Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

29 November 2012*

(Public service contracts — Directive 2004/18/EC — Contracting authority exercising over a legally distinct successful tenderer control similar to that exercised over its own departments — No obligation to carry out a tendering procedure in accordance with the rules of European Union law ('in-house' award) — Successful tenderer controlled jointly by several local authorities — Conditions for the applicability of an in-house award)

In Joined Cases C-182/11 and C-183/11,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decisions of 23 February 2011, received at the Court on 18 April 2011, in the proceedings

Econord SpA

v

Comune di Cagno (C-182/11),

Comune di Varese,

Comune di Solbiate (C-183/11),

Comune di Varese,

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta, acting as President of the Third Chamber, K. Lenaerts, E. Juhász (Rapporteur), T. von Danwitz and D. Šváby, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Comune di Cagno and the Comune di Solbiate, by C. Colombo, avvocatessa,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

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

* Language of the case: Italian.

— the Polish Government, by M. Szpunar, acting as Agent,

— the European Commission, by C. Zadra and P. Manzini, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 July 2012,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of the rules of European Union ('EU') law relating to the conditions for the application, by way of exception, of the direct in-house award of a public service contract.

2 The references have been made in the course of proceedings between, on the one hand, Econord SpA ('Econord') and, on the other, the Comune di Varese, the Comune di Cagno and the Comune di Solbiate (municipal councils of Varese, Cagno and Solbiate respectively) regarding the lawfulness of the direct award, by the municipal councils of Cagno and Solbiate, of a services contract to Aspem SpA ('Aspem') without organising a procedure for the award of that contract in accordance with the rules of EU law.

Legal context

EU law

3 In 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), paragraph 2 of Article 1, which is entitled 'Definitions', states:

'(a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

…

(d) "Public service contracts" are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

…'

4 Article 1(4) of that directive provides:

'"Service concession" is 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.'

5 Under Article 20 of that directive:

'Contracts which have as their object services listed in Annex IIA shall be awarded in accordance with Articles 23 to 55.'

6 In Annex IIA to that directive, 'sewage and refuse disposal services; sanitation and similar services' are listed as Category No 16.

Italian law

7 Article 30 of Legislative Decree No 267 of 18 August 2000 (Consolidated Law on the rules governing local authorities) (GURI No 227, 28 September 2000 – Ordinary supplement, No 162, 'Legislative Decree No 267/2000'), provides:

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

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

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

4. Agreements under the present Article may also provide for the setting up of joint departments, staffed by personnel on secondment from the participating authorities and tasked with carrying out public functions in place of the authorities party to the agreement, or for those functions to be delegated by the authorities party to the agreement to one such authority, which shall act in place and on behalf of the delegating authorities.'

8 Paragraph 5 of Article 113 of Legislative Decree No 267/2000, which is entitled 'Management of networks and provision of financially significant local public services', provides:

'[Local public service contracts] are to be awarded [by local authorities] in accordance with the sectoral rules and the legislation of the European Union, with entitlement to provide the service being granted to:

…

(c) companies which are wholly publicly owned, on condition that the public authority or authorities holding the share capital exercise over the company control which is similar 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 facts in the main proceedings and the question referred for a preliminary ruling

9 According to the documents placed before the Court, the Comune di Varese set up Aspem for the management of public services in the municipality – principally the urban hygiene service – as an in-house provider. At the material time, Aspem was almost wholly owned, and therefore controlled, by the Comune di Varese.

10 By decisions adopted in 2005, the Comune di Cagno and the Comune di Solbiate took a number of steps: (i) they selected, as the preferred system for managing the urban hygiene service and, in particular, the solid urban waste disposal service, the system coordinated with other municipalities in accordance with Articles 30 and 113(5)(c) of Legislative Decree No 267/2000; (ii) they approved the

conclusion of an agreement with the Comune di Varese for the award to Aspem, in return for payment, of their urban hygiene service; and (iii) they subscribed to Aspem as public sector shareholders, acquiring a holding in Aspem's share capital by purchasing one share each.

11 It emerges from the file submitted to the Court that Aspem's share capital amounts to EUR 173 785, which is represented by an equivalent number of shares, each with a nominal value of EUR 1. The Comune di Varese holds the majority of the capital, with 173 467 shares. The remaining 318 shares are divided between 36 municipal councils in the province of Varese, with individual shareholdings that vary between 1 and 19 shares.

