

Selected Court Cases of the European Court of Justice in the Field of Public Procurement

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The views expressed by experts in the document can under no circumstances be
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1. INTRODUCTION TO EC COURT CASES

1.1 The jurisdiction of the European Court of Justice

To enable it properly to fulfill its task, the Court has been given clearly defined jurisdiction, which it exercises on references for preliminary rulings and in various categories of proceedings.

1.2 References for preliminary rulings

The Court of Justice cooperates with all the courts of the Member States, which are the ordinary courts in matters of Community law. To ensure the effective and uniform application of Community legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of Community law, so that they may ascertain, for example, whether their national legislation complies with that law.

The Court of Justice's reply is not merely an opinion, but takes the form of a judgment or reasoned order. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given. The Court of Justice's judgment likewise binds other national courts before which the same problem is raised.

It is thus through references for preliminary rulings that any European citizen can seek clarification of the Community rules which affect him. Although such a reference can be made only by a national court, all the parties to the proceedings before that court, the Member States and the European institutions may take part in the proceedings before the Court of Justice. In that way, several important principles of Community law have been established by preliminary rulings, sometimes in reply to questions referred by national courts of first instance.

1.3 Actions for failure to fulfill obligations

These actions enable the Court of Justice to determine whether a Member State has fulfilled its obligations under Community law. Before bringing the case before the Court of Justice, the Commission conducts a preliminary procedure in which the Member State is given the opportunity to reply to the complaints against it.

The action may be brought by the Commission — as, in practice, usually is the case — or by a Member State. If the Court finds that an obligation has not been fulfilled, the State must bring the failure to an end without delay. If, after a further action is brought by the Commission, the Court of Justice finds that the Member State concerned has not complied with its judgment, it may impose on it a fixed or periodic financial penalty.

1.4 The Court of Justice of the European Communities in the Community legal order

For the purpose of European construction, the Member States concluded treaties creating first the European Communities and then a European Union, with institutions, which adopt laws in specific areas.

The Court of Justice of the European Communities is the judicial institution of the Community. It is made up of three courts: the Court of Justice, the Court of First Instance and the Civil Service Tribunal. Their main task is to examine the legality of Community measures and ensure the uniform interpretation and application of Community law.

Through its case-law, the Court of Justice has identified an obligation on administrations and national courts to apply Community law in full within their sphere of competence and to protect the rights conferred on citizens by that law (direct application of Community law), and to disapply any conflicting national provision, whether prior or subsequent to the Community provision (primacy of Community law over national law).

The Court has also recognized the principle of the liability of Member States for breach of Community law which, first, plays an important part in consolidating the protection of the rights conferred on individuals by Community provisions and, secondly, may contribute to more diligent application of Community provisions by Member States. Infringements committed by Member States are thus likely to give rise to obligations to pay compensation, which may, in some cases, have serious repercussions on their public funds. Moreover, any breach of Community law by a Member State may be brought before the Court and, where a judgment finding such an infringement is not complied with, the Court can order payment of a periodic penalty and/or a fixed sum.

The Court of Justice also works in conjunction with the national courts, which are the ordinary courts applying Community law. Any national court or tribunal, which is called upon to decide a dispute involving Community law may, and sometimes must, submit questions to the Court of Justice for a preliminary ruling. The Court must then give an interpretation or review the legality of a rule of Community law.

The development of its case-law illustrates the Court's contribution to creating a legal environment for European citizens by protecting the rights which Community legislation confers on them in various areas of their daily life.

2. PRINCIPLES OF AWARDING CONTRACTS

*C-26/62 Van Gend & Loos*¹

Principle of direct effect

In its case-law the Court has introduced the principle of the direct effect of Community law in the Member States, which enables European citizens to rely directly on Community provisions before their national courts.

The transport company Van Gend & Loos had imported goods from Germany to the Netherlands and had to pay customs duties which it considered to be incompatible with the rule in the EEC Treaty prohibiting increases in customs duties in trade between Member States. The action raised the question of the conflict between national legislation and the

¹ Case C-26/62 of 5 Februar 1963 ("Van Gend & Loos")

provisions of the EEC Treaty. The Court decided the question referred by a Netherlands court by stating the doctrine of direct effect, thus conferring on the transport company a direct guarantee of its rights under Community law before the national court.

