Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 24 February 2022 [1]

Case C-332/20

Roma Multiservizi SpA,
Rekeep SpA
v
Roma Capitale,
Autorità Garante della Concorrenza e del Mercato

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling – Public procurement – Concession contracts – Award of the management of an integrated school service to a semi-public company – Appointment of the private partner under a tender procedure – Requirement that the private partner holds a participation of at least 30% in the capital of the semi-public company – Indirect participation by the contracting authority in the capital of the private partner)

I. Introduction

1. This reference for a preliminary ruling provides the Court with the opportunity to clarify its case-law on how EU law views institutionalised public-private partnerships (IPPPs), which are sometimes used by contracting authorities in place of 'traditional' public procurement or concession contracts.

2. Although there are no binding provisions of EU law that expressly govern IPPPs, [2] an IPPP is however defined by the European Commission as a form of cooperation between public and private partners who establish a mixed-capital entity that performs public contracts or concessions [3] and has been the subject of case-law of the Court. The Court has taken the view, inter alia, that EU law does not, as a rule, preclude the use of a procedure in the context of an IPPP by which, first, a private partner is selected and, second, a contract or a concession is awarded to a public-private entity to be formed. [4]

1 Original language: French.

2 With regard to the different forms of public-private partnership, in particular an IPPP, in the light of EU law, see Bovis, Ch., 'Chapter 18: Public service partnerships', *Research Handbook on EU Public Procurement Law*, edited by Bovis, Ch., Edward Elgar, Cheltenham-Northampton, 2016, p. 554 et seq.

3 See Green Paper on public-private partnerships and Community law on public contracts and concessions (COM(2004) 327 final), point 54.

4 See, inter alia, judgment of 15 October 2009, *Acoset* (C-196/08, EU:C:2009:628; 'the judgment in *Acoset*').

3. The lack of provisions of EU law governing IPPPs appears to lie at the heart of the difficulties raised by this reference for a preliminary ruling, difficulties which are reflected in the structure and the content of this Opinion. From the perspective of EU law, the legal issue raised in the present case is neither clearly defined nor specifically contextualised.

4. Detailed analysis of this reference for a preliminary has led me to conclude that the questions submitted by the referring court concern whether the way in which the contracting authority calculated the private participation in the capital entity to be formed and subsequently excluded a tenderer from the tender procedure, is compatible with Directive 2014/23/EU [5] and/or Directive 2014/24/EU. [6]

II. Legal context

A. European Union law

1. Directive 2014/23

5. Article 3 of Directive 2014/23 provides:

'1. Contracting authorities and contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the concession award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.

2. Contracting authorities and contracting entities shall aim at ensuring the transparency of the award procedure and of the performance of the contract, while complying with Article 28.'

6. Article 30(1) and (2) of that directive states:

'1. The contracting authority or contracting entity shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with this Directive.

2. The design of the concession award procedure shall respect the principles laid down in Article 3. In particular during the concession award procedure, the contracting authority or contracting entity shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others.'

7. Article 38(1) of the Directive provides:

'Contracting authorities and contracting entities shall verify the conditions for participation relating to the professional and technical ability and the financial and economic standing of the candidates or tenderers, on the basis of self-declarations, reference or references to be submitted as proof in accordance with the requirements specified in the concession notice that shall be

[5] Directive of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

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

non-discriminatory and proportionate to the subject matter of the concession. The conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject matter of the concession and the purpose of ensuring genuine competition.'

2. Directive 2014/24

8. Article 18(1) of Directive 2014/24 provides:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.'

9. Article 58(1) of that directive states:

'Selection criteria may relate to:

(a) suitability to pursue the professional activity;

(b) economic and financial standing;

(c) technical and professional ability.

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.'

B. Italian law

10. In Italian law, the rules on mixed companies are governed by decreto legislativo n. 175 – Testo unico in materia di società a partecipazione pubblica (Legislative Decree No 175 – Consolidated text on publicly owned companies) of 19 August 2016,[7] in the version thereof applicable to the disputes in the main proceedings ('Legislative Decree No 175').

11. According to Article 1 of Legislative Decree No 175, the purpose of that decree is to ensure that public participations are managed effectively, to protect and promote competition and the market, and to streamline and reduce public expenditure. The decree provides that public authorities may, for the purpose of managing the relevant activities set out in its Article 4, choose between in-house management, via a company in which it holds 100% of the capital, and forming a semi-public company, and lays down detailed rules governing that second option so that it is compatible with EU law.

[7] GURI No 210 of 8 September 2016, p. 1.

12. With regard to that second option, Article 17(1) of Legislative Decree No 175 states:

'In public-private mixed companies, the percentage participation of the private partner may not be less than 30%, and that partner must be selected via a public procurement procedure in accordance with Article 5(9) of Legislative Decree No 50 of 2016 [8] which covers both the subscription or the acquisition of the participation by the private partner and the award of the contract or concession forming the sole object of the activities of the mixed company.'

III. Facts of the case in the main proceedings

13. In the course of 2018, the city of Rome launched a call for tenders with a dual purpose: first, to select a private partner with whom it would form a public-private mixed company ('the mixed company to be formed') and, second, to award to that company the integrated school service, representing an estimated EUR 277 479 616.21, for which the city of Rome has responsibility. According to the tender documents, the city of Rome was to hold 51% of the shares in the company with the remaining 49% to be acquired by the private partner, who was required to bear the operational risk in its entirety.

14. A bid was submitted by a consortium of the companies Roma Multiservizi SpA and Rekeep SpA.

15. By Decision No 435 of 1 March 2019 ('the exclusion decision'), that consortium was excluded from the ongoing procedure because 51% of Roma Multiservizi was owned by the company AMA SpA, the capital of which was wholly owned by the city of Rome, and accepting the consortium's bid would mean that the city of Rome would in fact effectively hold a 73.5% participation in the mixed company to be formed, [9] thus exceeding the 51% ceiling set in the tender documents.

16. Rekeep and Roma Multiservizi challenged that decision before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), which dismissed their actions by two judgments delivered on 18 June 2019.

17. Rekeep and Roma Multiservizi appealed against those two judgments before the referring court.

18. It is apparent from those parties' observations that, whilst their appeals were being examined, the city of Rome awarded the contract to perform the service at issue, on completion of a negotiated procedure, to CNS.

8 Decreto legislativo n. 50 – Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonche' per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture (Legislative Decree No 50 transposing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, contracts and procurement procedures of supplier entities operating in the water, energy, transport and postal services sectors as well as for reforming the existing provisions in relation public works contracts, public service contracts and public supply contracts), of 18 April 2016 (ordinary supplement to GURI No 91 of 19 April 2016).

9 An effective participation of 51% was already clear from the tender documents. According to those documents, the city of Rome was to hold 51% of the shares in the mixed company to be formed. As for the remainder (73.5% – 51% = 22.5%), an effective participation of 22.5% in that company would have to have followed from the fact that Roma Multiservizi's participation in the consortium formed with Rekeep amounted to approximately 90%. Accordingly, since AMA – the capital of which is wholly owned by the city of Rome – holds a 51% stake in the capital of Rome Multiservizi, the city of Rome has an effective participation of 22.5% in the mixed company to be formed (22.5% = 49% x 90% x 51%). In their written observations, Rekeep and the Consorzio Nazionale Servizi Società Cooperativa (CNS) state that it was agreed, first, that Rekeep, as the principal, would hold a 10% stake in that consortium and Roma Multiservizi, as the lead agent, would hold a 90% stake, and, second, that those companies would underwrite the capital of the mixed company to be formed with the city of Rome in proportion to their stake in the consortium.

