# OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 2 June 2009 [1]

## I — Introduction

1. This reference for a preliminary ruling from the Tribunale Amministrativo Regionale (Regional Administrative Court), Sicily, provides the Court of Justice with an opportunity to analyse the legal regime governing public-private partnership arrangements [2] in the context of the management of public services and to determine whether it is compatible with Articles 43 EC, 49 EC and 86 EC.

2. The direct attribution of the management of public services to a semi-public company is contrary to Community law if the requirements of the directives on public procurement are not satisfied. The complaint in the present case concerns the service concession formula, in so far as it may infringe Articles 43 EC and 49 EC and the principles of equal treatment, non-discrimination and transparency [3] unless proper recourse is had to own resources or executive services for performance. [4]

3. The present case has a specific characteristic which sets it apart from other procurement procedures which the Court of Justice has ruled unlawful to date: the Italian court describes the direct award of the integrated management of a water service to an entity in which both public and private interests converge but it also points out that this was preceded by a call for tenders, albeit one whose traditional function appears to have altered.

4. In effect, the selection of the contractor or concession holder has been transformed into a method for deciding on a private participant

1 — Original language: Spanish.

2 — The acronym CPP is used for the Spanish term *colaboración público-privada*, while in English and French the acronym PPP is used to refer, respectively, to public-private partnership and *partenariat public privé*.

3 — Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705, paragraph 48; Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 33; and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 52.

4 — Where the criteria for in-house providing are satisfied.

for the commercial company which assumes responsibility for the contract or concession, the role of that participant entailing, in addition to a financial outlay, the provision of the service.

5. Unlike *Commission* v *Austria*, [5] in which the Court found that there was an artificial construction comprising several distinct stages and revealed the unlawful nature of the award of a contract to a semi-public company under the guise of an in-house relationship, [6] in the present dispute the issue of competition comes into play and displays unprecedented potential in a procedure in which a measure of economy is evident, for, in a single instrument, a company is incorporated and assigned a task, and the criteria for inclusion of the private industrial participant are adopted. What more can one ask for?

6. The difficulty thus arises of determining whether that procedural short-cut complies with the requirements of Community law. [7]

5 — Cited above.

6 — From the facts, supplied to the Court by the Commission under Article 226 EC, it was clearly foreseeable that the action for failure to fulfil obligations would be upheld, since, while initially the Mödling municipal council, which wholly owned AbfallGmbH, entrusted that company with the collection and processing of the town's waste without issuing any call for tenders, shortly afterwards the municipal council approved the transfer of 49% of its shares to Saubermacher AG, a factor which, moreover, was conclusive for the purposes of enabling AbfallGmbH to effect what, in short, amounted to the direct award of a public services contract to a semi-public company in which a private undertaking held a 49% stake.

7 — That approach puts me in mind of the satirical comments of Dossi, C., *Note Azurre,* Adelphi, Milan, 1964, vol. I, p. 248, on the stupidity of cheating outside the law when it is easier to do so within the law.

## II — The applicable legislation

### A — *Community law*

#### 1. The Treaty of Rome

7. Under Article 43 EC:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited...

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.'

8. In accordance with Article 46 EC:

'1. The provisions of this chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

2. The Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the coordination of the abovementioned provisions.'

9. The first paragraph of Article 49 EC provides:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

10. Article 86(1) EC calls on Member States, '[i]n the case of public undertakings and undertakings to which Member States grant special or exclusive rights', neither to 'enact nor [to] maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.'

2. The directives on public procurement

(a) Traditional sectors

11. The sheer volume of provisions governing matters such as the criteria for evaluating the selection of tenders by reference to the subject-matter of the contract or the gradual reduction of the discretion enjoyed by the contracting authority necessitated a reform which, after a number of cautious attempts, [8] was achieved through codification under 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 ('Directive 2004/18'). [9]

8 — For example, in Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1).

9 — OJ 2004 L 134, p. 114.

12. However, the rules on the award of contracts are subject to compliance with the principles of the Treaty of Rome and, in particular, with the principles of the free movement of goods, freedom of establishment and freedom to provide services, and the more general principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

13. Nevertheless, in order to ensure the full effectiveness of the rules and guarantee the opening-up to competition of public procurement, for public contracts above a certain value it was necessary '… to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles' (recital 2 in the preamble to Directive 2004/18).

14. In accordance with the principle of legal certainty, Article 1 of Directive 2004/18 provides a series of definitions, of which, for the time being, and with a view to demarcating the vague boundary between a contract and a concession, I would draw attention to the following:

— public contracts: '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';

— public works concession: 'a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment';

— service concession: 'a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.'

(b) Excluded sectors

15. In view of the special nature of the markets in water, energy, transport and postal services, it was not possible to apply the general regime to those markets without adapting it to their particular characteristics.

16. The solution was provided by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, trans-

port and postal services sectors ('Directive 2004/17'),[10] which is underpinned by principles identical to those referred to above[11] but in a spirit which differs from that underlying Directive 2004/18, since the conclusive criterion is not the contracting entity but rather the nature of the activity to which the contract concerned relates.[12]

17. Directive 2004/17 governs supply, works and service contracts (Article 1(2)(b), (c) and (d)), which it differentiates from concessions (Article 1(3)(a) and (b)); that directive also states that it is to apply to 'the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water' (Article 4(1)(a)) and to 'the supply of drinking water to such networks' (Article 4(1)(b)).

B — *Italian law*

18. Article 113(5) of Legislative Decree No 267/2000 of 18 August 2000, approving the consolidated text of the laws on the organisation of local authorities ('Legislative Decree No 267/2000'),[13] in the version applicable *ratione temporis*,[14] offers local authorities[15] three options for the management of public services depending on whether the award is made to:

'…

(a) companies with share capital selected by means of public and open tendering procedures;

(b) companies with share capital with mixed public and private ownership in which the private partner is selected by means of public and open tendering procedures that have ensured compliance with domestic and Community legislation on competition in accordance with guidelines issued by the competent authorities in specific regulations or circulars;

10 — OJ 2004 L 134, p. 1.

