Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

8 December 2016 *

(Reference for a preliminary ruling — Public service contracts — Award of the contract without initiating a tendering procedure — So-called 'in-house' award — Conditions — Similar control — Performance of the essential activity — Successful public capital tendering company owned by several local authorities — Activity also carried out for the benefit of local authorities which are not shareholders — Activity imposed by a public authority which is not a shareholder)

In Case C-553/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 25 June 2015, received at the Court on 26 October 2015, in the proceedings

Undis Servizi Srl

v

Comune di Sulmona,

other party to the proceedings:

Cogesa SpA,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), C. Vajda, K. Jürimäe and C. Lycourgos, 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:

— Undis Servizi Srl, by S. Della Rocca, avvocato,

— Comune di Sulmona, by G. Blandini and M. Fracassi, avvocati,

— Cogesa SpA, by R. Colagrande, avvocato,

* * Language of the case: Italian.

— the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli, avvocato dello Stato,

— the European Commission, by G. Conte and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of EU law on the award of a public contract without a public tendering procedure, a so-called 'in-house' award.

2 The request has been submitted in a dispute between Undis Servizi Srl ('Undis') and the Comune di Sulmona (Municipality of Sulmona, Italy), concerning the direct award of a contract for services by that municipality to Cogesa SpA.

Legal context

EU law

3 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) establishes the regulatory framework applicable to contracts awarded by contracting authorities.

4 Article 1 of that directive, entitled 'Definitions', provides in paragraph 2(a):

'"Public contracts" are 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 this Directive.'

5 EU rules on the award of public contracts, in force at the time of the facts in the main proceedings, did not provide for the possibility of a direct award of a public contract without the initiation of a tendering procedure, a so-called 'in-house' award. Such a possibility had, however, been recognised by the case-law of the Court, the latter having also laid down the conditions in this connection.

6 According to that case-law, now settled, a contracting authority, such as a local authority, is exempted from initiating a procedure for the award of a public contract on condition that it satisfies the dual requirement that, first, it exercises over the successful contractor, legally separate from that authority, control similar to that which it exercises over its own departments and, second, the successful contractor carries out the essential part of its activities with the contracting authority or authorities to which it belongs (see, to that effect, judgment of 18 November 1999, *Teckal*, C-107/98, EU:C:1999:562, paragraph 50).

7 Directive 2004/18 was repealed and replaced by 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). In accordance with Article 91 of Directive 2014/24, the repeal of Directive 2004/18 took effect on 18 April 2016.

Italian law

8 According to the information in the order for reference, no provision of Italian law lays down the conditions to which the direct award of public contracts is subject, as national law refers to EU law in that regard.

9 Article 30 of decreto legislativo n. 267 — Testo unico delle leggi sull'ordinamento degli enti locali (Legislative Decree No 267 — Consolidated Law on the rules governing local authorities) of 18 August 2000 (ordinary supplement to GURI No 162 of 28 September 2000) provides:

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

2. Such agreements must set out the objectives, duration, forms of consultation between the contracting authorities, their financial relationships and their reciprocal obligations and guarantees.

3. As regards the fixed-term management of a specific service or performance of a task, the State and Regions may, in respect of those areas which come within their responsibility, provide for forms of mandatory agreement between local authorities, subject to the establishment of standard rules.

…'

10 As the referring court states, the second sentence of Article 149a(1) of decreto legislativo n. 152 — Norme in materia ambientale (Legislative Decree No 152 of 3 April 2006 on environmental standards) (Ordinary Supplement to GURI No 96 of 14 April 2006) provides:

'The direct award of a contract may be made to wholly public companies which comply with European Union regulatory requirements for in-house management, and which are, in any event, owned by local authorities within the territory concerned.'

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

11 It is apparent from the documents before the Court that, by decision of 30 September 2014, the municipal council of the Municipality of Sulmona awarded the contract for management of the integrated cycle of municipal waste to Cogesa, a wholly public capital company owned by several municipalities of the Regione Abruzzo (Abruzzo Region, Italy), including the Municipality of Sulmona. The latter holds 200 shares out of the 1 200 representing the company's total share capital, that is to say, a holding of approximately 16.6% of that capital.

12 On 30 October 2014, although the contract for services with Cogesa had not yet been concluded, the local authorities with shares in Cogesa entered into an agreement to exercise jointly over that body a control similar to that exercised over their own departments ('the Agreement of 30 October 2014').

13 By Integrated Environmental Authorisation No 9/11, the Abruzzo Region required Cogesa, in accordance with the principles of self-sufficiency, proximity and subsidiarity, to treat and recover the urban waste of certain municipalities of that region which were not shareholders of that company.