IV. The procedure before the Court and the questions referred for a preliminary ruling

19. It is in those circumstances that the Consiglio di Stato (Council of State, Italy), by decision of 13 February 2020, received at the Court on 22 July 2020, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) For the purposes of determining the minimum limit of 30% participation by the private partner in a future semi-public company – the limit deemed appropriate by the Italian legislature in implementation of the principles [of EU law] set in relation to European case-law – is it compatible with [EU] law and the correct interpretation of recitals 14 and 32 and Articles 12 and 18 of Directive [2014/24] and of Article 30 of Directive [2014/23], with reference also to Article 107 TFEU, for consideration to be given solely to the legal form/on-paper composition of that partner or may – or in fact must – the authority launching the tender also consider its own indirect participation in the private partner submitting a bid?

(2) If the answer to the above question is in the affirmative, is it consistent and in line with the principles of EU law, and in particular with the principles of fair competition, proportionality and appropriateness, for the authority launching the tender to be able to exclude from the tender a private partner submitting a bid, where the effective participation of that private partner in the future semi-public company is in fact less than 30%, on account of the direct or indirect public participation identified?'

20. Written observations were submitted by the parties to the main proceedings, CNS and the Commission. No hearing was held.

V. Analysis

A. The subject matter of the questions referred

21. It is clear from reading the request for a preliminary ruling that, in the light of the circumstances of the case in the main proceedings, the referring court is considering two requirements concerning the public participation and the private participation in the mixed company to be formed.

22. The first requirement concerns the 30% minimum participation threshold to be satisfied by the private partner in order to hold a capital stake in a mixed capital entity to be formed, in accordance with Article 17(1) of Legislative Decree No 175. That minimum private participation threshold is the logical corollary of a 70% maximum public participation threshold.

23. The second requirement is that set, in the present case, by the contracting authority itself in the call for tenders, namely the 49% participation of the private partner and the 51% participation of the contracting authority.

24. The two questions referred for a preliminary ruling, as formulated by the referring court, refer only to the 30% minimum participation threshold to be satisfied by the private partner in order to hold a capital stake in a mixed company. I must point out, in that context, that the referring court does not ask the Court about the validity of that threshold in the light of EU law. The wording of the questions suggests that, by those questions, the referring court is seeking to ascertain whether

EU law precludes, for the purpose of determining such a 30% minimum participation threshold, account from being taken of the contracting authority's indirect participation in the share capital of that private partner.

25. However, the grounds stated for the request for a preliminary ruling are not as unequivocal vis-à-vis the subject matter of the questions referred.

26. First, in line with the wording of the questions referred for a preliminary ruling, the referring court states that, in order to decide the case in the main proceedings, 'it is necessary to establish whether, for the purposes of ensuring the correct thresholds for participation in the mixed company [to be formed] (no more than 70% public participation, no less than 30% private participation), reference should be made only to the legal nature of the private partner or, where that private partner has public participation, whether consideration should also be given to that public participation'.

27. Second, the referring court also states that the lawfulness of the limits on public participation (51%) and on private participation (49%) has not been challenged in the dispute in the main proceedings. Accordingly, it takes the view that '[that] dispute concerns the lawfulness of the decision by a contracting authority which, for the purposes of examining compliance with the 51% ceiling of its participation in the new company that was to be formed, considered that account also had to be taken of that authority's [indirect participation in that company]'.

28. In the light of the ambiguity of the subject matter of the questions referred for a preliminary ruling, I am bound to note, in the first place, that the referring court states that the *lex specialis* of the call for tenders, the provisions of which are 'effective' in the case in the main proceedings, specifies the exact public and private participation, respectively 51% and 49%.[10] It therefore appears that, in the dispute in the main proceedings, which concerns the exclusion decision, the referring court is asking primarily about the public and private participation requirements laid down in the tender documents.

29. In the second place, when asked whether the exclusion decision was formally justified by an infringement of Article 17(1) of Legislative Decree No 175 or by the failure to comply with the capital distribution requirement laid down in the tender documents, most of the parties favoured that second scenario.

30. Roma Multiservizi gave a categorical response, stating that the exclusion decision invokes the alleged non-compliance with the distribution of share capital as set out in the tender documents.

31. The city of Rome initially stated that the bid submitted by the consortium concerned by the exclusion decision includes two irregularities relating to the two requirements concerning the public and private participation. However, it subsequently reproduced the grounds for that consortium's exclusion, from which it is apparent that its exclusion is based on the finding that 'the share of risk capital in the [mixed company to be formed] attributable to private investment is below 49% and manifestly fails to comply with the conditions set out in the tender documents and in the acts approved by the city council'.

[10] Similarly, according to the information contained in the request for a preliminary ruling, Roma Multiservizi and Rekeep challenged the exclusion decision referring, inter alia, to the infringement, the misapplication and the inadmissible purposive interpretation of what those parties regarded as constituting *lex specialis*.

32. In line with the city of Rome's response, Rekeep stated that the reasoning in the exclusion decision refers only to the failure to comply with the capital shares specified in the tender documents, adding that Legislative Decree No 175 is mentioned in the preliminary considerations of that decision.

33. The Commission's response appears implicitly to argue along the same lines. In its view, it is clear that the setting of the private participation at 49% – and the exclusion that follows as a result – is based solely on the limit laid down in Article 17 of Legislative Decree No 175. I infer from that fact that, in the Commission's opinion, the exclusion *follows* directly from the failure to comply with the 49% private participation requirement laid down in the tender documents.

34. Only CNS is of the view that the exclusion decision is based both on the infringement of Article 17(1) of Legislative Decree No 175 and on non-compliance with the capital distribution requirement set out in the tender documents. However, the passages of that decision reproduced by CNS concern only the public and private participation requirements laid down in the call for tenders.

35. In the light of those clarifications, it should be concluded that, by its first question referred for a preliminary ruling, the referring court is seeking to ascertain whether, for the purpose of determining the private participation percentage in the mixed company to be formed, EU law precludes account from being taken of the contracting authority's indirect participation in the share capital of a private partner submitting a bid.

36. Therefore, the second question referred for a preliminary ruling should be understood as meaning that the referring court is seeking to ascertain whether EU law precludes a contracting authority from excluding from the call for tenders a private partner submitting a bid whose effective participation in the mixed-capital entity to be formed does not comply with the requirement relating to the minimum private participation threshold set in the tender documents.