*C-6/64 Costa v ENEL*²

Principle of the primacy of Community law

In 1964, the Costa judgment established the primacy of Community law over domestic law. In that case, an Italian court had asked the Court of Justice whether the Italian law on nationalization of the production and distribution of electrical energy was compatible with certain rules in the EEC Treaty. The Court introduced the doctrine of the primacy of Community law, basing it on the specific nature of the Community legal order, which is to be uniformly applied in all the Member States.

*C-6/90 and C-9/90 Francovich*³

Principle of the liability of a Member State

In 1991, in Francovich and Others, the Court developed another fundamental concept, the liability of a Member State to individuals for damage caused to them by an infringement of Community law by that State. Since 1991, European citizens have therefore been able to bring an action for damages against a State, which infringes a Community rule.

Two Italian citizens who were owed pay by their insolvent employers had brought actions for a declaration that the Italian State had failed to transpose Community provisions protecting employees in the event of their employers' insolvency. On a reference from an Italian court, the Court stated that the directive in question was designed to confer on individual's rights, which they had been denied as a result of the failure to act of the State which had not implemented the directive. The Court thus opened up the possibility of an action for damages against the State itself.

*C-46/93 and C-48/93 Brasserie du Pecheur*⁴

Principle that a Member State has to transpose Community law to national law

These cases followed earlier decisions of the ECJ, in which it had been held that member states had been in breach of their obligations under EU law. The question to be determined was whether a specific remedy should be available to the affected individuals. The member states argued that the EC Treaty did not create a general right to reparation for individuals who had suffered loss as a result of member states' breaches of EU law -- such a right could only be created by legislation.

² Case C-6/64 of 3 June 1964 ("Costa/ENEL")

³ Cases C-6/90 and C-9/90 of 19 November 1991 ("Francovich and Bonifaci")

⁴ Cases C-46/93 and 48/93 of 5 March 1996

*C-111/97 Evo Bus Austria*⁵*Connection between Community law and national law*

When applying national law, whether adopted before or after the directive, the national court called upon to interpret that law must do so, as far as possible,

- in the light of the wording and the purpose of the directive so as to achieve the result which it has in view.
- persons concerned may claim compensation for the damage incurred owing to the failure to transpose the directive within the time prescribed

3. THE SCOPE OF PP REGULATION*3.1 PERSONAL SCOPE***3.1.1 Definition of contracting authority - Body governed by public law***C-31/87 Beentjes*⁶

The preliminary ruling „Beentjes“ is one of the most important judgments in the field of public procurement.

The main question was, whether the EC Procurement Directive applies to the award of public works contracts by a body such as the local land consolidation committee. This committee was a body with no legal personality of its own whose functions and composition are governed by legislation and its members are appointed by the Provincial Executive of the province concerned. The State finances the public works contracts awarded by this local committee.

Concerning the question, if this committee is a contracting authority in the meaning of the Directive, the Court decided that for the purposes of this provision, the term "the State" must be interpreted in functional terms. The aim of the Directive is to ensure the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts. This aim would be jeopardized if the provisions of the Directive were to be held to be inapplicable solely because a public works contract is awarded by a body which, although it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration.

A body such as that in question here, whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members and the financing of the public works contracts which it is its task to award, must be regarded as falling within the notion of the State for the purpose of the abovementioned provision, even though it is not part of the State administration in formal terms.

⁵ Case C-111/97 of 24 September 1998 (“Evo Bus Austria”)

⁶ Case C-31/87 of 20 September 1988 (“Gebroeders Beentjes”)

The essential core of the matter is that such an organization by public law means any body which is:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
- having legal personality, and (only one of the following three elements must be there):
 - financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law,
 - or subject to management supervision by those bodies,
 - or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

Beside this the ECJ decided that the criterion of specific experience and the criteria for the award of contracts are not allowed to be mixed, even though the checking has to be at the same time. All these criteria have to be mentioned within the contract documents.

Beside this the ECJ decided that a condition of employment of long-term unemployed is permissible as far as there is no discrimination intended⁷.

*C-44/96 Mannesmann*⁸

In this case the ECJ qualified the Austrian Public Review Office (“Bundesvergabeamt”) as a court, which is allowed to ask for preliminary rulings.

The facts were as follows: The Austrian State Printers (ÖSD) purchased an other undertaking, the Strohal Printers Ltd and established the new undertaking Strohal Rotationsdruck Ltd (SRD), the ÖSD owned 99,9% of the SRD.