14 Undis, a company with an interest in the contract for services at issue in the main proceedings, brought proceedings before the Tribunale amministrativo regionale per l'Abruzzo (Abruzzo Regional Administrative Court, Italy) against the decision to award that contract for services and against the decision approving the inter-municipal agreement project referred to in paragraph 12 of the present judgment. Alleging infringement of Article 2 of decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE

(Legislative-Decree No 163 — Code on public works contracts, public service contracts and public supply contracts in implementation of Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006), as well as Articles 43, 49 and 86 TFEU, Undis claimed that the two conditions required for that contract of services to be awarded on an 'in-house' basis had not been met.

15 More specifically, Undis claimed that the condition requiring the contracting authority to exercise over the successful tenderer, legally separate from that authority, control similar to that which it exercises over its own departments had not been met. It argues that the Municipality of Sulmona is a minority shareholder of Cogesa, that the Agreement of 30 October 2014 was entered into after the decision to award the contract for services at issue in the main proceedings, and that that company's statute confers on the company's constituent bodies a degree of independence incompatible with the concept of 'similar control'. Undis added that the condition requiring the successful tenderer to perform the essential part of its activities with the contracting authority or authorities had also not been met. According to Undis, Cogesa's financial statements covering the years 2011 to 2013 indicated that only 50% of its overall activity had been performed with shareholder local authorities, given that activities carried out for the benefit of non-shareholder municipalities had to be included in that overall activity.

16 The Tribunale amministrativo regionale per l'Abruzzo (Abruzzo Regional Administrative Court) dismissed the action. That court considered first that the condition of similar control was met as a result of the conclusion of the Agreement of 30 October 2014. It then ruled that the condition regarding the performance of the essential part of the activity was also met, explaining that, disregarding the activity carried out by Cogesa for the benefit of non-shareholder municipalities, the activity carried out for shareholder municipalities exceeded 90% of that company's turnover; the remaining percentage could be considered an entirely marginal activity.

17 The Consiglio di Stato (Council of State, Italy), before which Undis has brought an appeal, notes that, irrespective of the fact that Directive 2014/24 is not applicable *ratione temporis* to the dispute in the main proceedings, the provisions of Article 12 of that directive are, in any event, significant for the purpose of resolving that dispute.

18 As regards the condition relating to the performance of the essential part of the activity, the Consiglio di Stato (Council of State) refers to the judgment of 11 May 2006, *Carbotermo and Consorzio Alisei* (C-340/04, EU:C:2006:308, paragraph 65), in which the Court ruled that 'it should be held that the decisive turnover is that which the undertaking in question achieves pursuant to decisions to award contracts taken by the supervisory authority, including the turnover achieved with users in the implementation of such decisions'. In the light of that case-law, the award decisions which must be taken into account in order to determine whether that condition is met are therefore only those which were adopted directly by the supervisory authority. An increase in the number of relevant awards may stem from Article 12(2) of Directive 2014/24.

19 The Consiglio di Stato (Council of State) observes, however, that no provision of that directive indicates that, in order to assess whether the condition at issue is met, the awards relating to non-shareholder public bodies, in the case where those awards are imposed by an authoritative measure of a higher, also non-shareholder, public authority, must be taken into account.

20 Furthermore, according to the Consiglio di Stato (Council of State), the question arises as to whether, in the dispute in the main proceedings, in order to determine whether the condition relating to the performance of the essential part of the activity is satisfied, awards made for the benefit of public bodies holding shares in Cogesa before the conclusion of the Agreement of 30 October 2014 should be taken into account. The Consiglio di Stato (Council of State) refers in this respect to the second subparagraph of Article 12(5) of Directive 2014/24.

21 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) When the essential activity undertaken by the controlled body is assessed, must an activity imposed on it by a non-shareholder public administration and undertaken in favour of non-shareholder public bodies also be taken into account?

(2) When the essential activity undertaken by the controlled body is assessed, must the contracts awarded to shareholder public bodies before the requirement of similar control became applicable also be taken into account?’

Consideration of the questions referred

22 As a preliminary point, it must be noted that the facts at issue in the main proceedings, as set out in paragraphs 11 and 12 of the present judgment, occurred prior to the expiry, on 18 April 2016, of the period for transposition of Directive 2014/24 by the Member States. It follows that the questions referred for a preliminary ruling must be assessed *ratione temporis* in the light of Directive 2004/18 alone, as interpreted by the Court’s case-law.

23 Furthermore, it should be noted that the referring court does not in the present case provide any clarification as to whether the value of the contract at issue in the main proceedings exceeds the threshold for the application of Directive 2004/18. Moreover, the decision to refer also does not include the information necessary to determine whether it is a public service contract or a service concession.