11 — Article 10 of Directive 2004/17 and recital 9 in the preamble thereto.

12 — As I explain in paragraph 41 of my Opinion in Case C-393/06 *Aigner* [2008] ECR I-2339.

13 — Gazzetta Ufficiale della Repubblica Italiana ('GURI') of 28 September 2000, Ordinary Supplement No 227.

14 — The provision was replaced by Article 35 of Law No 448/2001 (Ordinary Supplement to GURI No 285 of 29 December 2001) and amended by Article 14 of Decree Law No 269 of 30 September 2003 laying down urgent measures to promote development and to correct the state of public finances (Ordinary Supplement to GURI No 229 of 2 October 2003).

15 — With the appropriate reminder concerning conformity with the sectoral legislation and Community law.

(c) companies with share capital with wholly public ownership, on condition that the public authority or authorities holding the share capital exercise over the company control comparable to that exercised over their own departments and that the company carries out the essential part of its activities with the controlling public authority or authorities.'

19. Point (a) refers to the contractual model and point (c) to in-house provision relationships, [16] while point (b) addresses the problematical area of public-private partnerships.

## III — The facts and the questions referred for a preliminary ruling

20. On 10 July 2002, the Provincia Regionale di Ragusa and its municipal councils established, by a cooperation agreement, the 'Ambito Territoriale Ottimale' (Optimal Territorial Ambit; 'ATO') for water, the main purpose of which was to provide the management of the 'Servizio Idrico Integrato' (Integrated Water Service).

21. On 26 March 2004, the Conferenza dei Sindaci e del Presidente della Provincia Regionale di Ragusa (Conference of Mayors and of the President of the Province) [17] entrusted the management of the integrated water service to a 'semi-public company with share capital which is predominantly publicly owned', as provided for in Article 113(5)(b) of Legislative Decree No 267/2000, while, on 7 June 2005, it approved the draft deed of incorporation of the company and its articles of association, which confirmed that the company had a single corporate purpose.

22. A contract notice was published in the *Official Journal of the European Union* (OJ S 195 of 8 October 2005) in order to select an undertaking as the private minority participant to which the operation of the service and execution of the related works would be entrusted.

23. Three temporary groups of undertakings took part in the competition: Saceccav Depurazioni Sacede SpA, Acoset SpA and Aqualia SpA.

24. The contracting authority excluded Aqualia SpA and admitted the others to the tendering procedure, but after it had invited them to indicate if they were still interested, only Acoset SpA answered in the affirmative.

16 — In *ANAV*, the Court analysed whether Article 113(5) of Legislative Decree No 267/2000 is compatible with Community law but did not deal with the difficult matter of point (b), since the Tribunale Amministrativo Regionale per la Puglia had asked about the freedom which that provision appeared to grant a local authority to entrust the management of public transport to a company controlled by that local authority (point (c)) or to hold a public tendering procedure for that purpose (point (a)), as Advocate General Geelhoed pertinently explains in point 11 of his Opinion in that case.

17 — Governing body of the ATO.

25. However, on 26 February 2007, the process for cancelling the tendering procedure was commenced on the grounds that it might be contrary to Community law. After hearing the relevant submissions, the Conference of Mayors and of the President of the Province finally cancelled the procedure by act of 2 October 2007, which also adopted the consortium as management model. [18]

26. Acoset SpA brought an action contesting that administrative act and the previous acts which had given rise to it, claiming that it was entitled to be awarded the contract or to receive compensation for damage, and requesting the interim suspension of the contested acts.

27. Having summarised the dispute before it in those terms, the Tribunale Amministrativo Regionale della Sicilia asks the Court of Justice the following question:

'Is the model of a semi-public company formed specifically to provide a particular public service of industrial importance and possessing a single corporate purpose, to which that service is awarded directly, the private "industrial" and "operational" participant in the company being selected by means of a public and open procedure, after verification of the financial and technical requirements and of the operating and managerial requirements specific to the service to be performed and the specific services to be provided, consistent with Community law and in particular with the obligations of transparency and free competition referred to in Articles 43, 49 and 86 of the Treaty?'

## IV — The procedure before the Court of Justice

28. The order for reference was lodged with the Court Registry on 14 May 2008.

29. In their written observations, the Conference of Mayors and of the President of the Province and the municipal council of Vittoria contend that the tendering procedure should be ruled incompatible with Community law because, although there was a public call for tenders for selection of the private participant, the service was awarded directly to the semi-public company. The municipal councils of Comiso and Modica claim that there should be an initial ruling on the consequences of the fact that, owing to the cancellation of the tendering procedure, Acoset SpA has no legal interest in the proceedings.

30. In contrast, Acoset SpA, the Commission and the Italian, Austrian and Polish governments submit that Articles 43 EC, 49 EC and 86 EC do not preclude the award of a contract

18 — Governed by Article 31(8) of Legislative Decree No 267/2000.

in that manner, provided that the safeguards laid down in Community law are observed.

31. At the hearing on 2 April 2008, oral argument was presented by the representatives of Acoset SpA, the Italian Government and the Commission.

## V — Admissibility

### A — *A preliminary point*

32. Although no one has raised this point, I should like to dispel any uncertainty which may arise as to whether the question referred for a preliminary ruling by the Tribunale Amministrativo Regionale della Sicilia has a Community-law dimension, in order to allay any concerns that it may refer to a situation which is purely internal to a Member State because all the undertakings involved have their seats in Italy.

33. It is important to bear in mind that, in view of their significance, the services at issue might have attracted the attention of a company established in another Member State, a factor that is indicative of a Community connection (*Commission* v *Belgium* [19] and *Parking Brixen*), which is bolstered by the interpretation of the principles and provisions of the Treaty.