In order to reduce the waiting period prior to those printing works becoming operational, while SRD was still in the process of being set up, the ÖSD initiated a tendering procedure for a project relating to the technical installations. To that end, it incorporated into each of the works contracts a clause reserving the right to assign all its rights and obligations under those contracts to a third party of its choice at any time.

After the withdrawal of the tendering procedure the ÖSD initiated a new call for tender and declared the SRD to be the contractor.

In the following review procedure it had to be clarified, if the ÖSD and the SRD are contracting authorities or not. In a preliminary ruling the ECJ decided that the ÖSD is a contracting authority in the meaning of the PP-Directives because:

- The ÖSD was established for the specific purpose of meeting those needs in the general interest, not having an industrial or commercial character.
- The ÖSD is a body governed by public law, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law.

⁷ In the case C-225/98 of 26 September 2000 “Nord-Pas-de-Calais” the ECJ confirmed explicit the ruling of “Beentjes”

⁸ Case C-44/96 of 15 January 1998 (“Mannesmann”)

- The Director-General of the ÖSD is appointed by a body consisting mainly of members appointed by the Federal Chancellery or various ministries.
- Furthermore the ECJ explained that it is marginal that such an entity is free to carry out other activities in addition to that task. The fact, that meeting needs in the general interest constitutes only a relatively small proportion of the activities actually pursued by the ÖSD is also irrelevant, provided that it continues to attend to the needs which it is specifically required to meet.

Concerning SRD the ECJ decided that it has not the character of a contracting authority because:

- The above mentioned characters and conditions have to exist simultaneous.
- It is not sufficient that an undertaking was established by a contracting authority or that its activities are financed by funds derived from activities pursued by a contracting authority in order for it to be regarded as a contracting authority itself.
- If those conditions are not satisfied, an undertaking cannot be considered to be a contracting authority within the meaning of the Directive.

*C-360/96 Arnhem and Rheden/BFI Holding*⁹

- Contracting authorities – **Body governed by public law** - Needs in the general interest, not having an industrial or commercial character - Meaning - Existence of private undertakings capable of satisfying such needs - Not relevant
- **Status not dependent on the relative importance of activities designed to satisfy needs in the general interest and of the way they are carried out**
- **Needs in the general interest, not having an industrial or commercial character** - Legal form of provisions defining such needs - Not relevant

The provision stipulating that “Body governed by public law means any body ... established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character”, must be interpreted as meaning that the Community legislature drew a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character.

The term “needs in the general interest not having an industrial or commercial character” does not exclude needs which are or can be satisfied by private undertakings as well. The fact that there is competition is not sufficient to exclude the possibility that a body financed or controlled by the State, territorial authorities or other bodies governed by public law may choose to be guided by other than economic considerations.

The removal and treatment of household refuse may be regarded as constituting a need in the general interest. Since the degree of satisfaction of that need considered necessary for reasons of public health and environmental protection cannot be achieved by using disposal services wholly or partly available to private individuals from private economic operators, that activity is one of those which the State may require to be carried out by public authorities or over which it wishes to retain a decisive influence.

⁹ Case C-360/96 of 10 November 1998 (Arnhem and Rheden/ BFI Holding)

The status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character. It is likewise immaterial that commercial activities may be carried out by a separate legal person forming part of the same group or concern.

The term “contracting authority” must be interpreted in functional terms. Therefore, the existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal forms of the provisions in which those needs are mentioned being immaterial in that respect.

*C-380/98 University of Cambridge*¹⁰

- Contracting authorities – **Bodies governed by public law – Expression “financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law”** – Definition - Research awards and grants, student grants – Included – Payments made for the provision of services – Excluded – Percentage of public financing – Assessment
- Contracting authorities – Bodies governed by public law – Financed by the State – Definition – Percentage of public financing – Reference period – Determination

The lists of bodies and categories of bodies governed by public law are set out in Annex I in the former service directive. These lists shall be as exhaustive as possible and may be reviewed. Member States shall periodically notify the Commission of any changes of their lists of bodies and categories of bodies.

In UK that list used to include universities and polytechnics, maintained schools and colleges. In 1995 and 1996 some universities communicated its view to the Treasury that PP directives did not apply universally to universities so that the reference to universities should be deleted. The Treasury suggested that the reference of “universities and polytechnics, maintained schools and colleges” would be replaced by the words “maintained schools, universities and colleges financed for the most part by other contracting authorities”. Then it would be possible to restrict the circumstances in which the public procurement directives were applicable in the case of universities.