37. I must make a few additional comments regarding the questions referred for a preliminary ruling as thus reworded.

38. First of all, the original wording of the first question implies that the referring court is seeking to determine whether EU law precludes a contracting authority from taking into account not any public participation in the capital of the private partner submitting a bid, but rather only 'its own participation' in the capital of that partner ('may – or in fact must – the authority launching the tender consider its own indirect participation in the private partner submitting a bid?'). Several passages of the request for a preliminary ruling support such an interpretation not only of the public and private participation requirements laid down in the call for tenders [11] but also, even more importantly for the case in the main proceedings, of the exclusion decision. [12]

39. Next, by the first question referred for a preliminary ruling, as it is worded, the referring court asks whether account 'may – or in fact must –' be taken of such an indirect participation. However, it is established that, in the case in the main proceedings, the contracting authority did

[11] The referring court states inter alia that the contracting authority 'set the participation by the city of Rome at 51% and the participation by the private partner at 49%' and that that contracting authority launched a call for tenders 'setting the participation by the city of Rome at 51%'.

[12] The referring court states inter alia that 'the city of Rome … ultimately held an effective participation of 73.5% in the public-private company, thus exceeding the 51% limit set in the tender documents' and that 'the city of Rome's participation in the [mixed company to be formed] exceeded the limit set at 51%'.

take account of its indirect participation. In order to review the exclusion decision, it is simply necessary to determine whether EU law precludes account from being taken of indirect participation.

40. Furthermore, the referring court states that the second question referred for a preliminary ruling arises if the first question is answered in the affirmative. However, as it was originally worded, the first question contains two alternatives ('[the provisions of EU law] preclude … consideration being given solely to the [direct participation] or [the contracting authority] may – or in fact must – consider [the indirect participation] in the private partner submitting a bid?'). In any case, the view should be taken that the second question is raised if the first question is answered to the effect that EU law does not preclude account from being taken of the contracting authority's indirect participation in the private partner submitting a bid.

41. Finally, in order for useful answers to be provided to the referring court, it is necessary to identify the regime applicable in the case in the main proceedings and the provisions of that regime requiring interpretation in order to settle the dispute before that court. Not all the provisions mentioned by the referring court in its reference for a preliminary ruling appear relevant. For that reason, some of the parties question the admissibility of the questions referred for a preliminary ruling.

B. Admissibility of the questions referred for a preliminary ruling and the applicable regime

42. In its first question, the referring court mentions several provisions of EU law without explicitly stating exactly why it was prompted to ask about their interpretation. As for the second question, it merely mentions the legal principles, in particular the principles of fair competition, proportionality and appropriateness, without mentioning any provision of EU law.

43. In that regard, the Commission takes the view that the first question referred for a preliminary ruling is inadmissible in so far as it concerns Article 107 TFEU, whereas CNS calls into question the admissibility of the request for a preliminary ruling in its entirety.[13] I will examine those pleas of inadmissibility as part of my analysis of the request for a preliminary ruling, the goal of which is to identify the provisions of EU law relevant to the present case.

1. Directives 2014/23 and 2014/24

44. The first question referred for a preliminary ruling, as worded by the referring court, makes reference to both Directive 2014/23 and Directive 2014/24. Those directives lay down, respectively, the rules applicable to the procedures for the award of concession contracts and those applicable to public procurement procedures.

45. In order to identify the directive applicable here, consideration must be given to the subject matter of the call for tenders and the contract that the contracting authority sought to conclude after the launch of that call for tenders.

[13] According to CNS, the referring court is simply requesting a review of the compatibility of national law in the light of general principles of EU law, without specifically identifying the exact provisions in the light of which such compatibility should be examined. In its view, the fact that EU law does not contain any specific provisions on the forms of public-private partnership further demonstrates that the first question referred for a preliminary ruling is irrelevant.

46. The call for tenders at issue in the main proceedings has a dual purpose, meaning that the contract to be concluded can be regarded as consisting of two aspects: the first relates to the selection of a private partner for the mixed company to be formed, the second concerns the award to that company of the integrated school service.

47. Can the first aspect affect the applicability of Directive 2014/23 or Directive 2014/24 vis-à-vis the two aspects of the contract at issue in the main proceedings? Case-law contains useful guidance in answering that question.

(a) Relevant case-law

48. In the case that gave rise to the judgment in *Club Hotel Loutraki and Others*, [14] the Court was faced with a similar question. The reference for a preliminary ruling concerned a contract consisting of three agreements: one relating to the sale of 49% of the shares in a public undertaking with a view to its privatisation, one under which the transferee would take over the management of the casino business in return for payment, and one pursuant to which that transferee would undertake to implement a plan to refurbish the casino premises.

49. In order to settle that question, the Court, after confirming that the referring court had been right to classify the contract as a 'mixed contract', [15] examined whether the contract at issue constituted an indivisible whole and whether it fell, as a whole, because of its main object, within the scope of one of the directives at issue. [16] In so doing, the Court referred to case-law under which, 'in the case of a mixed contract, the different aspects of which are … inseparably linked and thus form an indivisible whole, the transaction at issue must be examined as a whole for the purposes of its legal classification and must be assessed on the basis of the rules which govern the aspect which constitutes the main object or predominant feature of the contract'. [17]

50. With regard to that case-law, the Court stated, first, that the contract in question was a mixed contract that constituted an indivisible whole, since that contract had to be concluded with a single partner with both the financial standing necessary to purchase the shares at issue and professional experience in operating a casino. Second, the Court took the view that the transfer of 49% of the shares of a public undertaking constituted the main object of the contract at issue. [18] That finding arose from the fact that the transfer of the shares in fact constituted a privatisation and had effects for an unlimited time, allowing the transferee to obtain, as a shareholder, significantly greater income than the remuneration that was payable to it as the service provider. [19]

51. In the judgment in *Mehiläinen and Terveystalo Healthcare*, [20] the Court examined, on the basis of the same case-law, [21] an arrangement by which the contracting authority concluded with a private entity separate from it a contract establishing a joint venture, in the form of a limited company, from which that contracting authority committed, when setting up that company, to purchase occupational health and welfare services for its own staff for a transitional period of four years.

14 Judgment of 6 May 2010 (C-145/08 and C-149/08, EU:C:2010:247; 'the judgment in *Club Hotel Loutraki and Others*').

15 The judgment in *Club Hotel Loutraki and Others* (paragraph 46).

16 The judgment in *Club Hotel Loutraki and Others* (paragraph 50).

17 The judgment in *Club Hotel Loutraki and Others* (paragraph 48 and the case-law cited).

18 The judgment in *Club Hotel Loutraki and Others* (paragraph 57).

19 The judgment in *Club Hotel Loutraki and Others* (paragraphs 55 and 57).

20 Judgment of 22 December 2010 (C-215/09, EU:C:2010:807; 'the judgment in *Healthcare*').

21 The judgment in *Healthcare* (paragraph 36).

52. In the judgment in *Healthcare*, as in the judgment in *Club Hotel Loutraki and Others*, the Court found that the arrangement in question constituted a mixed contract. However, the Court took the view that the aspects of that arrangement were not inseparable, since there was no objective need to conclude the mixed contract with a single partner. In particular, in the Court's view, the divisible nature of the aspect related to the services from the remainder of the mixed contract was supported by the fact, first, that the contracting authority had expressed its intentions to launch a call for tenders for the purchase of such services at the end of the transitional period and, second, that a joint venture had indeed been established and had operated without the aspect related to the services. [22]

53. In the judgment in *Acoset*, the Court, when asked about a direct award of a local public service for the integrated management of water to a semi-public company, did not even raise the question of whether the contract at issue constituted a mixed contract, the different aspects of which were inseparably linked and thus formed an indivisible whole. In determining whether that award fell within the scope of one of the directives at issue, the Court focussed on the local public service for the integrated management of water and on the works connected with the management of that service.