34. Further, as I shall explain below, although public-private partnerships (PPPs) have not been harmonised, it is appropriate to identify the homogenous provisions which apply to all public procurement contracts and to examine concessions in the light of those provisions, merely as a means of ascertaining the nature of the services and the management structure concerned in each case.

### B — *The incompleteness of the question*

35. The Austrian Government maintains that the request for an interpretation, although logical and worthy of a response, is vitiated by a lack of clarity, meaning that it cannot be of any use in the proceedings brought in Italy, because no information is provided about the specific details of the service, the content of the invitation to tender, or the scope of the prior verification of the criteria.

36. The need for an interpretation of Community law which is helpful to the referring court and which also enables those

19 — See Case C-87/94 [1996] ECR I-2043, paragraphs 33 and 54.

who participate in preliminary ruling proceedings to submit observations [20] means that it is essential that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. [21]

37. The Court has held that refusal to rule on a question referred for a preliminary ruling is justified only where it is quite obvious that the interpretation sought is unrelated to the actual facts of the main action or its purpose, or where the problem is hypothetical. [22]

38. The order for reference does at least provide some information regarding the connection between Article 113(5) of Legislative Decree No 267/2000 and the tendering procedure which was commenced under that provision, and with the Community provisions and principles at issue, from which it follows that the Court must give a ruling, [23] since none of the grounds for refusal *ad limine* are satisfied.

20 — See Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6.

21 — See Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6; orders in Case C-157/92 *Banchero* [1993] ECR I-1085, paragraph 4; Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023, paragraph 8; and Case C-2/96 *Sunino and Data* [1996] ECR I-1543, paragraph 4.

22 — See Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19.

23 — See Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38.

C — *Whether Acoset SpA has locus standi*

39. The Conference and the municipal councils of Comiso and Modica maintain that Acoset has no legal interest in the present preliminary ruling proceedings because it is simply seeking to challenge the cancellation of the procedure for selecting the private participant.

40. That is a totally spurious argument which should be rejected outright.

41. It is clear from Article 234 EC that responsibility for seeking a preliminary ruling [24] rests exclusively with the national court and not with the parties to the proceedings, although they may be heard on the matter. [25] The Court merely requires confirmation of status as a party to the proceedings before the national court, a criterion which Acoset SpA more than satisfies. [26]

24 — On the essential nature of Article 234 EC as an instrument of cooperation within the Community, see Case 16/65 *Schwarze* [1965] ECR 265 and Case 166/73 *Rheinmühlen* [1974] ECR 33.

25 — Article 23 of the Statute of the Court of Justice.

26 — In any event, it is striking that the claim that Acoset lacks *locus standi* is based on the cancellation of the tendering procedure when that was, in fact, the reason why the proceedings were commenced.

## VI — Substantive analysis of the question

### A — *Towards an autonomous definition of public-private partnership*

#### 1. National viewpoints

42. Over the last century, the financial and managerial activities of public authorities underwent a profound change. From liberal *laissez-faire* beginnings, aimed solely at maintaining public order through traditional control measures such as orders and prohibitions, their activities evolved into the provision of assistance to individuals [27] until finally arriving at the welfare state model, based on the concept of solidarity. [28]

43. The traditional embodiment of public service was left behind in the race to the finishing line since, nowadays, the degree of openness between the authorities and individuals means that their reciprocal duties cannot be sealed into airtight compartments.

44. Although the efforts of the authorities must be directed at the general interest, there are many methods of satisfying that requirement; particularly striking are methods which foster a clear measure of cooperation by enabling private parties to carry out activities of a public nature. [29]

45. As exponents of that convergence, the models based on the so-called indirect management of public services or public contracts — models which have their roots in the history of the law — occupy a unique position.

46. In that connection, where a private undertaking assumes responsibility for providing a service and, motivated by profit, places its assets at risk in order to ensure that the service is provided properly and operates well, a close link is forged with the public finances. That also occurs where an administrative authority is aware of its technical or financial limitations and decides that a contractor is best suited to executing works or providing services.

27 — Forsthoff, E., *Die verwaltung als Leistungsträger,* Kohlhammer, Stuttgart, 1938, grouped all benefits under what he called 'existential provision', and, through the introduction of the concept of *Daseinsvorsorge* to denote the vital needs of society, recreated a strong, dynamic executive, capable of meeting those needs. For a proper understanding of that theory, see Martín Retortillo, L., 'La configuración jurídica de la Administración pública y el concepto de Daseinsvorsorge', *Revista de Administración Pública,* No 38, May-August 1962, pp. 35 to 65.

28 — One of the greatest pioneers of that view, Duguit, L., *Leçons de Droit public général,* Boccard, Paris, 1926, p. 36, rejects force as an inherent characteristic of the State by assigning to it the task of promoting social solidarity.

29 — On the other hand, the State is made subject to provisions of private law when it competes in the industrial sphere on an equal footing with other operators.

47. Private capital acts as an intermediary between the body responsible for the work or service and its beneficiaries, and accordingly, subject always to variations based on type, the shared-work model is omnipresent in such structures and governs all their characteristics.

48. Moreover, aside from the contractual model and concessions, it is neither unusual nor original for an administrative authority to carry out public duties in cooperation with private parties which are not, however, part of its structure. [30]

49. Accordingly, in order to identify the public-private partnership as an autonomous category, it was necessary to create the term on the basis of all the reciprocal influences with which certain legal concepts are imbued.

50. Indications of its origins in English-speaking countries may be found in the discussions concerning New Public Management, which was a veritable breeding ground for the creation of PPPs since it paved the way for administrative authorities to use business management criteria, which require private financial contributions (Private Finance Initiative).

30 — Santamaría Pastor, J.A., in *Principios de derecho administrativo,* vol. I, 3rd ed., Colección Ceura, Centro de Estudios Ramón Areces, p. 460, describes that cooperation, arguing that, in addition to administration in the strict sense, there has always been a type of 'atypical administration'.

