JUDGMENT OF THE COURT (First Chamber)

6 April 2006 *

In Case C-410/04,

REFERENCE for a preliminary ruling under Article 234 EC, by the Tribunale amministrativo regionale per la Puglia (Italy), made by decision of 22 July 2004, received at the Court on 27 September 2004, in the proceedings

Associazione Nazionale Autotrasporto Viaggiatori (ANAV)

v

Comune di Bari,

AMTAB Servizio SpA,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, J.N. Cunha Rodrigues (Rapporteur), K. Lenaerts, M. Ilešič and E. Levits, Judges,

* Language of the case: Italian.

Advocate General: L.A. Geelhoed,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 October 2005,

after considering the observations submitted on behalf of:

— the Associazione Nazionale Autotrasporto Viaggiatori (ANAV), by C. Colapinto, avvocato,

— the Comune di Bari, by R. Verna, B. Capruzzi and R. Cioffi, avvocati,

— AMTAB Servizio SpA, by G. Notarnicola and V. Caputi Jambrenghi, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Fiengo, avvocato dello Stato,

— the German Government, by C. Schulze-Bahr, acting as Agent,

— the Austrian Government, by M. Fruhmann, acting as Agent,

— the Polish Government, by T. Nowakowski, acting as Agent,

— the Commission of the European Communities, by X. Lewis and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2006,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 43 EC, 49 EC and 86 EC.

2 The request was made in the course of proceedings between, on the one hand, the Associazione Nazionale Autotrasporto Viaggiatori ('ANAV') and, on the other hand, the Comune di Bari (Municipality of Bari) and AMTAB Servizio SpA ('AMTAB Servizio') concerning the award to that latter company of the public transport service within the municipality in question.

Legal context

Community legislation

3 Article 43 EC provides:

'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.'

4 Article 46 EC specifies:

'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.'

5 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.'

6 Article 86(1) EC is worded as follows:

'In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor 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.'

National legislation

7 As regards the Italian legislation, Article 14 of Decree Law No 269 laying down urgent measures to promote development and correct the operation of public

finances of 30 September 2003 (Ordinary Supplement to GURI No 229 of 2 October 2003; 'Decree Law No 269/2003') amended Article 113 of Legislative Decree No 267 laying down the consolidated text of the laws on the organisation of local bodies of 18 August 2000 (Ordinary Supplement to GURI No 227 of 28 September 2000; 'Legislative Decree No 267/2000'). The new version of paragraph 5 of Article 113 of the latter decree provides:

'The service contract is awarded in accordance with the rules of the sector and the legislation of the European Union, with entitlement to provide the service being granted to:

(a) joint stock companies selected by means of public and open tendering procedures;

(b) companies 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;

(c) companies belonging entirely to the public sector 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'.

The main proceedings and the question referred for a preliminary ruling

8 According to the order for reference, AMTAB Servizio is a joint stock company, the share capital of which is wholly owned by the Municipality of Bari and the sole activity of which is the provision of public transport services in that municipality. That company is wholly controlled by the Municipality of Bari.

9 The same decision shows that, under its statutes, ANAV represents undertakings providing national and international passenger transport services and services associated with transport activities and in that capacity safeguards, inter alia, the efficient running of the urban and out-of-town public transport service in the interest of the companies entrusted with operating such a service.

10 By decision of 17 July 2003, the Municipality of Bari initiated a public call for tenders for the award of the service contract for public transport in that municipality.

11 Following the amendment of paragraph 5 of Article 113 of Legislative Decree No 267/2000 by Article 14 of Decree Law No 269/2003, the Municipality of Bari abandoned that tendering procedure by decision of 9 October 2003.

12 By decision of 18 December 2003, that municipality awarded the service contract in question directly to AMTAB Servizio for the period from 1 January 2004 to 31 December 2012.

13 By application notified on 1 March 2004 and lodged on 9 March 2004 before the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court for Apulia), ANAV applied to that court for annulment of that decision and any connected or consequential acts on the ground that they constituted an infringement of Community law and, in particular, of Articles 3 EC, 16 EC, 43 EC, 49 EC, 50 EC, 51 EC, 70 EC to 72 EC, 81 EC, 82 EC, 86 EC and 87 EC.

14 In the light of those arguments, the Tribunale amministrativo regionale per la Puglia decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is the part of paragraph 5 of Article 113 of Legislative Decree No 267/2000, as amended by Article 14 of Decree Law No 269/2003, that sets no limit on the freedom of a public authority to choose between the different methods of awarding a contract for the provision of a public service and, in particular, between an award as a result of a public and open tendering procedure and direct award to a company wholly controlled by the authority, compatible with Community law and, in particular, with the obligations to ensure transparency and freedom of competition pursuant to Articles [43 EC], 49 EC and 86 EC?'

On the question referred for a preliminary ruling

15 By its question, the national court is essentially asking whether Community law, in particular the obligations to ensure transparency and freedom of competition

referred to in Articles 43 EC, 49 EC and 86 EC, precludes national legislation such as that at issue in the main proceedings which sets no limit on the freedom of a public authority to choose between the various methods of awarding a contract for the provision of a public service, in particular between an award as a result of a public tendering procedure and direct award to a company of which that authority wholly owns the share capital.