54. However, the judgment in *Acoset* cannot be interpreted as meaning that, in the case of a contract consisting of several aspects, one of which concerns the formation of a semi-public company, that aspect should be disregarded and consideration given to the other aspects only. Such an interpretation would run counter to the case-law established after that judgment, which is cited in the preceding points of this Opinion.

55. The judgment in *Acoset* should therefore be understood to mean that the Court implicitly found, in the first place, that the contract in question was a mixed contract, the aspects of which formed an indivisible whole, and, in the second place, that the aspect related to the local public service constituted the main object of that contract.

56. It follows from the foregoing that the contract concluded as part of a procedure launched by a contracting authority for the selection of a private partner for a semi-public company and the award of a contract or a concession to that company is a mixed contract consisting of two aspects. [23] In addition, as far as concerns such a mixed contract, it is necessary, first, to determine whether the different aspects of the contract are indivisibly (inseparably) linked and form an

[22] The judgment in *Healthcare* (paragraphs 43 and 44).

[23] Some of the parties appear to question the classification as a 'mixed contract' of a contract, one of the aspects of which relates to the selection of a private partner for a mixed-capital entity to be formed. However, although the Court did not use the concept of a 'mixed contract' in the judgment in *Acoset*, it did so in its judgments in *Club Hotel Loutraki and Others* and *Healthcare*. In addition, even assuming that Directive 2014/24 applies in the present case and that the contract at issue in the main proceedings does not fall within the scope of the concept of a 'mixed contract' within the meaning of Article 3 of that directive because the selection of a private partner for the formation of a mixed company is unrelated to a contract (see footnote 24), that contract may nevertheless come under the broader category of mixed contracts to which the Court appears to have referred in the judgments in *Club Hotel Loutraki and Others* and *Healthcare*.

indivisible whole; second, to identify the main object or predominant feature of that contract; and, third, to determine the rules applicable to the contract in the light of that main object or predominant feature. [24]

(b) Application

(1) Mixed contract: indivisible aspects?

57. It is my view that the two aspects of the contract at issue in the main proceedings are indivisible, as in the cases that gave rise to the judgments in *Club Hotel Loutraki and Others* and *Acoset*.

58. In order to guarantee the provision of the integrated school service by a semi-public company composed of the contracting authority and a private partner, it is objectively necessary to select a partner with the financial capacity necessary to purchase 49% of the capital of the mixed company to be formed and who satisfies other conditions which enable it, in the form of a semi-public company, to take on the integrated school service and bear the operational risk in its entirety. The two aspects of the contract must therefore concern the same partner, even though, technically, the first aspect concerns the selection of a private partner and the second the award of the integrated school service to a semi-public company in which that partner holds 49% of the shares. [25]

59. Furthermore, unlike the case that gave rise to the judgment in *Healthcare*, [26] in which the circumstances connected with the aspect related to the services were quite specific, there are no grounds for taking the view that, in the present case, the aspect related to the formation of a semi-public company is divisible from that related to the integrated school service. Without the latter aspect, the mixed company to be formed would objectively be deprived of its economic rationale. In Italian law, pursuant to Article 17(1) of Legislative Decree No 175, the contract or concession constitutes the sole object of the activities of the semi-public company.

[24] Regardless of the solution adopted by the Court in its case-law, assuming that Directive 2014/24 applies in the case in the main proceedings, the same outcome could a priori be reached on the basis of Article 3(6) thereof, under which, 'where the different parts of a given contract are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject matter of that contract'. Under that Directive, contracts are concerned with the execution of works, the supply of goods or the provision of services. The question therefore arises as to whether the selection of a private partner and the formation of a mixed company fall within the definition of a 'contract' within the meaning of that same directive. The view taken in legal literature appears to be that that is the case (see, to that effect, in so far as the author refers to Article 3(4) of Directive 2014/24, Andrecka, M., 'Institutionalised Public-Private Partnership as a Mixed Contract under the Regime of the New Directive 2014/24/EU', *European Procurement & Public Private Partnership Law Review*, Vol. 9, No 3, 2014, p. 176). Furthermore, in view of the doubts that exist as to the rules applicable in the present case, attention must be drawn to the difference between the wording used in Directive 2014/24, Article 3(6) of which provides that, 'where the different parts of a given contract are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject matter of that [mixed] contract', and that used in Directive 2014/23, Article 20(5) of which provides that, 'where the different *parts of a given contract* are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject matter of that contract' (emphasis added); the wording of the latter provision appears to me to be more flexible, at least as regards certain language versions of those directives, in particular the French version.

[25] See, by way of analogy, paragraph 53 of the judgment in *Club Hotel Loutraki and Others*, read in the light of paragraph 28 thereof, in accordance with which the mixed contract at issue contained 'one aspect relating to the sale of shares by [the company Ellinika Touristika Akinita AE] to the highest bidding tenderer [and … one] aspect relating to a service contract to be concluded with the highest bidding tenderer, which assumes the obligations of managing the casino business'), whereas, as is apparent from paragraph 25 of that judgment, the company to be formed by the tenderer (and not that tenderer itself) acted as manager and concluded at the very least one agreement. See also, in this regard, the judgment in *Acoset* (paragraphs 54 and 61).

[26] See point 52 of this Opinion.

60. It is now necessary to determine whether the aspect that constitutes the main object of the contract at issue in the main proceedings is that related to the formation of a semi-public company or that related to the integrated school service.

(2) Main object of the contract

61. I am of the view that the aspect related to the integrated school service is the main object of the mixed contract at issue in the main proceedings.

62. The mixed company to be formed was just one way of ensuring that the integrated school service is provided by an IPPP and was by no means the purpose of the call for tenders. Unlike the case that gave rise to the judgment in *Club Hotel Loutraki and Others*, the present case is concerned not with a purchase of shares in a pre-existing public undertaking with a view to its privatisation but rather the formation of a mixed company with a view to providing an integrated school service.

63. In addition, in that case, the holding of shares in the pre-existing public undertaking constituted in itself a significant source of income. There is nothing to support the view that that is the case here. It cannot therefore be concluded, on the basis of the judgment in *Club Hotel Loutraki and Others*, that, in the present case, the formation of the mixed company is the main object of the contract at issue in the main proceedings.

64. Accordingly, the question of which directive applies in the case in the main proceedings must be examined in the light of the aspect related to the integrated school service.

(3) Public service contracts or services concessions?

65. The information contained in the request for a preliminary ruling concerning the aspect related to the integrated school service is incomplete.

66. It is true that the parties' replies to the written questions put by the Court do contain some clarifications as to the range of services that make up the aspect related to the integrated school service.[27] However, it is not possible on the basis of those clarifications to classify irrefutably, in the context of this Opinion, that aspect as falling within the scope of a 'public service contract' or a 'services concession'.

67. In any case, such classification is a matter falling within the jurisdiction of the national court alone.[28] The Court may, where appropriate, provide clarifications intended to guide that national court in carrying out that classification.