51. However, practices have subsequently varied; while models of partnership contracts have been introduced in some national legal systems, [31] in others they remain strictly atypical. [32]

2. A diverse Community perspective

52. Community law seeks to harmonise the laws of the Member States on public procurement contracts, although its momentum has been slowed by the emergence of the PPP 'phenomenon'. [33]

53. However, the Member States promote regulation at Community level in the light of the increasing presence of PPPs in the public

31 — For example, in France that approach is illustrated by Ordonnance No 2004/559 of 17 June 2004 and Law No 2008-735 of 28 July 2008, both of which concern *contrats de partenariat.* In Spain, Law 30/2007 of 30 October on public sector contracts (BOE No 261 of 31 October 2007, p. 44336) provides that a *colaboración público-privada* has the status of a contract.

32 — As an indication of the uncertainty surrounding their characteristics, González García, J., *Colaboración público-privada. Entre la atipicidad contractual y el contrato de colaboración entre el sector público y el sector privado,* to be published shortly, predicts the birth of a new contractual model and then concludes his discussion with the assertion that it will be a method of 'incorporating into administrative practices all the mechanisms of atypical relationships which develop in the sphere of financial relationships between individuals', praising atypical contracts for being more consistent with the need for flexibility and for injecting imagination into the provision of services.

33 — The Green Paper on public-private partnerships and Community law on public contracts and concessions of 30 April 2004 (COM(2004) 327 final) ('the Green Paper') shows that, at least at the time of publication, PPPs warranted that description in the eyes of the Commission.

sector, since their attractive qualities have not gone unnoticed.

54. In addition to acting as a safety valve in the face of budgetary restrictions, PPPs encourage private finance and the use of the knowledge of undertakings outside the public sector as a response to the setbacks inflicted on the State by liberalisation; the State's position as a direct operator has evolved into that of a regulator and it is the ultimate guarantor of conduct which affects the general interest.

55. In a field without any specific binding provisions governing such conduct, legal uncertainty is particularly rife as regards the participation of private participants in those financial counterweights and the methods of including them.

56. That gave rise to the need to lay down criteria for bringing such practices into line with the principles of the Treaty, a matter which is dealt with in the Commission Interpretative Communication [34] of 5 February 2008 on the application of Community Law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPPs). [35]

57. In my opinion, the absence of Community harmonisation [36] precludes the emancipation of PPPs as true contracts, but that does not preclude recognition of the fact that these neophyte instruments of cooperation include certain clauses which are contractual in nature or which resemble the characteristics of a concession.

58. Integrated legislation would remove a number of difficulties and would provide guidance to public authorities and private entities, since the prevailing uncertainty frequently deters them from founding PPPs (as the Communication states), [37] to the detriment of the financing of infrastructure and public services, in view of the likelihood that they would be incompatible with the system sought by the European Union.

34 — Alonso, García, R., in 'El soft law comunitario', *Revista de Administración Pública*, No 154, January-April 2001, p. 79, cites as one of the virtues of the mechanisms laid down in Article 249 EC the fact that it provides administrative authorities and private operators with a framework the predominant features of which are clarity and consistency, so that they may ensure that their conduct is compatible with Community law.

35 — C(2007)6661; 'the Communication'.

36 — However, in its opinion on first reading of 10 May 2002, the European Parliament urged the Commission to examine the possibility of adopting a proposal for a directive, COM(2000) 275. For its part, the European Economic and Social Committee took the view that a legislative initiative was necessary (Opinion of the EESC (OJ 2001 C 14, p. 91), rapporteur Mr Levaux, paragraph 4.1.3, and Opinion of the EESC (OJ 2001 C 193, p. 7), rapporteur Mr Bo Green, paragraph 3.5.)

37 — That reaction, which is natural in legal practitioners, is confirmed by Carbonnier, J., in *Sociologie juridique*, Quadrige, PUF, Paris, 1994, p. 331, who notes the different reactions of jurists and sociologists to the complexity of the law; whereas the former regard it as a misfortune, or even an illness, and long for a return to straightforwardness, the latter offer no assessments and regard it merely as an unusual feature which is yet to be analysed.

59. That vacuum tinges with relativism the attempts to classify the activities of administrative authorities in the spheres of control, development and public service, [38] in addition to which, in a globalised legal Community, each of those components reflects different viewpoints depending on the country concerned.

60. In particular, the concept of public service is imbued with diversity; [39] in some systems it is the cornerstone of their administrative legal order, [40] while, in others, the concept does not underpin the structure of the 'régime administratif' and the notion of 'publicatio' does not take centre stage. [41]

61. That, in my view, is where one of the reasons for the diversity in the field of PPPs lies, and it must be balanced against a more substantial difficulty, which is that the Community legislature has harmonised public contracts but not the complicated fields of concessions [42] and public services. Since those categories underlie many PPPs, the absence of legislation is thus no mere accident.

38 — Such as the ones shown by Presutti E., in *Principi fondamentali di scienze dell'amministrazione*, Societá Editrice, Milan, 1903.

39 — As stated in the Opinion of the Economic and Social Committee of 22 May 2003 on the Green Paper on services of general interest (COM(2003) 270 final (OJ 2004 C 76)).

40 — That is clearly the case in France, Italy and Spain, in contrast to the concepts which have flourished in the United Kingdom, Germany and Denmark, for example.

41 — While the terminology may occasionally vary, the basis and the essential nature of public service remain the same; see González-Varas Ibáñez, S., *El derecho administrativo privado*, Montecorvo, Madrid, 1996, p. 398.

42 — Even though the Commission interpretative communication on concessions under Community law (OJ 2000 C 121, p. 2) includes a separate definition of national concessions.

B — *A classification of PPPs*

62. Despite the absence of a definition of PPP, the Green Paper proposed a classification drawn from empirical evidence that two major models reflect the diversity of PPPs in the Member States, according to whether the partnership is based solely on contractual links (contractual PPPs) or whether it comes into being through an entity (institutionalised PPPs or IPPPs).

