecolan and therefore do not exercise joint similar control.

23 However, the fact that Ecolan is an in-house entity with regard only to decision-making shareholders is not contrary to EU law. Joint similar control, within the meaning of Article 12(3) of Directive 2014/24, must not be ruled out solely by virtue of the fact that contracting authorities which do not exercise any control or power of veto and do not make direct awards own shareholdings in a company with multiple shareholdings.

24 The referring court takes the view that a non-decision-making contracting authority must be entitled subsequently to decide to acquire joint similar control and to directly award contracts for services to Ecolan.

25 However, that scenario is excluded by Article 4(1) of Legislative Decree No 175/2016 where the acquisition of joint similar control and the direct award of contracts do not occur immediately but are merely envisaged.

26 It is in that context that the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does EU law (in particular the principle of free administration by public authorities and the principle that the different methods of awarding contracts for the provision and management of services falling within the remit of public authorities must be essentially equivalent) preclude a provision of national law (such as that set out in Article 192(2) of the … Public Procurement Code …) which places the in-house award of contracts on a subordinate level to award by means of public tender procedure and establishes it as an exception to the latter, by: (i) permitting contracts to be awarded in house only when there is

clear evidence of failure in the relevant market, and (ii) requiring authorities intending to make an award by inter-departmental delegation to provide specific reasons with regard to the benefits for society at large accruing from that form of award?

(2) Does EU law (in particular Article 12(3) of Directive [2014/24] concerning the in-house award of contracts where similar control is exercised jointly by a number of public authorities) preclude a provision of national law (such as that set out in Article 4(1) of … Legislative Decree No [175/2016]) which prevents a public authority from acquiring a shareholding (which, in any event[, cannot guarantee control or a power of veto) in a body whose shareholders are other public authorities, where that authority nevertheless intends to subsequently acquire a position of joint control and therefore the possibility of making direct awards to that body whose share capital is owned by a number of public authorities?'

Cases C-90/19 and C-91/19

27 It is apparent from the orders for reference in Cases C-89/19 to C-91/19 that the factual and legal contexts of the cases in the main proceedings in Cases C-90/19 and C-91/19 are similar to those of the case in the main proceedings in Case C-89/19 and that the questions raised by the referring court in Cases C-90/19 and C-91/19 are identical to those raised in Case C-89/19.

Consideration of the questions referred

28 Under Article 99 of the Rules of Procedure of the Court, where the reply to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to such a question admits of no reasonable doubt, the Court may, at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

29 It is appropriate to apply that provision in the present cases.

First question

30 By its first question, the referring court asks, in essence, whether Article 12(3) of Directive 2014/24 must be interpreted as precluding a provision of national law which makes the conclusion of an in-house transaction, also called an 'in-house contract', conditional on it not being possible to use a public procurement procedure and, in any event, on the demonstration by the contracting authority of the benefits specifically arising, for society at large, from recourse to an in-house transaction.

31 As the Court pointed out in the judgment of 3 October 2019, *Irgita* (C-285/18, EU:C:2019:829; 'the judgment in *Irgita*', paragraph 41), the purpose of Directive 2014/24, as stated in recital 1 thereof, is to coordinate national procurement procedures for contracts above a certain value.

32 It is apparent from paragraph 43 of the judgment in *Irgita* that the effect of Article 12(1) of that directive, relating to in-house transactions, which thus does no more than state the conditions which a contracting authority must observe when it wishes to conclude an in-house transaction, is simply to empower the Member States to exclude such a transaction from the scope of Directive 2014/24.

33 That provision cannot, consequently, deprive the Member States of the freedom to give preference to one means of providing services, performing work or obtaining supplies to the detriment of others. That freedom implies a choice which is made at a stage prior to that of procurement and which cannot, therefore, fall within the scope of Directive 2014/24 (the judgment in *Irgita*, paragraph 44).

34 The freedom of the Member States as to the choice of means of providing services whereby the contracting authorities meet their own needs follows, moreover, from recital 5 of Directive 2014/24, which states that 'nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive', thereby reflecting the case-law of the Court prior to that directive (the judgment in *Irgita*, paragraph 45).

35 Thus, just as Directive 2014/24 does not require the Member States to have recourse to a public procurement procedure, it cannot compel them to have recourse to an in-house transaction where the conditions laid down in Article 12(1) are satisfied (the judgment in *Irgita*, paragraph 46).

36 Furthermore, as the Court pointed out in paragraph 47 of the judgment in *Irgita*, the freedom thus left to the Member States is more clearly distinguished in Article 2(1) of Directive 2014/23, which states:

'This Directive recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services.