[27] It is apparent from the parties' observations and their replies to the written questions put by the Court that the integrated school service consists in general support, handling services, collection and delivery services and cleaning services in nurseries and schools as well as school transportation. The inclusion of a service concerned with school transportation in that range does not appear to encourage the referring court to consider applying Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243). In any event, first, that directive also lays down, in Articles 4 and 6, rules on mixed procurement and, second, there is nothing to support the view that school transportation constitutes the main object of the contract at issue in the main proceedings or of the aspect of that contract related to the integrated school service.

[28] See, to that effect, judgment of 10 November 2011, *Norma-A and Dekom* (C-348/10, EU:C:2011:721, paragraphs 57 and 59).

68. In that regard, I would point out, in the first place, that public service contracts, within the meaning of Directive 2014/24, involve consideration which is paid directly by the contracting authority to the service provider.[29] By contrast, a services concession, within the meaning of Directive 2014/23, consists in the act of entrusting the provision and the management of services, the consideration of which consists either solely in the right to exploit the services in question or in that right together with payment.[30] In that same vein, the Court has recognised the existence of a services concession, inter alia, in cases in which the service provider's remuneration came from payments made by users of a service.[31] Accordingly, the fact that, as the referring court states, a semi-public company under Italian law in fact carries on activities in return for remuneration and which generate profits (even if those profits are, according to that court, modest) may be an indication that Directive 2014/23 should be applied.

69. In the second place, while the method of remuneration is one of the determining factors for the classification of a services concession, the services concession implies that the service supplier takes the risk of operating the services in question.[32] The distinguishing feature related to the transfer of such a risk was codified in Directive 2014/23.[33] The Italian language version of that directive describes that feature using the term 'rischio operativo' (operating risk). The same term is used in the decision by which the city of Rome launched a call for tenders so as to make clear that the tenderer selected would be required to bear such a risk in its entirety.[34]

70. In the third place, in order to be able to answer the questions referred for a preliminary ruling, the Court may, on the basis of the information provided to it, proceed on the assumption that a contract falls within the scope of one of the directives at issue.[35] However, in the absence of information on the basis of which the rules applicable in the present case can be determined, such an approach appears inconceivable to me in the present case. More significantly, I, like the Commission, take the view that the application of the rules laid down in one or the other of those directives need not necessarily affect the answers that should be given to the questions referred for a preliminary ruling in the present case. After all, the rules applicable to the aspect related to the integrated school service will be applicable to the aspect related to the selection of a private partner only 'by extension'. Since the questions concern the latter aspect only, my sole focus, in that regard, will be the application of the general principles under those rules, which are

29 See Article 2(1)(5) of Directive 2014/24. See also, to that effect, the judgment in *Acoset* (paragraph 39 and the case-law cited).

30 See Article 5(1)(b) of Directive 2014/23.

31 See the judgment in *Acoset* (paragraph 43 and the case-law cited).

32 See, to that effect, judgment of 10 November 2011, *Norma-A and Dekom* (C-348/10, EU:C:2011:721, paragraph 44). See also, to that effect, my Opinion in Joined Cases *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:122, points 62 and 63), in which I took the view that a services concession is characterised, in particular, by the fact that the authority entrusts the exercise of a service activity, a service the provision of which would as a rule fall to that authority (together with, I would add, the associated risk), to the concessionaire, thus requiring that concessionaire to provide a specific service.

33 See Article 1(1) and recital 18 of Directive 2014/23.

34 It is true that, in the case in the main proceedings, the risk was to have been assumed by the private partner selected in the context of the first aspect of the mixed contract, whereas the integrated school service, which constituted the main object of that contract, was to have been awarded, in the context of the second aspect of that contract, to the mixed company to be formed. In view of that particular circumstance, it could be argued that, in connection with the second aspect taken in isolation, there is no transfer of risk to the tenderer selected. However, in the present case, the tender procedure intended, in any event, to free the contracting authority from the risk associated with the provision of the integrated school service. For that reason, I cannot rule out the classification of that second aspect as a 'concession', despite the particular circumstance. With regard to the issues related to that same circumstance, see also point 58 of this Opinion.

35 See, by way of analogy, the judgment in *Acoset* (paragraph 42).

common to those two aspects. Therefore, whilst observing the division of jurisdiction between the national courts and the Court of Justice, I will refer in this Opinion to both Directive 2014/23 and Directive 2014/24. [36]

2. The rules governing public contracts awarded between entities within the public sector

71. In the first question referred for a preliminary ruling, the referring court mentions Article 12 and recitals 14 and 32 of Directive 2014/24 and reproduces, in the request for a preliminary ruling, the first subparagraph of Article 12(1) thereof. However, that court provides no explanation as to the reasons that led it to ask about the interpretation of the latter provision.

72. In that regard, in the first place, recital 14 of Directive 2014/24 states merely that the concept of 'economic operators' should be interpreted in a broad manner, thus confirming that a semi-public company can fall within the scope of that concept. The remainder of that recital reproduces, in essence, the definition of the concept contained in Article 2(1)(10) thereof. The latter provision was not invoked by the referring court in its question referred for a preliminary ruling.

73. In the second place, Article 12(1) of Directive 2014/24 provides that public contracts awarded to controlled legal persons by contracting authorities should not be subject to the application of the procedures provided for in that directive. That provision governs vertical cooperation between the relevant entities or a traditional in-house award.

74. However, the referring court clearly states that, in Italian law, the formation of a semi-public company, such as that at issue in the case in the main proceedings, constitutes an alternative to in-house management. [37]

75. Even more significantly, application of the exclusion provided for in Article 12(1) of Directive 2014/24 in the context of the award of services to an IPPP appears to me to be a priori precluded. As is stated in the third paragraph of recital 31 of that directive, care should be taken that any public-public cooperation thus excluded 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. Furthermore, in line with the case-law pre-dating Directive 2014/24, [38] recital 32 of that directive clarifies that the exclusion provided for in Article 12(1) of the Directive '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 an undue advantage over its competitors'.

76. In the third place, it is even open to consideration whether the mixed contract at issue in the main proceedings is excluded from the scope of Directive 2014/24 under Article 12(4) thereof. That provision concerns contracts concluded exclusively between a number of contracting authorities, where those contracts establish or implement cooperation between those contracting authorities.

[36] For the sake of completeness, I note that Directives 2014/23 and 2014/24 are applicable *ratione temporis* and that the value of the contract, estimated at above EUR 277 million, is greater than the thresholds required under those directives. See Article 8 of Directive 2014/23 and Article 4 of Directive 2014/24.

[37] See point 11 of this Opinion.

[38] See judgment of 6 April 2006, *ANAV* (C-410/04, EU:C:2006:237, paragraphs 31 and 32).

77. It may be argued that the city of Rome, as the contracting authority, wanted to establish cooperation with a future semi-public company, which was also to provide the integrated school service and 51% of the shares in which would be held by the city of Rome. That company would therefore constitute a 'body governed by public law' for the purposes of Article 2(1)(4) of Directive 2014/24 and, accordingly, could constitute a 'contracting authority' for the purposes of Article 2(1)(1) of that directive.