24 It is true that the exception to the application of the rules of EU law in cases where the ‘in-house’ award conditions are fulfilled may apply in situations coming within the scope of application of Directive 2004/18 as well as in situations falling outside that scope (see, to that effect, judgment of 29 November 2012, *Econord*, C-182/11 and C-183/11, EU:C:2012:758, paragraph 26 and the case-law cited). However, in the latter case, the application of that exception will be relevant to the dispute in the main proceedings only in so far as the contract at issue is subject to the fundamental rules and general principles of the FEU Treaty, which presupposes that it is of certain cross-border interest (see, to that effect, judgment of 6 October 2016, *Tecnoedi Costruzioni*, C-318/15, EU:C:2016:747, paragraph 19 and the case-law cited).

25 By reason of the spirit of cooperation in relations between the national courts and the Court of Justice in the context of the procedure for a preliminary ruling, the lack of such preliminary findings by the referring court does not lead to the request being inadmissible if, in spite of those failings, the Court, having regard to the information available from the file, considers that it is in a position to provide a useful answer to the referring court. Nevertheless, the answer provided by the Court is given subject to the proviso that the referring court has found that the conditions for application of EU law are met (see, by analogy, judgment of 11 December 2014, *Azienda sanitaria locale n. 5 ‘Spezzino’ and Others*, C-113/13, EU:C:2014:2440, paragraph 48).

26 The Court’s answer to the questions raised by the referring court is therefore based on the premiss that either Directive 2004/18 applies to the contract at issue in the main proceedings, or, if that is not the case, that contract has a certain cross-border interest, this being a matter for that court to determine.

The first question

27 By this question, the referring court asks in essence whether, in the context of the application of the Court's case-law on direct awards of so-called 'in-house' public contracts, in order to determine whether the contractor carries out the essential part of its activity for the contracting authority, including local authorities which are its controlling shareholders, an activity imposed on that contractor by a non-shareholder public authority for the benefit of local authorities which are also not shareholders of that contractor and do not exercise any control over it must be taken into account.

28 In accordance with the case-law of the Court, the main objective of the rules of EU law in the field of public contracts, namely the free movement of goods and services and the opening-up of undistorted competition in all the Member States, implies the obligation to apply the rules regarding the procedures for the award of public contracts provided for by the relevant directives, where a contracting authority, such as a local authority, is planning to enter into a written contract for pecuniary interest with a separate legal body, whether or not that body is itself a contracting authority (see, to that effect, judgments of 18 November 1999, *Teckal*, C-107/98, EU:C:1999:562, paragraph 51, and of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraphs 44 and 47).

29 The Court has emphasised that any exception to the application of that obligation must be interpreted strictly (judgments of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 46, and of 8 May 2014, *Datenlotsen Informationssysteme*, C-15/13, EU:C:2014:303, paragraph 23).

30 Given that a public authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments (see, to that effect, judgment of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 48), the Court justified the recognition of the exception for so-called 'in-house' awards, by the existence, in such a case, of a specific internal link between the contracting authority and the contractor, even if the latter is an entirely separate legal entity (see, to that effect, judgment of 8 May 2014, *Datenlotsen Informationssysteme*, C-15/13, EU:C:2014:303, paragraph 29). In such cases, it may be considered that the contracting authority, in actual fact, uses its own resources (see, to that effect, judgment of 8 May 2014, *Datenlotsen Informationssysteme*, C-15/13, EU:C:2014:303, paragraph 25) and that the contractor is almost part of its internal departments.

31 That exception requires, in addition to the contracting authority exercising over the contractor a control similar to that which it exercises over its own departments, that that contractor performs the essential part of its activities for the benefit of the contracting authority or authorities which control it (see, to that effect, judgment of 18 November 1999, *Teckal*, C-107/98, EU:C:1999:562, paragraph 50).

32 Thus, it is essential that the contractor's activity be principally devoted to the controlling authority or authorities; the nature of any other activity may only be marginal. In order to determine whether that is the case, the court having jurisdiction must take into account all the facts of the case, both qualitative and quantitative. In that regard, the relevant turnover is the turnover that that contractor achieves pursuant to the award decisions taken by that or those controlling authorities (see, to that effect, judgments of 11 May 2006, *Carbotermo and Consorzio Alisei*, C-340/04, EU:C:2006:308, paragraphs 63 and 65, and of 17 July 2008, *Commission* v *Italy*, C-371/05, not published, EU:C:2008:410, paragraph 31).