12 In parallel with the acquisition of that shareholding, the Comune di Cagno and the Comune di Solbiate signed, along with other interested municipal councils, a shareholders' agreement that established their right to be consulted, to appoint a member of the supervisory council and to nominate, in agreement with the other municipal councils participating in the shareholders' agreement, a member of the management board.

13 In that context, the Comune di Cagno and the Comune di Solbiate took the view that the conditions for an in-house award of the public service in question had been met, given that Aspem was jointly controlled by local authorities. They therefore awarded that contract directly to Aspem. Econord challenged that direct award, arguing that, in the circumstances, the two municipal councils did not have certain control over Aspem and that, consequently, the contract had to be awarded in accordance with the rules of EU law.

14 The Consiglio di Stato (Council of State) notes that Case C-107/98 *Teckal* [1999] ECR I-8121 marked the beginning of a line of authority specifying the conditions which justify the direct award of a public service contract. According to paragraph 50 of that judgment, the direct award of a contract is justified, even with regard to a person formally and legally distinct from the contracting authority, where the local authority exercises over the person concerned control similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities. In such circumstances, the person concerned cannot be regarded as having the status of a third party in relation to the contracting authority. The Consiglio di Stato points out that, in the cases before it, of those two cumulative conditions referred to in paragraph 50 of *Teckal*, it is only the exercise of 'similar control' that is under discussion.

15 The Consiglio di Stato notes that, in Case C-485/03 *Parking Brixen* [2005] ECR I-8585, the Court laid down quite strict conditions with regard to recognition of the existence of 'similar control' and established a significant number of specific criteria in that regard.

16 However, according to the Consiglio di Stato, in Case C-295/05 *Asemfo* [2007] ECR I-2999; Case C-371/05 *Commission* v *Italy* [2008] ECR I-110; and Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, the Court demonstrated openness and relaxed the conditions to be met in order to obtain recognition of the exercise of 'similar control'. The Consiglio di Stato infers from that judgment, more specifically, that it is permissible for there to be an in-house company in circumstances where that company is controlled jointly by a number of public authorities and that the individual situation of each of those public authorities, with regard to the control exercised over that company, is not material.

17 The Consiglio di Stato observes that, in the case before it, the Comune di Varese exercises full control over Aspem, but that cannot be said of the Comune di Cagno and the Comune di Solbiate. The acquisition of a single share and a singularly weak shareholders' agreement do not give rise to any effective control over the company in question, in that those two municipal councils cannot influence Aspem's decisions and cannot satisfy the criterion of 'similar control'. However, in the light of *Coditel Brabant*, the individual controlling position of the participating public authorities, considered separately, is not material.

18 In view of those considerations, the Consiglio di Stato decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must the principle that the position of an individual public authority holding shares in a municipal company [(a company set up to provide certain municipal services)] is irrelevant also apply where one of the partner municipalities holds a single share in the municipal company and the shareholders' agreements entered into by the partner public authorities are not such as to give the shareholding municipality any effective power of control over the company, with the result that the company shareholding may be regarded merely as formal cover for a contract for the provision of services?'

Consideration of the question referred for a preliminary ruling

Preliminary observations

19 The Comune di Cagno and the Comune di Solbiate submit that, after the events which gave rise to the present references for a preliminary ruling, they initiated open tendering procedures, at the end of which the contract at issue was definitively awarded to Aspem. They argue that that subsequent development carries implications for the usefulness of a reply from the Court to the question submitted by the Consiglio di Stato.

20 The Italian Government submits that the reference for a preliminary ruling is inadmissible because it does not provide an adequate description of the legal and factual context of the main proceedings.

21 In that regard, it should be recalled that, in accordance with settled case-law, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions that it submits to the Court. Consequently, where the questions referred concern the interpretation of EU law, the Court is in principle bound to give a ruling (Case C-553/11 *Rintisch* [2012] ECR, paragraph 15 and the case-law cited).

22 Accordingly, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or to its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*Rintisch*, paragraph 16 and the case-law cited).

23 However, that is not the position in the present case. The Consiglio di Stato is asking the Court to clarify its case-law concerning the control jointly exercised by several contracting authorities over a successful tenderer jointly owned by those authorities, as well as the conditions under which it must be considered that 'similar control' is exercised in such a case, a question which is undeniably related to the subject-matter of the main proceedings. Furthermore, the Court finds that the information given in the order for reference regarding the legislative and factual background is sufficient to enable it to reply usefully to the question referred.