63. That twofold classification is clear in the Commission Communication, which deals only with the latter, possibly because the fact that there are multiple forms of contractual PPP, because of the considerable scope for freedom of action, makes them less resistant to systematisation. [43]

64. In the case of IPPPs, the tasks of the public participant and those of the private participant are managed by an entity with separate legal personality, under which the participants ensure the execution of work, or the provision of a service, for the benefit of the public.

43 — According to the Green Paper, the term 'covers a variety of set-ups where one or more tasks of a greater or lesser magnitude are assigned to the private partner, and which can include the design, funding, execution, renovation or exploitation of a work or service.'

65. In contrast to some contractual models where a direct relationship is created between the private participant, which provides the service in place of the authority, and the end user, in the case of IPPPs, the company, as the contractor or concession holder, has an 'official' relationship with the end user, although 'physically' it is the private partner which carries out the activities. In that regard, the assertion made at the hearing by the representative of Acoset that, in effect, the private participant provides services to the semi-public company, makes sense.

66. In addition to the advantages described, an IPPP places in the hands of the public participant a relatively high degree of control over the performance of the activities concerned, through its presence as a shareholder and a member of the decision-making bodies.

67. In short, a case-by-case analysis shows that there are two methods of forming an IPPP: the first is to create an entity *ex novo* and the second is to alter the share capital of a pre-existing company so that it passes from being a wholly publicly owned company to being partly in private ownership. Naturally, the correct interpretation of the second method requires a dominant private sector participation to be disclosed before or at the same time as the award of the contract, but not afterwards. [44]

68. In accordance with Article 113(5)(b) of Legislative Decree No 267/2000, the model used in the present case is an IPPP formed by the first method, since a semi-public company is formed, in which the private participant assumes responsibility for the integrated management of the municipal water service, [45] following a public call for tenders to select it.

69. Finally, IPPPs involve the use of a contract or a concession, establishing another distinction relating to the expression of their purpose which is conclusive when it comes to identifying the applicable provisions of Community law.

C — *The distinction between contracts and concessions*

70. In the light of the foregoing classification, it is necessary to define the terms 'contract' and 'concession' before identifying the legal regime applicable to the Ragusa IPPP.

44 — That may be inferred from paragraph 42 of the judgment in *Commission* v *Austria*, and its aim is to prevent underhand practices which are outside the scope of Community law, since contracting authorities may not 'resort to devices designed to conceal the award of public service contracts to semi-public companies'.

45 — It is most illuminating that the Green Paper acknowledges that in the Member States such structures are used 'to administer public services at local level (for example, for water supply services or waste collection services)'.

71. I share the view of the Commission that the award of a local public service, such as the integrated management of the water service, may be effected by a contract or by a concession and that the paucity of the information provided in the order for reference makes it impossible to ascertain which mechanism was chosen.

72. However, the following points must be borne in mind: first, the Tribunale Amministrativo Regionale della Sicilia refers in its question only to the provisions and principles of the Treaty and does not mention the directives on public procurement; [46] secondly, it uses the term ['concession-holding'] semi-public company; and, thirdly, the planned duration of 30 years is more in keeping with a concession. [47]

73. The distinction is important because, where performance of a public contract is entrusted to a public-private entity, Directives 2004/17 and 2004/18 lay down rules governing publicity and the methods of selecting the private partner which is to perform the contract, where its value exceeds the financial thresholds specified in those directives. However, in the case of a service concession or a public contract not covered by those directives (for example, because its value is below the threshold), the principles and freedoms laid down in the Treaty will be the only expression of such rules.

74. It is clearly important, therefore, to identify the criteria for establishing the vague dividing line between a contract and a concession, [48] a task which, in the absence of the necessary information, it ultimately falls to the national court to carry out on the basis of the criteria of 'the operating risk' and 'the payment for the provision of the service', as interpreted by the Court of Justice.

75. The present reference for a preliminary ruling throws into relief the first difficulties in the task of distinguishing a public service contract from a public service concession.

76. A public service contract involves consideration which is paid directly by the contracting authority to the service provider; however, where the remuneration comes not from the public authority concerned, but from

46 — The caution displayed by the referring court is praiseworthy indeed, since, faced with the panoply of rules and provisions capable of breathing legal life into an IPPP, it refers only to the freedoms and principles laid down in the Treaty, which are the minimum requirements applicable to contracts and concessions. In that regard, the referring court follows the advice of Bacon, F., in *Essays*, Cosimo, 2007, Chapter LVI, of Judicature, p. 137, to the effect that '[j]udges must beware of hard constructions, and strained inferences; for there is no worse torture, than the torture of laws'.

47 — Based on that fact, the Italian Republic and Acoset are quick to categorise the phenomenon as a concession. Moreover, as was made clear at the hearing, the duration depends on the amount of the investment, since the cost must be recovered.

48 — Passerieux, R. and Thouvenin, J. M., in 'Le partenariat public/privé à la croisée des chemins, entre marché et concession', *Revue du Marché commun et de l'Union européenne*, No 487, April 2005, p. 237, identify the blurring of those categories as the main source of legal uncertainty, in view of the risk that categories devised within the sphere of flexible concession arrangements ('PPP concessions') will be reclassified as 'PPP marchés'.

sums paid by third parties benefiting from the service, there is a public service concession. [49]

77. In addition, the transfer of the operating risk [50] is one of the most valuable clues for the purposes of examining that distinction, because it is an essential element of a concession [51] but does not feature in a contract. [52]

78. However, the referring court must not let its guard down because it is possible that there are more obstacles to overcome in its task of providing a definition in the case before it, in which, in addition to the management of the service, the question of the preliminary works is also material. In consequence, the referring court must examine the differences between a service contract, a works concession and a service concession. [53]

79. Article 18 of Directive 2004/17 excludes 'works and service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7, where those concessions are awarded for carrying out those activities.' It should be noted that, in contrast to Directive 2004/18, Article 17 of which excludes only service concessions, Directive 2004/17 also excludes works concessions, a factor which, in accordance with a systematic interpretation of Article 12 of Directive 2004/18, indicates that, even when works concessions relate to special sectors (such as water), they are subject only to the provisions governing traditional sectors. [54]

80. In order to dispel the confusion which may be caused by contracts covering several activities (for example, where the provision of a water service entails the execution of certain works), Directive 2004/17 lays down the objective rule that such contracts are to be subject to the rules applicable to the activity for which they are principally intended (Article 9(1)), pursuant to case-law to the effect that a contract may not be classified as a works contract where the works are incidental to services or to the supply of goods. [55]

81. Having resolved that uncertainty, it is clear that service concessions are subject to the provisions and fundamental principles of the Treaty and that works concessions are, in

49 — Case C-360/96 *BFI Holding* [1998] ECR I-6821 and Case C-458/03 *Parking Brixen* [2005] ECR I-8585.