The amendment did not satisfy the University, which brought an application for judicial review. The court asked preliminary ruling for ECJ. Following questions were asked:

1. Where the directives refers to any body financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law **what monies are to be included in the expression financed ... by [one or more contracting authorities]**? In particular, in relation to payments to an entity such as the University of Cambridge, **does the expression include:**
 - (a) awards or grants paid by one or more contracting authorities for the support of research work;
 - (b) consideration paid by one or more contracting authorities for the supply of services comprising research work;

¹⁰ Case C-380/98 of 3 October 2000 (University of Cambridge)

- (c) consideration paid by one or more contracting authorities for the supply of other services, such as consultancy or the organisation of conferences;
- (d) student grants paid by local education authorities to universities in respect of tuition for named students?

2. What percentage or other meaning is to be given to the expression for “the most part” in the directives?

3. If the expression for the most part is defined in terms of a percentage figure, is the calculation limited to considering sources of finance for academic and related purposes or **should it include finance obtained in relation to commercial activities as well?**

4. **Over what period should any calculation be made** for determining whether a university is a contracting authority in respect of any particular procurement, and how are foreseeable or future changes to be taken into account?

ECJ's answers:

According to ECJ not all payments made by a contracting authority have the effect of creating or reinforcing a specific relationship of subordination or dependency. Only payments which go to finance or support the activities of the body concerned without any specific consideration therefor may be described as public financing.¹¹

In the definition of “Bodies governed by public law” provided by the EU procurement directive, the expression “financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law”, properly construed,

- includes awards or grants paid by one or more contracting authorities for the support of research work and student grants paid by local education authorities to universities in respect of tuition for named students.

Payments made by one or more contracting authorities either

- in the context of a contract for services comprising research work or
- as consideration for other services such as consultancy or the organisation of conferences

do not, by contrast, constitute public financing within the meaning of those directives.

On a proper construction, the term “for the most part”, cited above, means more than half. In order to determine correctly the percentage of public financing of a particular body, account must be taken of all of its income, including that which results from a commercial activity.

The decision as to whether a body such as a university is a contracting authority must be made annually. In addition the budgetary year in which the procurement procedure commences must be regarded as the most appropriate period for calculating the way in which that body is financed, so that the calculation must be made on the basis of the figures available at the beginning of the budgetary year, even if they are provisional. A body which constitutes a contracting authority for the purposes of the directive when a procurement procedure commences remains, as far as that procurement is concerned, subject to the requirements of the directive until such time as the relevant procedure has been completed.

¹¹ Paragraph 21 of the judgement.

*C-470/99 Universale-Bau AG*¹²

Some facts:

The EBS-Vienna (principal sewage treatment plant) issued a public invitation to tender for the award, under a restricted procedure, of a public works contract (terrassing, large-scale and specialist works) for the construction of the second biological treatment phase of the principal sewage treatment plant of Vienna.

Some words about the legal nature and objects of EBS: EBS was established in 1976 by Wiener Allgemeine Beteiligungs- und Verwaltungsgesellschaft mbH and BIA Betriebsgesellschaft für Industrieabfall- und Altölbeseitigung GmbH (a privat organisation). Each of the two shareholders subscribed for half the share capital. According to the findings of the referring review office, Wiener Allgemeine Beteiligungs- und Verwaltungsgesellschaft mbH was accountable to the City of Vienna.

The objects of EBS were initially the design, construction and management of a special waste disposal and waste incineration facility. All its operations were carried out on a commercial basis and in competition with other waste disposal businesses, such as operators of private refuse dumps. EBS alone bore the risk of profit or loss. The deed of incorporation does not warrant any finding that EBS was to meet general-interest needs of a non-industrial or non-commercial nature.

The question is whether a body which, whilst not established for the specific purpose of performing general-interest tasks, of a non-industrial and non-commercial nature, subsequently takes on and from then actually performs such a task, is to be regarded as a body governed by public law within the meaning of the PP-Directives.

In 1985 EBS entered into a lease with the City of Vienna under which it took over management of the City of Vienna's principal sewage plant with effect from 1 January 1986. Under this agreement, the City of Vienna paid a reasonable and uniform remuneration to cover the costs of management of the principal sewage plant and of existing waste disposal plants. EBS does not perform the task of sewage treatment with a view to profit. Rather, it is a public-service activity entrusted to EBS and carried out on a break-even basis. Thus, EBS' activity in this area is not managed on an industrial or commercial basis.