16 It is apparent from the documents relating to the case in the main proceedings that the public transport service in the Municipality of Bari is remunerated, at least in part, through the purchase of tickets by those using it. That method of remuneration characterises a public service concession (Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 40).

17 It is common ground that public service concessions are excluded from the scope of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (*Parking Brixen*, paragraph 42). That directive was replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), Article 17 of which expressly provides that it is inapplicable to service concessions.

18 Notwithstanding the fact that public service concession contracts are excluded from the scope of Directive 92/50, replaced by Directive 2004/18, the public authorities concluding them are, none the less, bound to comply with the fundamental rules of the EC Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular (see, to that effect, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60; Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 16, and *Parking Brixen*, paragraph 46).

19 The provisions of the Treaty which are specifically applicable to public service concessions include, in particular, Article 43 EC and Article 49 EC (*Parking Brixen*, paragraph 47).

20 Besides the principle of non-discrimination on grounds of nationality, the principle of equal treatment of tenderers is also to be applied to public service concessions even in the absence of discrimination on grounds of nationality (*Parking Brixen*, paragraph 48).

21 The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with. That obligation of transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed (see, to that effect, *Telaustria and Telefonadress*, paragraphs 61 and 62, and *Parking Brixen*, paragraph 49).

22 Theoretically, a complete lack of any call for competition in the case of the award of a public service concession such as that at issue in the main proceedings does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency (*Parking Brixen*, paragraph 50).

23 Furthermore, it follows from Article 86(1) EC that the Member States must not maintain in force national legislation which permits the award of public service concessions without their being put out to competition since such an award infringes Article 43 EC or 49 EC or the principles of equal treatment, non-discrimination and transparency (*Parking Brixen*, paragraph 52).

24 However, in the field of public service concessions, the application of the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as the general principles of which they are the specific expression, is precluded if the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority (*Parking Brixen*, paragraph 62).

25 National legislation which reproduces literally the wording of the conditions specified in the preceding paragraph, as does Article 113(5) of Legislative Decree No 267/2000 as amended by Article 14 of Decree Law No 269/2003, theoretically complies with Community law, with the proviso that the interpretation of that legislation must also comply with the requirements of Community law.

26 It should be made clear that, since it is a matter of a derogation from the general rules of Community law, the two conditions stated in paragraph 24 of this judgment must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying the derogation to those rules lies on the person seeking to

rely on those circumstances (see Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 46, and *Parking Brixen*, paragraph 63).

27 According to the written observations submitted to the Court by AMTAB Servizio, the Municipality of Bari decided, on 27 December 2002, to transfer 80% of the shares it owned in the capital of that company and, on 21 May 2004, it decided to initiate for that purpose the call for tenders in order to select the majority private partner. That information was confirmed by ANAV at the hearing before the Court.

28 However, at the same hearing, the Municipality of Bari stated that it had altered its intention to transfer part of its shareholding in the capital of AMTAB Servizio. On 13 January 2005, it decided not to act on its previous decision and not to privatise that company. That decision was not put in evidence in the file before the national court since it was taken after the decision to refer.

29 It is a matter for that court, and not for the Court of Justice, to determine whether the Municipality of Bari intends to open the capital of AMTAB Servizio to private shareholders. However, in order to provide that court with the guidance it needs for the purpose of ruling on the proceedings before it, it is useful to provide the following clarification.

30 If, for the duration of the contract at issue in the main proceedings, the capital of AMTAB Servizio is open to private shareholders, the effect of such a situation would be the award of a public services concession to a semi-public company without any call for competition, which would interfere with the objectives pursued by Community law (see, to that effect, Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705, paragraph 48).

31 In fact, the participation, even as a minority, of a private undertaking in the capital of a company in which the concession-granting public authority is also a participant excludes in any event the possibility of that public authority exercising over such a company a control similar to that which it exercises over its own departments (see, to that effect, *Stadt Halle and RPL Lochau*, paragraph 49).

32 Therefore, in so far as the concessionaire is a company which is open, even in part, to private capital, that fact precludes it from being regarded as a structure for the 'in-house' management of a public service on behalf of the controlling local authority (see, to that effect, *Coname*, paragraph 26).

33 In the light of the foregoing considerations, the answer to the question referred must be that Articles 43 EC, 49 EC and 86 EC, and the principles of equal treatment, non-discrimination on grounds of nationality and transparency do not preclude national legislation which allows a public authority to award a contract for the provision of a public service directly to a company of which it wholly owns the share capital, provided that the public authority exercises over that company control comparable to that exercised over its own departments and that that company carries out the essential part of its activities with the controlling authority.

Costs

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

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

Articles 43 EC, 49 EC and 86 EC, and the principles of equal treatment, non-discrimination on grounds of nationality and transparency do not preclude national legislation which allows a public authority to award a contract for the provision of a public service directly to a company of which it wholly owns the share capital, provided that the public authority exercises over that company control comparable to that exercised over its own departments and that that company carries out the essential part of its activities with the controlling authority.

[Signatures]