50 — In that connection, it should be noted that the representative of Acoset categorically stated at the hearing that that risk was assumed by the private participant.

51 — See Case C-382/05 *Commission* v *Italy* [2007] ECR I-6657, paragraph 34, and Judgment of 13 November 2008 in Case C-437/07 *Commission* v *Italy*, paragraph 29.

52 — See Case C-234/03 *Contse and Others* [2005] ECR I-9315, paragraph 22.

53 — Clarity in this delicate task may be found in the views of Gimeno Feliú, J.M., in *La nueva contratación pública europea y su incidencia en la legislación española. La necesaria adopción de una nueva Ley de contratos públicos y propuestas de reforma*, Thomson Civitas, Madrid, 2006, pp. 151 to 175, which are based on a conceptual analysis of the different categories.

54 — The exclusion of concessions from the scope of the directives on public procurement was examined in the order of the Court in Case C-358/00 *Buchhändler-Vereinigung* [2002] ECR I-4685, but, in Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, the Court held that works concessions fell within the scope of the rules governing traditional sectors.

55 — See Case C-331/92 *Gestión Hotelera Internacional* [2004] ECR I-1329.

addition, subject to the provisions of Directive 2004/18, which provides that it is to apply, depending on the value of the concession.

D — *Control parameters for IPPPs*

82. The uncertainties raised by Article 113(5)(b) of Legislative Decree 267/2000 consist essentially in the need to determine whether, in addition to the call for tenders to select the private participant, another call for tenders is required for the award of the service. [56] If that uncertainty is resolved to the effect that only one call for tenders is required, it will be necessary to examine in detail the legal basis for its lawfulness in the light of freedom of establishment (Article 43 EC), freedom to provide services (Article 49 EC), and freedom of competition (Article 86 EC).

1. A single call for tenders with two objectives

83. In its Communication, the Commission states that it '… does not consider a double tendering procedure — one for selecting the private partner to the IPPP and another one for awarding public contracts or concessions to the public-private entity — to be practical...'

56 — As contended by the Conference of Mayors and of the President of the Province, and the Municipal Council of Vittoria.

84. It is not appropriate to make pragmatism, a logical aspiration of any legal system, the exclusive basis of a legal argument. Subject to that reservation, I share the view of the Commission. However, in addition, it is necessary to carry out an analysis of the conditions which the Community imposes on contracts and concessions and which, by osmosis, define the context in which IPPPs may be used.

85. The use of a double tendering procedure is not compatible with the reduction of procedural formalities which underlies IPPPs, whose foundation involves the use of the same procedure both to select the private economic participant and to award the public contract or concession to the public-private entity.

86. Strictly speaking, it is not possible for efficiency to be at odds with the principle of legality, since legality implies efficiency, which means that it is enough to argue that inefficient management is unlawful.

87. When their limits are respected, [57] IPPPs become reliable indicators of an assessment

57 — That is, the limits resulting from the right to good administration, which is laid down in Article 41, in Chapter V on citizens' rights, of the Charter of Fundamental Rights of the European Union, to which I refer, in the context of the right not to be deprived of the opportunity to be heard, in my Opinion in Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565, which the Court followed in part in its judgment.

based on the principles of rationality, stating reasons, coordination and economy, which inspire the actions of a responsible administrative authority in securing public welfare, while also distancing it from its role as a mere 'transmission belt' [58] of the law.

88. One of the keys to the problem lies in the fact that the undertaking which becomes a participant in the new entity effectively acts as a contractor or as a concession holder when it assumes responsibility for providing the service, which is evident because one of the criteria taken into account when selecting the undertaking, in addition to those relating to its administrative contribution to the management of the company, is its ability to provide the service. [59]

89. Thus, the selection of the contractor or concession holder is effected indirectly through the selection of the industrial participant, from which it follows that its activity is extremely important. Providing a precise definition of their characteristics would prevent IPPPs from being manipulated in order to avoid new tendering procedures.

90. That situation is linked to the reason for the existence of an IPPP, which in the present case is centred on the integrated water service, as confirmed by the fact that the question refers to a 'single corporate purpose'.

91. Moreover, the purpose of an IPPP must remain unchanged while it is providing the service, [60] although there is nothing to preclude adjustments in the light of developments or the acumen of the private participant, provided that the essential terms [61] of the tender are not varied. [62]

92. It appears from the information provided by the Tribunale Amministrativo Regionale della Sicilia that the procedure at issue complies with that key requirement, since the tendering rules stated that the award of the works [63] which are not to be directly carried out by the private participant must be governed by 'the public and open tendering procedures laid down by law'.

93. However, the observations of the Italian Republic (paragraph 8) point out that, in

58 — The term comes from the now classic work of Stewart, R. B., 'The reformation of American Administrative Law', *Harvard Law Review*, Vol. 88, No 8, 1975, p. 1675.

59 — In view of the fact that all the criteria concerned must be evaluated in a single procedure, the assertion of the Municipal Council of Vittoria to the effect that the tendering procedure for the selection of the private participant must not take precedence over the award of the service, because of the differences between their subject and purpose, is weakened.