78. However, even assuming that the conditions for application of the exclusion provided for in Article 12(4) of Directive 2014/24 are met in such a situation, the Court has held, in the judgment in *Informatikgesellschaft für Software-Entwicklung*,[39] that that provision means that cooperation between contracting authorities must not have the effect, in accordance with the principle of equal treatment, of placing a private undertaking in a position of advantage vis-à-vis its competitors. It follows from that fact, as Advocate General Campos Sánchez-Bordona observed in his Opinion in that case,[40] that cooperation between public authorities which places a private operator in a position of advantage vis-à-vis its competitors on the market cannot be covered by Article 12(4) of Directive 2014/24. In the light of those clarifications, and in view of the involvement of private capital in the mixed company to be formed, it is my view that the cooperation at issue in the present case cannot come under the exclusion laid down in that provision.

79. There is therefore no need to interpret Article 12 of Directive 2014/24 in order to be able to answer the questions referred for a preliminary ruling.

3. The procurement regime for social and other specific services

80. Article 74 of Directive 2014/24 provides that public contracts for social and other specific services listed in Annex XIV to that directive are to be awarded in accordance with Chapter I of Title III of the Directive. With the exception of CNS, all the parties stated in their replies to the Court's written questions that, at the very least, one of the services making up the integrated school service falls within or may fall within the scope of that annex.

81. It will be for the referring court to assess whether that is the case. If so, the procurement procedure would simply have to comply with the more flexible rules laid down in Directive 2014/24 for the award of that type of contract. I will therefore merely put forward some additional considerations that may prove useful to that court.

82. First, it is true that Chapter I of Title III of Directive 2014/24 does establish a particular procurement regime for social and other specific services. Such contracts therefore fall outside the rules that make up the standard regime. However, Article 76(1) of that directive provides that Member States are to put in place national rules for the award of contracts subject to that chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Those principles are a priori the same principles as those referred to in Article 18 of the Directive. I cannot therefore rule out that the application of Chapter I of Title III of Directive 2014/24 in the case in the main proceedings will not affect the answers that should be given to the questions referred for a preliminary ruling.[41]

[39] Judgment of 28 May 2020 (C-796/18, EU:C:2020:395).

[40] Opinion in *Informatikgesellschaft für Software-Entwicklung* (C-796/18, EU:C:2020:47, point 109, point 3).

[41] See also, in this regard, point 70 of this Opinion.

83. Second, before concluding that the rules in Chapter I of Title III of Directive 2014/24 apply to the contract at issue in the main proceedings, the estimated values of the services covered by that chapter must also be compared with those of the services covered by the standard regime under that directive, and then, on the basis of those values, the main object of the contract must be established. [42]

84. In the absence of information to support the conclusion that the services covered by Chapter I of Title III of Directive 2014/24 must be regarded as the main object of the contract at issue in the main proceedings and in view of the fact that the referring court makes no reference whatsoever to the provisions of that chapter, I am working on the assumption that the more flexible rules do not apply in the present case.

4. Article 107 TFEU

85. The first question referred for a preliminary ruling mentions Article 107 TFEU. The Commission argues that the request for a preliminary ruling is inadmissible in so far as it concerns the interpretation of that provision of primary law.

86. I agree with the Commission. The request for a preliminary ruling does not identify clearly the measure which, in the case at issue in the main proceedings, constitutes State aid. Nor does the referring court clarify the reasons why the interpretation of that provision is necessary for the resolution of the dispute pending before it.

87. The request for a preliminary ruling may, it is true, be understood to the effect that the referring court is asking the Court to interpret not one of the provisions of primary law but rather Directives 2014/23 and 2014/24 in the light of that law ('with reference … to Article 107 TFEU'). Nevertheless, such a reading of the request for a preliminary ruling would not alter the fact that, in any case, there is no need to answer the questions referred for a preliminary ruling in so far as they concern Article 107 TFEU.

88. In those circumstances, the plea of inadmissibility raised by CNS must also be accepted in so far as it concerns the first question referred for a preliminary ruling and both Article 107 TFEU and, for the reasons set out in points 71 to 79 of this Opinion, Article 12 of Directive 2014/24.

C. Substance

89. Besides the provisions of EU law deemed irrelevant to the present case, the first question referred for a preliminary ruling mentions Article 30 of Directive 2014/23 and Article 18 of Directive 2014/24. In order to be able to identify all the relevant provisions of those directives, the requirements related to the public and private participation laid down in the tender documents must first be put in context.

[42] Under the second paragraph of Article 3(2) of Directive 2014/24, '[i]n the case of mixed contracts consisting partly of services within the meaning of Chapter I of Title III and partly of other services or of mixed contracts consisting partly of services and partly of supplies, the main subject shall be determined in accordance with which of the estimated values of the respective services or supplies is the highest'.

1. The requirements related to the public and private participation in the context of Directives 2014/23 and 2014/24

90. In Article 56 of Directive 2014/24, the EU legislature expressly distinguishes two types of criteria, namely criteria for qualitative selection, which essentially consist of exclusion grounds and selection criteria intended to assess the ability of economic operators to perform the contract awarded (Articles 57 and 58 of that directive), and the contract award criteria, which refer to the tenders themselves. Articles 38 and 41 of Directive 2014/23, which concern, respectively, criteria relating to the selection and qualitative assessment of candidates and award criteria, make a similar distinction.

91. In that connection, it must be stated that the request for a preliminary ruling does not clearly set out the rationale behind the requirements related to the public and private participation laid down in the tender documents. Since those requirements constitute *lex specialis* as compared with those laid down in Legislative Decree No 175,[43] that rationale may however be inferred from the clarifications related to that legislative decree. The tender documents appear to qualify the percentages and their nature (they are specific requirements rather than maximum and minimum thresholds), without however substantially affecting their objectives.

92. In that regard, I understand the clarifications provided by the referring court to mean that the 70% ceiling of public participation in the mixed company to be formed is intended to guarantee that the private participation in that company is not below 30%.

93. Therefore, on the one hand, from the general perspective of the market and of economic operators, a private partner would not be able to limit excessively (below 30%) the economic risk of its participation in a semi-public company and benefit unduly from the advantages of the public participation, by ensuring that other entities are prevented from enjoying profitable access to the same economic activity on the market segment concerned. Viewed thus, as the referring court points out, the aim of that ceiling is to prevent circumvention of the principle of free competition.

94. On the other hand, from the point of view of the subject matter of the tender procedure and of the contracting authority, that ceiling guarantees that the private partner is an operational partner whose contribution to the performance of the tasks entrusted to the mixed-capital entity to be formed consists in a capital contribution and the provision of the necessary skills to perform those tasks, whilst assuming the operational risk for their performance in its entirety.

95. I must point out that the aspect related to the actual contribution of the private partner appears to be of great importance as far as concerns the case in the main proceedings and the requirements of the public and private participation laid down in the tender documents. In view of the necessarily personalised nature of the conditions and criteria of economic and financial

[43] See point 28 of this Opinion.

standing and/or technical and professional ability [44] and in line with the judgment in *Acoset*, [45] that observation is an indication that the requirements of the public and private participation laid down in the tender documents constitute qualitative selection criteria.