Those authorities may choose to perform their public interest tasks with their own resources or in cooperation with other authorities or to confer them upon economic operators.'

37 The freedom of the Member States as to the choice of the management method that they judge to be most appropriate for the performance of works or the provision of services cannot, however, be unlimited. That freedom must, on the contrary, be exercised with due regard to the fundamental rules of the FEU Treaty, in particular the free movement of goods, the freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency (the judgment in *Irgita*, paragraph 48).

38 Consequently, the Court stated, in paragraph 50 of the judgment in *Irgita*, that Article 12(1) of Directive 2014/24 must be interpreted as not precluding a rule of national law whereby a Member State imposes a requirement that the conclusion of an in-house transaction should be subject, inter alia, to the condition that public procurement fails to ensure that the quality of the services performed, their affordability or their continuity can be guaranteed, provided that the choice made in favour of one means of providing services in particular, made at a stage prior to that of public procurement, has due regard to the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

39 Admittedly, in the judgment in *Irgita*, the Court interpreted the provisions of Article 12(1) of Directive 2014/24 and not those of Article 12(3) of that directive.

40 Nevertheless, it is apparent from the wording of those provisions that the only difference between Article 12(1) of Directive 2014/24 and Article 12(3) of that directive is the fact that, in the first of those provisions, the contracting authority alone controls the in-house entity, whereas, in the second of those provisions, that entity is jointly controlled by a number of contracting authorities.

41 In those circumstances, the freedom enjoyed by the Member States as to the choice of means of providing services whereby the contracting authorities meet their own needs permits the Member States to make the conclusion of an in-house transaction conditional on it not being possible to use a public procurement procedure and, in any event, on the demonstration by the contracting authority of the benefits specifically arising, for society at large, from recourse to an in-house transaction.

42 The answer to the first question is therefore that Article 12(3) of Directive 2014/24 must be interpreted as not precluding a provision of national law which makes the conclusion of an in-house transaction, also referred to as an 'in-house contract', conditional on it not being possible to use a public procurement procedure and, in any event, on the demonstration by the contracting authority of the benefits specifically arising, for society at large, from recourse to an in-house transaction.

Second question

43 By its second question, the referring court asks, in essence, whether Article 12(3) of Directive 2014/24 must be interpreted as precluding a provision of national law which prevents a contracting authority from acquiring a shareholding in an entity whose shareholders are other contracting authorities where that shareholding cannot guarantee control or a power of veto and where that contracting authority intends to later acquire joint control and, consequently, the possibility of directly awarding contracts to that entity whose share capital is owned by a number of contracting authorities.

44 As is apparent from its wording, the purpose of Article 12(3)(a) to (c) of Directive 2014/24 is to specify the conditions under which a contracting authority which exercises, jointly with other contracting authorities, control over a legal person governed by private or public law within the meaning of Article 12(1) of that directive may award a public contract to that legal person without applying that directive.

45 The exclusion of the public procurement rules laid down in Article 12(3) of Directive 2014/24 is thus, in accordance with point (a) of that provision, subject to the condition that a contracting authority exercises, jointly with other contracting authorities, a control over the legal person concerned which is similar to that which they exercise over their own departments.

46 It follows that Article 12(3) of Directive 2014/24 does not lay down any requirements relating to the conditions under which a public authority may acquire a shareholding in a company whose shareholders are other public authorities.

47 The answer to the second question is therefore that Article 12(3) of Directive 2014/24 must be interpreted as not precluding a provision of national law which prevents a contracting authority from acquiring a shareholding in an entity whose shareholders are other contracting authorities where that shareholding cannot guarantee control or a power of veto and where that contracting

authority intends to later acquire joint control and, consequently, the possibility of directly awarding contracts to that entity whose share capital is owned by a number of contracting authorities.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

1. **Article 12(3) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as not precluding a provision of national law which makes the conclusion of an in-house transaction, also referred to as an 'in-house contract', conditional on it not being possible to use a public procurement procedure and, in any event, on the demonstration by the contracting authority of the benefits specifically arising, for society at large, from recourse to an in-house transaction.**

2. **Article 12(3) of Directive 2014/24 must be interpreted as not precluding a provision of national law which prevents a contracting authority from acquiring a shareholding in an entity whose shareholders are other contracting authorities where that shareholding cannot guarantee control or a power of veto and where that contracting authority intends to later acquire joint control and, consequently, the possibility of directly awarding contracts to that entity whose share capital is owned by a number of contracting authorities.**

[Signatures]