60 — A conclusive factor in the present case, since a duration of 30 years was set.

61 — The Court held in paragraph 116 of the judgment in Case C-496/99 P *Commission* v *CAS Succhi di Frutta SpA* [2004] ECR I-3801 that an essential term is one which, had it been included in the notice of invitation to tender or in the tendering rules, would have made it possible for tenderers to submit a substantially different tender.

62 — Subject always to the exceptions laid down in Articles 31 and 61 of Directive 2004/18 and in Article 40(3)(f) and (g) of Directive 2004/17/EC, any variation of the essential terms of a contract which has not been provided for in the tendering rules requires a new tendering process, as the Court held in Case C-337/98 *Commission* v *France* [2000] ECR I-8377, paragraph 50.

63 — Originally the ones referred to in the Three-year Operating Plan approved by the Conference of Mayors in its meeting of 15 December 2003.

accordance with *ius variandi*, that provision of the tendering rules indicates the possibility that part of the capital held by public shareholders might be sold on the stock market.

94. From a contractual point of view, certain non-fundamental amendments may be permitted during the period of execution, although, in the interests of transparency and in order not to alter the essential nature of the performance of the contract, there must be express authorisation to that effect. [64]

95. The Italian Government pointed out in its written observations that, regardless of whether a stock market sale would alter the uniformity of the conditions, such a transfer of capital would mean that the entity would cease to exist, since its articles of association provide for 'predominantly public participation' and therefore, rather than placing the entity in an irregular situation, it would lead to its cessation. However, the Avvocato dello Stato qualified that position at the hearing, referring to 'other, alternative forms of control' which are not based on the ownership of capital. I agree with that view, provided that increased private participation does not distort the existence of predominantly public participation in the company, resulting from the public participant's ownership of the majority of the company's capital or, at least, from its indisputable influence over the strategic decisions relating to the provision of the water service. [65]

64 — See *Commission* v *CAS Succhi di Frutta SpA*.

65 — In any event, it should be borne in mind that the articles of association of the semi-public company refer to 'predominantly public participation' and, accordingly, no matter what efforts are made to ensure the continued existence of the company in the event that the public shareholding falls below 50%, one of the essential conditions for the formation of the entity would have disappeared.

2. Semi-public company and in-house provision: two conflicting situations

96. Most of the observations lodged in these preliminary ruling proceedings mention examples where performance is carried out by executive services, although those interpretations follow divergent lines of reasoning; while some refer to such examples in order to submit that they do not correspond to the planned 'Servizio Idrico Integrato', others refer to them for the purpose of drawing distinctions with IPPPs.

97. In my opinion, the tendering procedure is justified in the case of in-house services, but also in the case of certain IPPPs which respect the principle of transparency and comply with the principles of equal treatment and non-discrimination.

98. The Court has ruled that Articles 12 EC, 43 EC and 49 EC, together with the general principles expressed therein, do not apply where a concession-granting public authority exercises over a concession-holding entity a control which is similar to that which it exercises over its own departments and, at the same time, the latter carries out the essential part of its activities with the controlling authority. [66]

66 — Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50; *Parking Brixen*, paragraph 62; and Case C-324/07 *Coditel Brabant SA* [2008] ECR I-8457, paragraph 26.

99. Management by a company in which the share capital also comprises certain contributions not made by the public administration falls, by definition, outside the in-house model, since participation by a private undertaking excludes the possibility of the public authority exercising control which is similar to that which it exercises over its own departments. [67]

100. Although it must be acknowledged that fixing the percentages or ratios which would make such control possible would be an arbitrary exercise, it would nevertheless be most helpful if the Court were to clarify its position in that regard.

101. On the one hand, in some judgments, the Court has held that the fact that the contracting authority holds all of the share capital in a successful tenderer tends to indicate, without being decisive, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments. [68]

102. *A contrario sensu*, private participation excludes an in-house structure, as is clear from *Stadt Halle* and *Coname*, in which the Court also found that a minority private shareholding prevented the contracting authority from exercising such control.

103. On the other hand, that case-law is rendered unclear by the assertion of the Court, referring to *Asemfo*, that 'in certain circumstances the condition relating to the control exercised by the public authority could be satisfied where such an authority held only 0.25% of the capital in a public undertaking.' [69]

104. Since the partnership proposed by the Conference of Mayors and of the President of the Province and the municipal councils of Ragusa entailed the purchase by the private participant of 49% of the share capital of the new company, [70] that high participation does not legitimise the in-house facade of the activities because it is necessary to establish before the national court that the influence of the public shareholder is such that it is capable of overruling the wishes of the private shareholder concerning the strategic objectives of the entity. [71]

3. An exercise in legal separation

105. Having established that the hybrid company in issue is not an 'instrument', all that remains is to determine whether its coming into existence means that the absence of a public tendering procedure for provision of the water service is lawful.

67 — As may be inferred from Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 49, and Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 26.

68 — See Case C-340/04 *Carbotermo* [2006] ECR I-4137, paragraph 37, and Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 57.

69 — See *Coditel*, paragraph 53, which refers to paragraphs 56 to 61 of the judgment in *Asemfo*, from which, however, that level of participation cannot be inferred.

70 — Paragraph II. 7 of the observations of the Italian Government and paragraph 5 of the observations of Acoset.

71 — See *Parking Brixen* and *Carbotermo*.

106. Without wishing to dismantle the legal category of the institutionalised public-private partnership, I believe that it is necessary to separate its individual elements.

107. There is no reason why regional public authorities may not set up a legal person and perform the related tasks of drafting its articles of association, subscribing to its capital, and entering into partnerships with whomsoever they consider suitable.

108. Nor is there any cause for complaint in a contract notice which seeks the participation in that company of private parties who are prepared to pay the financial contribution needed to enable it to operate.

109. The complete absence of a tendering procedure for the award of services is incompatible with Articles 43 EC and 49 EC and with the principles of equal treatment and non-discrimination and contaminates the integrated water service; the antidote which may put an end to that situation lies in the criteria for selection of the private participant.