24 It follows that the references for a preliminary ruling are admissible.

Substance

25 According to well-established case-law, a contracting authority, such as a local authority, is exempted from initiating a procedure for the award of a public contract where it exercises over the successful tenderer control similar to that which it exercises over its own departments and the tenderer carries out the essential part of its activities with the contracting authorities to which it belongs (*Teckal*, paragraph 50). It is common ground that that case-law, initially adopted for the purposes of the interpretation and application of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), is also applicable to procedures for the award of public works contracts and public service contracts.

26 It should also be noted that, according to the Court's case-law, the question whether it is a service concession or a public service contract and, in the latter case, whether the value of the contract reaches the threshold provided for under the EU rules has no effect on the Court's answer to the question referred for a preliminary ruling, given that the exception to the application of the rules of EU law where the 'similar control' conditions are fulfilled is applicable in all those situations (see, to that effect, Case C-573/07 *Sea* [2009] ECR I-8127, paragraphs 31 to 40).

27 According to settled case-law, there is 'similar control' where the entity in question is subject to control enabling the contracting authority to influence that entity's decisions. The power exercised must be a power of decisive influence over both the strategic objectives and the significant decisions of that entity (*Parking Brixen*, paragraph 65; *Coditel Brabant*, paragraph 28; and *Sea*, paragraph 65). In other words, the contracting authority must be able to exercise a structural and functional control over that entity (*Commission* v *Italy*, paragraph 26). The Court also requires that this control should be effective (*Coditel Brabant*, paragraph 46).

28 According to the case-law, where use is made of an entity jointly owned by a number of public authorities, the 'similar control' may be exercised jointly by those authorities, without it being essential for such control to be exercised individually by each of them (see, to that effect, *Coditel Brabant*, paragraphs 47 and 50, and *Sea*, paragraph 59).

29 It follows that, if a public authority becomes a minority shareholder in a company limited by shares with wholly public capital for the purpose of awarding the management of a public service to that company, the control that the public authorities which are members of that company exercise over it may be categorised as similar to the control they exercise over their own departments when it is exercised by those authorities jointly (*Sea*, paragraph 63).

30 In those circumstances, although, where a number of public authorities make use of a common entity for the purposes of carrying out a common public service task, it is certainly not essential that each of those authorities should in itself have an individual power of control over that entity, nevertheless, if the very concept of joint control is not to be rendered meaningless, the control exercised over that entity cannot be based solely on the controlling power of the public authority with a majority holding in the capital of the entity concerned.

31 Where the position of a contracting authority within a jointly owned successful tenderer does not provide it with the slightest possibility of participating in the control of that tenderer, that would, in effect, open the way to circumvention of the application of the rules of EU law regarding public contracts or service concessions, since a purely formal affiliation to such an entity or to a joint body managing it would exempt the contracting authority from the obligation to initiate a tendering procedure in accordance with the EU rules, even though it would take no part in exercising the 'similar control' over that entity (see, to that effect, Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 24).

32 Consequently, in the cases before the referring court, it is for that court to verify whether the signing, by the Comune di Cagno and the Comune di Solbiate, of a shareholders' agreement conferring on them the right to be consulted, to appoint a member of the supervisory council and to nominate a member of the management board, in agreement with the other authorities concerned by that shareholders' agreement, can enable those municipal councils to contribute effectively to the control of Aspem.

33 In the light of the foregoing, the answer to the question referred is that where, in their capacity as contracting authority, a number of public authorities jointly establish an entity with responsibility for carrying out their public service mission, or where a public authority subscribes to such an entity, the condition established by the case-law of the Court to the effect that, in order to be exempted from their obligation to initiate a public tendering procedure in accordance with the rules of EU law, those authorities must jointly exercise over that entity control similar to the control they exercise over their own departments, is fulfilled where each of those authorities not only holds capital in that entity, but also plays a role in its managing bodies.

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 (Third Chamber) hereby rules:

Where, in their capacity as contracting authority, a number of public authorities jointly establish an entity with responsibility for carrying out their public service mission, or where a public authority subscribes to such an entity, the condition established by the case-law of the Court of Justice of the European Union to the effect that, in order to be exempted from their obligation to initiate a public tendering procedure in accordance with the rules of European Union law, those authorities must jointly exercise over that entity control similar to the control they exercise over their own departments, is fulfilled where each of those authorities not only holds capital in that entity, but also plays a role in its managing bodies.

[Signatures]