96. In addition, it is apparent from the request for a preliminary ruling that, given the method of calculation that factors in the indirect participation of the contracting authority in the share capital of that partner, the tenderers were excluded from the procedure launched following the call for tenders because they did not comply with those requirements. In that regard, it is settled case-law that the qualitative selection criteria enable the contracting authority to restrict the tendering procedure to economic operators whose ability suggests that they will be able to perform the subject matter of the call for tenders. [46]

97. Thus, requirements concerning the public and private participation, such as those at issue in the case in the main proceedings, do not appear to relate to the tenders (contract award criteria). [47] However, they do appear to constitute qualitative selection criteria by which a contracting authority seeks to ensure that a private partner has the economic and financial standing and/or the technical and professional ability to enable it to maintain the division between the public capital and the private capital of the semi-public company, as determined by the contracting authority, via that partner's participation in the capital of that company and its assumption of the operational risk, in its entirety, for the performance of the service by the company. [48] Requirements related to the public and private participation laid down in the tender documents, such as those at issue in the case in the main proceedings, therefore constitute criteria and conditions within the meaning of Article 38(1) of Directive 2014/23 or, as the case may be, within the meaning of Article 58(1) of Directive 2014/24.

[44] The second sentence of Article 38(1) of Directive 2014/23 states that 'the conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject matter of the concession and the purpose of ensuring genuine competition'. In that same vein, Article 58(1) of Directive 2014/24 states inter alia that contracting authorities are to limit the requirements of participation 'to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.'

[45] See paragraph 59 of the judgment in *Acoset*: '… that situation may be rectified by selecting the private participant in accordance with the requirements set out at paragraphs 46 to 49 above and choosing appropriate criteria for the selection of the private participant, since the tenderers must provide evidence not only of their capacity to become a shareholder but, primarily, of their technical capacity to provide the service and the economic and other advantages which their tender brings'. The Court pointed out, in that judgment, the significance of the qualitative selection criteria related to the capacity to perform a service or a concession (see, to that effect, Brown, A., 'Selection of the Private Participant in a Public-Private Partnership which is entrusted with a Public Services Concession: Acoset (Case C-196/08)', *Public Procurement Law Review*, Vol. 2, 2010, p. 4), without however disregarding the qualitative selection criteria related to the capacity to become a private partner of the mixed company to be formed.

[46] See, to that effect, judgment of 8 July 2021, *Sanresa* (C-295/20, EU:C:2021:556, paragraph 62).

[47] As has been observed in legal literature, in the context of an IPPP, it is important, in spite of the difficulties, to distinguish qualitative selection criteria from contract award criteria. See Andrecka, M., and Kania, M., 'Choosing the Private Partner for a Public Private Partnership: A European Union Law Perspective on Polish Practice', *Polish Review of International and European Law*, Vol. 2, No 1, 2013, p. 148.

[48] For that reason, I take the view that the classification used by the Court in the judgment of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317, paragraphs 21 and 23) as regards national legislation intended to prevent any potential collusion between participants in the same procedure for the award of a public contract and to safeguard the equal treatment of candidates and the transparency of the procedure cannot be applied in the present case as regards the requirements of the public and private participation at issue here as laid down, moreover, in the tender documents.

2. Reformulation of the questions referred for a preliminary ruling

98. In the light of the clarifications provided relating to the subject matter of the questions referred for a preliminary ruling,[49] the applicable regime in the case in the main proceedings[50] and the classification of the requirements of the public and private participation applicable in that case,[51] I propose to reformulate the questions referred for a preliminary ruling, clearly stating the provisions of EU law which require interpretation for useful answers to be provided to the referring court.

99. More specifically, I propose to take the view that, by its questions, which I intend to examine jointly, the referring court is seeking to ascertain whether Article 30 and Article 38(1) of Directive 2014/23 or, as the case may be, Article 18 and Article 58(1) of Directive 2014/24 are to be interpreted as precluding, for the purpose of determining the percentage participation of a private partner submitting a bid in the semi-public company to be formed, account from being taken of the indirect participation of the contracting authority in the share capital of that private partner submitting a bid, such that that partner is excluded from the call for tenders where, as a result of the account taken of that indirect participation, the private participation percentage sought by the contracting authority in accordance with the tender documents is not met.

3. Assessment

100. As they constitute conditions and criteria concerning economic and financial standing and/or technical and professional ability, the requirements related to the public and private participation laid down in the tender documents must be related and proportionate to the subject matter of the tender procedure.[52] In accordance with Article 30 of Directive 2014/23 and Article 18 of Directive 2014/24, the contracting authority must apply those requirements in accordance with the principles of equal treatment and non-discrimination between tenderers as well as those of transparency and proportionality.

101. In the first place, it is necessary to examine whether there is a link between those requirements and the subject matter of the tender procedure.

102. Following the rationale of the requirements laid down in the tender documents (participation set at 51% for the city of Rome and at 49% for the private partner), a tenderer eligible for selection must be an entity unaffiliated with the contracting authority. A greater participation by the contracting authority in the semi-public company via the control of that tenderer (also arising from an indirect participation) would affect the division between the public capital and the private capital of that company, as determined by the contracting authority. In addition, such a situation could limit the role of the private partner and, as a result, the genuine commitment of the economic and financial standing and/or the technical and professional ability of the tenderer below the 49% threshold set by the contracting authority. Those requirements are therefore related to the subject matter of the tender procedure.

[49] See points 35 and 36 of this Opinion.

[50] See point 70 of this Opinion.

[51] See point 97 of this Opinion.

[52] See footnote 44.

103. Furthermore, since, as a rule, EU law does not preclude the use of a single procedure in the context of an IPPP,[53] the interpretation of the requirement related to the existence of a link between the qualitative selection criteria and the subject matter of the tender procedure that must be accepted cannot prevent the use of that form of cooperation by contracting authorities (including the setting by the contracting authority of the division between the public capital and private capital of the semi-public company). Use of an IPPP is the result of the Member States' freedom of choice as to how the services are provided by which contracting authorities will meet their own needs.[54]

104. In the second place, as regards the proportionality of the requirements of the public and private participation, I would observe that, at the very least in the light of my reading of the request for a preliminary ruling, those requirements do not systematically exclude any tenderer whose capital is in public hands.[55] However, given the original wording of the first question referred for a preliminary ruling, those requirements appear to cover all forms of indirect participation by the contracting authority in the share capital of the private partner.

105. That being so, a contracting authority's indirect participation in the capital of a private partner can take different forms. In addition, its impact on the functioning of that private partner depends on the latter's organisational structure. It is therefore not certain that any indirect participation in the capital of the private partner restricts the actual commitment of the economic and financial standing and/or technical and professional ability of the tenderer below the 49% threshold, as set by the contracting authority.

106. Accordingly, taking account of any indirect participation of the contracting authority in the share capital of the private partner is inconsistent with the principle of proportionality, in so far as that approach disregards the fact that such an indirect participation does not necessarily restrict the actual commitment of the economic and financial standing and/or technical and professional ability of that tenderer below the 49% threshold, as set by the contracting authority. If checks are not conducted to establish that that is the case, that private partner submitting a bid cannot be automatically excluded from the call for tenders on account of that indirect participation.