33 The requirement that the person at issue performs the essential part of its activities with the controlling authority or authorities is designed to ensure that Directive 2004/18 remains applicable in the event that an undertaking controlled by one or more authorities is active in the market, and therefore liable to be in competition with other undertakings. An undertaking is not necessarily deprived of freedom of action merely because the decisions concerning it are controlled by the

controlling municipal authority or authorities, if it can still carry out a large part of its economic activities with other operators. By contrast, where that undertaking's services are mostly intended for that authority or those authorities alone, it seems justified that that undertaking should not be subject to the restrictions of Directive 2004/18, since they are in place to preserve a state of competition which, in that case, no longer has any *raison d'être* (see, by analogy, judgment of 11 May 2006, *Carbotermo and Consorzio Alisei*, C-340/04, EU:C:2006:308, paragraphs 60 to 62).

34 It follows from that case-law that any activity of the contractor which is devoted to persons other than those which control it, namely persons without any relationship of control in regard to that entity, including public authorities, must be regarded as being carried out for the benefit of a third party.

35 Consequently, in the light of that case-law, in the dispute in the main proceedings, the local authorities which are not shareholders of Cogesa must be regarded as third parties. According to the information in the decision to refer, there is no control relationship between those local authorities and that company, with the result that the specific internal link between the contracting authority and the contractor, which according to the case-law of the Court justifies the exception for 'in-house' awards, is lacking.

36 Therefore, in order to determine whether Cogesa performs the essential part of its activity with the local authorities which control it, the activity which that company devotes to non-shareholder local authorities must be regarded as being carried out for the benefit of third parties. It is for the referring court to examine whether that latter activity can be regarded as merely marginal in comparison with the activity of Cogesa with the controlling local authorities, in accordance with the Court's case-law on so-called 'in-house' awards.

37 That finding cannot be invalidated by the fact, mentioned by the referring court, that Cogesa's activity carried out for the benefit of the non-shareholder local authorities is imposed by a public authority, which is also not a shareholder of that company. Although it imposed that activity upon Cogesa, it is apparent from the information in the decision to refer that that public authority is not a shareholder of that company and does not exercise any control over it within the meaning of the Court's case-law on so-called 'in-house' awards. In the absence of any control by that public authority, the activity which it imposes on Cogesa must be regarded as an activity carried out for third parties.

38 Having regard to the foregoing, the answer to the first question is that, in the context of the application of the Court's case-law on direct awards of so-called 'in-house' public contracts, in order to determine whether the contractor carries out the essential part of its activity for the contracting authority, including local authorities which are its controlling shareholders, an activity imposed on that contractor by a non-shareholder public authority for the benefit of local authorities which are also not shareholders of that contractor and do not exercise any control over it must not be taken into account, since that activity must be regarded as being carried out for third parties.

The second question

39 By this question, the referring court asks in essence whether, for the purpose of determining whether the contractor performs the essential part of its activity for the shareholder local authorities which jointly exercise over it control similar to that which they exercise over their own departments, the activity of that contractor performed for those local authorities before such joint control took effect must also be taken into account.

40 In that regard, it must be noted that, according to the case-law of the Court, in order to assess the condition concerning the performance of the essential part of the activity, the national courts must take into account all the facts of the case, both qualitative and quantitative (see, to that effect, judgment of 11 May 2006, *Carbotermo and Consorzio Alisei*, C-340/04, EU:C:2006:308, paragraphs 63 and 64).

41 In the present case, it follows from the information in the decision to refer that Cogesa had already carried out activities for the local authorities which control it prior to the conclusion of the Agreement of 30 October 2014. Those activities must certainly be taken into consideration when they are still in existence at the time of the award of a public contract. Furthermore, activities completed before 30 October 2014 may also be relevant for the purpose of assessing whether the condition concerning the performance of the essential part of the activity is met. Past activities may be indicative of the importance of the activity that Cogesa is planning to carry out for its shareholder local authorities after their similar control has taken effect.

42 In the light of the foregoing, for the purpose of determining whether the contractor carries out the essential part of its activity for the shareholder local authorities which jointly exercise over it control similar to that which they exercise over their own departments, account must be taken of all the circumstances of the case, which may include the activity carried out by that contractor for those local authorities before such joint control took effect.

Costs

43 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 (Fourth Chamber) hereby rules:

1. **In the context of the application of the Court's case-law on direct awards of so-called 'in-house' public contracts, in order to determine whether the contractor carries out the essential part of its activity for the contracting authority, including local authorities which are its controlling shareholders, an activity imposed on that contractor by a non-shareholder public authority for the benefit of local authorities which are also not shareholders of that contractor and do not exercise any control over it must not be taken into account, since that activity must be regarded as being carried out for third parties.**

2. **For the purpose of determining whether the contractor carries out the essential part of its activity for the shareholder local authorities which jointly exercise over it control similar to that which they exercise over their own departments, account must be taken of all the circumstances of the case, which may include activity carried out by that contractor for those local authorities before such joint control took effect.**

[Signatures]