110. The tenderers must provide evidence of their personal and financial capacity to become a shareholder, but the technical skills and the economic and other advantages which their tender brings must take precedence among the criteria to be evaluated.

111. The Communication on IPPPs states: 'The fact that a private party and a contracting entity co-operate within a public-private entity cannot serve as justification for the contracting entity not having to comply with the legal provisions on public contracts and concessions when assigning public contracts or concessions to this private party or to the respective public-private entity.'

112. Accordingly, the material validity of an IPPP is subject to the requirements of fairness and prior knowledge, so that all tenderers, whether or not they have expressed an interest, have access to adequate information about the contracting authority's plan to form a public-private entity to which a public contract or a concession will be awarded.

113. For contracts, the publicity requirement is laid down in Article 41 et seq. of Directive 2004/17/EC and Articles 35, 36 and 58 of Directive 2004/18/EC; for public service concessions, the case-law has established [72] that publicity is required as a means of

72 — See Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 to 62, and *Coname*, paragraphs 16 to 19.

ensuring compliance with the principles of transparency, equal treatment and non-discrimination on grounds of nationality. [73]

114. The Court has held that Articles 43 EC and 49 EC reflect the principle of equal treatment [74] and the prohibition of discrimination on grounds of nationality. [75]

115. As concerns competition, in my Opinion in *Ing. Aigner* I urge a correction to the short-sightedness of those who relegate Community public procurement law to the role of merely coordinating procurement procedures, since, in fact, it has a more important objective, which is the development of effective competition in this sector in the interests of establishing the fundamental freedoms essential to European integration. [76]

116. Although that case-law concerns contracts, the distortion of competition must also be halted in the sphere of public service concessions [77] because they are sustained by the same principles of the Treaty, even though the range of national definitions of the concepts of 'concession', 'public services of general interest', 'special rights' and 'exclusive rights' conceals their relationship with Articles 81 EC, 82 EC and 86 EC. [78]

4. Corollary

117. An affirmative answer to the question referred for a preliminary ruling is unavoidable given the need for efficient administra-

73 — All tenderers must have equality of opportunity, irrespective of their nationality, as is clear from Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraphs 33 and 54.

74 — See Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 8.

75 — See Case 810/79 *Überschär* [1980] ECR 2747, paragraph 16.

76 — As follows from recital 2 in the preamble to Directive 2004/18 and recital 9 in the preamble to Directive 2004/17, and from, inter alia, Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 18 *in fine*; *BFI Holding*, paragraph 41; Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16; Case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraph 41; *Stadt Halle and RPL Lochau*, paragraph 44; and *Carbotermo*, paragraph 58.

77 — Muñoz Machado, S., in *Servicio público y mercado. Los fundamentos*, vol. I, Civitas, Madrid, 1998, p. 40, allays concerns by explaining that Europe does not dislike the notion of public service but is simply seeking to adapt it to a competitive environment, which entails a new challenge but not its abolition.

78 — Those aspects are summarised in Neergaard, U. in 'The concept of concession in EU public procurement law versus EU competition law and national law', *The new EU public procurement Directives*, edited by Ruth Nielsen & Steen Treumer, Djøf Publishing, 2005, pp. 149 to 181.

tion, which is an essential requirement, provided that the safeguards deriving from Community law are not disregarded.

118. The fundamental freedoms laid down in the Treaty require that transparency and the prohibition of discrimination already be ensured at the time of the public call for tenders to select the private participant in the entity, whose fate, without prejudice to certain minor amendments, remains linked to the management of the service, the semi-public company being formally entrusted with that task while the private undertaking takes operational responsibility for it.

119. The criteria for selection of the private participant must be based not only on its capital contribution but also on its experience and on the characteristics of its tender with regard to the particular services to be provided.

120. The referring court must assess whether the notice published in the *Official Journal of the European Union* is appropriate and sufficient for the purposes of safeguarding competition, freedom to provide services and freedom of establishment, as well as the interests of those whom it is liable to affect.

121. Further, in order to ensure that the private participant does not benefit from certain unfair advantages over its competitors, [79] the referring court must determine whether that participant was selected in accordance with the award procedure set out in Directives 2004/17 and 2004/18, whenever the terms and conditions of a contract for services or a works concession lie behind the IPPP façade.

122. In order to reach its decision, the referring court must establish whether the Ragusa IPPP masks a contract or a concession and whether, in the light of the foregoing considerations, it refers to works or to a public service; that will determine the compulsory legal regime, which is necessary for a lawful award procedure and full publicity.

79 — The Communication contains some reliable guidance, in that it proposes that the contract notice or contract documents should include information concerning the public contract or concession to be awarded to the future public-private entity, and its articles of association. The Communication also recommends the inclusion of information regarding the shareholder agreement, details of the contractual relationship between the contracting entity and the private participant, on the one hand, and between the contracting entity and the public-private entity, on the other, and also the options for renewing or varying the procurement contract or concession and details of the optional assignment of other tasks.

## VII — Conclusion

123. In the light of all of the foregoing considerations, I propose that, in reply to the question referred for a preliminary ruling by the Tribunale Amministrativo Regionale della Sicilia, the Court should state that:

Articles 43, 49 and 86 of the Treaty, 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 and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors do not preclude the direct award of a public service which entails the prior execution of certain works to a semi-public company formed specifically for that purpose, provided that the following conditions are satisfied:

— the company maintains that single corporate purpose throughout its existence;

— the private participant is selected through a public tendering procedure, after verification of the financial, technical, operating and managerial requirements and of the characteristics of its tender, with regard to the service to be delivered;

— the private participant assumes, as the industrial participant, responsibility for provision of the service and execution of the works; and

— the tendering procedure is consistent with the principles of free competition, transparency and equal treatment as required under Community law for concessions, and, as the case may be, with the rules on the publicity and the award of public contracts.