107. It is not clear that the contracting authority actually conducted such checks in the present case. However, first of all, the analysis of the capital structure of the entities concerned contained in the exclusion decision may suggest that it did so. Next, it appears that the reference for a preliminary ruling echoes that decision in so far as the referring court states that if, 'account is taken of that substantive aspect, namely the business relationships of [Roma Multiservizi] and in particular the fact that it is 51% owned by [AMA], which is itself wholly owned by the city of Rome, … the [public and private] participation in the mixed company [to be formed] would *in reality* be 73.5% and [26.5%]'. Lastly, there is nothing to suggest that decision-making powers or operational risks have been allocated in proportion to the capital stake held. The fact that the contracting authority holds the majority of the capital of a private partner submitting a bid therefore seems capable of limiting the actual commitment of the economic and financial standing and/or technical and professional ability of that private partner below the 49% threshold, as set by the contracting authority.

[53] See the judgment in *Acoset* (paragraph 63).

[54] See also 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'.

[55] See point 38 of this Opinion.

108. I am therefore of the view that Article 30 and Article 38(1) of Directive 2014/23 or, as the case may be, Article 18 and Article 58(1) of Directive 2014/24 must be interpreted as meaning that they preclude, for the purposes of determining the percentage participation of a private partner submitting a bid in the mixed public-private company to be formed, account from being taken of any indirect participation of the contracting authority in the share capital of that private partner submitting a bid, such that that partner is automatically excluded from the tender documents, where, as a result of the account taken of that indirect participation, the private participation percentage sought by the contracting authority in accordance with the call for tenders is not met.

109. However, Article 30 and Article 38(1) of Directive 2014/23 or, as the case may be, Article 18 and Article 58(1) of Directive 2014/24 do not preclude account from being taken where it is not automatic. In particular, those provisions do not preclude account from being taken of an indirect participation where it is apparent from checks conducted by the contracting authority that that participation involves the majority of the capital of a private partner submitting a bid being held by another entity which, in turn, is wholly owned by the contracting authority, provided that decision-making powers and risks are allocated in proportion to the capital stake held as far as concerns that private partner submitting a bid and that entity.

110. As regards observance of the principle of proportionality, I note, for the sake of completeness, that the Commission appears to question whether the exclusion of the bid submitted by Rekeep and Roma Multiservizi complies with that principle on the ground that the city of Rome should have allowed them to show, where appropriate, that the indirect participation it holds in the capital of Roma Multiservizi did not entail a risk of conflicts of interest. However, the primary goal of the requirements related to the public-private participation laid down in the tender documents is not to eliminate such risks. In addition, a conflict of interests is a ground for exclusion provided for in Directives 2014/23 and 2014/24 and the request for a preliminary ruling makes no reference whatsoever to that ground. Moreover, that request mentions neither Article 35 of Directive 2014/23 nor Article 24 of Directive 2014/24.

111. In the third place, as regards the principles of transparency and equal treatment, I must point out that, in their written observations, Roma Multiservizi and Rekeep allege that no mention was made in the tender documents that account would be taken of the contracting authority's indirect participation in the capital of a tenderer.

112. The request for a preliminary ruling makes no reference to the failure to mention that fact in the tender documents. In that context, I am bound to note that, in its replies to the written questions put by the Court, the city of Rome states that, under Legislative Decree No 175, which appears to lay down rules for the implementation of Directives 2014/23 and 2014/24, a public undertaking is defined as an undertaking over which the contracting authorities can exercise a dominant influence, whether directly or indirectly. According to Rekeep's observations, that decree also provides that, 'where the provisions in force authorise the formation of mixed companies for the performance and management of public works or for the organisation and management of a service of general interest, the private partner must be selected by means of a procedure for the award of a public contract'. On the basis of an interpretation *a contrario*, it may therefore be stated that, in the context of a semi-public company, a private partner cannot be in a situation where the contracting authority has a direct or indirect dominant influence over it. However, an indirect participation in the capital of a private partner that results in the exercise of a dominant influence cannot be treated in the same way as any indirect participation whatsoever in the capital of that private partner.

113. In any case, the national courts alone have jurisdiction to determine, where appropriate, the merits of those allegations and their relevance at the current stage of the case in the main proceedings.

114. Thus, in so far as the referring court mentions Article 30 of Directive 2014/23 and Article 18 of Directive 2014/24, useful clarifications should be provided to that court as regards a review carried out in the light of the principles set out in those provisions.

115. It is settled case-law that the principles of transparency and equal treatment which govern all public procurement procedures require the substantive and procedural conditions concerning participation in a contract to be clearly defined in advance and made public, in particular the obligations of tenderers, in order that those tenderers may know exactly the procedural requirements and be sure that the same requirements apply to all candidates. [56]

116. For instance, and in relation to the regime under Directive 2014/24, contract notices must, as a rule, include a list and brief description of the selection criteria and the criteria regarding the personal situation of economic operators that may lead to their exclusion. [57]

117. The logical extension of that fact is that the principle of equal treatment and the obligation of transparency must be interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator's non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or from the national law in force, but from an interpretation of that law and those documents and from the incorporation of provisions into those documents by the national authorities or the administrative courts. [58]

118. Since the indirect participation of a contracting authority in the capital of a private partner can take different forms and its impact on the functioning of that private partner depends on the latter's organisational structure, it does not appear to me to be self-evident that any form of indirect participation held by the contracting authority would automatically entail the exclusion of a tenderer from the tender documents by reason of non-compliance with the requirements of the public and private participation. It does not appear to be sufficiently clear that the national legislation or the tender documents should be interpreted to that effect.

119. Without prejudice to the foregoing additional remarks concerning compliance with the principles of transparency and equal treatment, I stand by the position that I set out in point 108 of this Opinion regarding compliance with the principle of proportionality.

VI. Conclusion

120. In the light of the foregoing, I propose that the Court provide the following answer to the Consiglio di Stato (Council of State, Italy):

Article 30 and Article 38(1) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts or, as the case may be, Article 18 and Article 58(1) of Directive 2014/24/EU of the European Parliament and of the

[56] See judgment of 17 May 2018, *Specializuotas transportas* (C-531/16, EU:C:2018:324, paragraph 23 and the case-law cited).

[57] See Article 49 and point 11(c) of Part C of Annex V to Directive 2014/24.

[58] See judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404, paragraph 51).

Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that they preclude, for the purposes of determining the percentage participation of a private partner submitting a bid in the mixed public-private company to be formed, account from being taken of any indirect participation of the contracting authority in the share capital of that private partner submitting a bid, such that that partner is automatically excluded from the call for tenders, where, as a result of the account taken of that indirect participation, the private participation percentage sought by the contracting authority in accordance with the tender documents is not met.

However, Article 30 and Article 38(1) of Directive 2014/23 or, as the case may be, Article 18 and Article 58(1) of Directive 2014/24 do not preclude account from being so taken where it is not automatic. In particular, those provisions do not preclude account from being taken of an indirect participation where it is apparent from checks conducted by the contracting authority that that participation involves the majority of the capital of a private partner submitting a bid being held by another entity which, in turn, is wholly owned by the contracting authority, provided that decision-making powers and risks are allocated in proportion to the capital stake held as far as concerns that private partner submitting a bid and that entity.