Concerning these facts the applicant (Universale-Bau AG) is of the view that EBS is a contracting authority for the purposes of the Directive. That issue is determined by the tasks actually performed by the body at the time of the invitation to tender and the award of the contract, rather than by the terms of its deed of incorporation.

In support of its view, Universale-Bau AG relies on existing case-law¹³, from which it appeared that this term was to be interpreted functionally. The consortium does not relate the criterion established for the specific purpose to the time of establishment, but submits that subsequent changes actually made should be taken into account.

¹² Case C-470/99 of 12 December 2002 (Universale-Bau AG)

¹³ see case C-360/96 of 10 November 1998 ("BFI Holding")

In his opinions Advocate General Alber explained, that on the basis of the foregoing considerations it must be stated that actually taking over the performance of general-interest tasks, on the basis of objectively ascertainable circumstances such as the conclusion of a contract, may be assimilated to its establishment for that specific purpose.

A legal person constitutes a contracting authority within the meaning of the Directive even if it was not established for the specific purpose of meeting needs in the general interest, but which later actually meets such needs, provided that the assumption of such tasks is founded on objectively ascertainable circumstances.

The ECJ decided:

- The concept of body governed by public law must be interpreted in functional terms.
- This does not entail that the body concerned may be entrusted only with meeting needs in the general interest, not having an industrial or commercial character.
- The Court has already held that the existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal form of the provisions in which those needs are mentioned being immaterial in that regard.
- The assumption of responsibility for needs in the general interest not having an industrial or commercial character has to be objectively established.
- A body which was not established to satisfy specific needs in the general interest not having an industrial or commercial character, but which has subsequently taken responsibility for such needs, which it has since actually satisfied, fulfils the condition required by the PP-Directives so as to be capable of being regarded as a body governed by public law within the meaning of that provision, on condition that the assumption of responsibility for the satisfaction of those needs can be established objectively.

C-373/00 Adolf Truley GmbH¹⁴

According to the order for reference, the provisions governing the business of funeral undertaker in Vienna have undergone significant amendments.

Until 1999, those services were performed by Wiener Bestattung (Vienna Funerals), a component undertaking of the Wiener Stadtwerke (Vienna Public Utilities), which were themselves an undertaking of the City of Vienna. As such, Wiener Bestattung - like Wiener Stadtwerke - lacked legal personality and formed part of the Administration of the City of Vienna. In connection with its activities, Wiener Bestattung had, on several occasions, organised calls for tenders in which Truley, which is a licensed funeral undertaker, had apparently participated successfully.

In 1998, the Municipal Council of the City of Vienna decided to separate the Wiener Stadtwerke from the municipal administration and to create a new company with its own legal personality, Wiener Stadtwerke Holding AG (WSH), which is wholly owned by the City of Vienna. That company comprises six operational subsidiaries, which include, in particular, Bestattung Wien. That company, the entire capital of which is held by WSH, has legal

¹⁴ Case C-373/00 of 27 February 2003 (“Adolf Truley GmbH”)

personality. The date on which its activity began was fixed, by order of the Magistrat of the City of Vienna, as being 12 June 1999.

Shortly after its creation, Bestattung Wien organised a tendering procedure, published both in the Amtlicher Lieferanzeiger (Official Bulletin of calls for tenders for supply contracts) and the Amstblatt der Stadt Wien (Official Journal of the City of Vienna), for the award of a public contract for the supply of coffin fittings. Truley submitted a tender during that procedure but was informed, that the contract had not been awarded to it on the ground that the price, which it had quoted was too high.

Taking the view that the tender submitted by it was the only one which complied with the specifications in the call for tenders, Truley brought proceedings for review of the contract award procedure before the review office of Vienna

In those proceedings, Bestattung Wien claimed that it was no longer subject to the rules in PP-Directive as it had its own legal personality and was completely independent of the Administration of the City of Vienna, while Truley submitted that that directive remained fully applicable by reason of the close ties which continued to bind that company to the City of Vienna. In that regard, Truley pointed out, inter alia, that all the shares in Bestattung Wien were held by WSH, which itself was wholly owned by the City of Vienna.

The following questions were referred to the Court for a preliminary ruling:

- Must the term needs in the general interest be interpreted as meaning that
 - (a) the definition of needs in the general interest must be derived from the national legal system of the Member State?
 - (b) the fact that a regional or local authority's obligation is subsidiary is in itself sufficient for the existence of a need in the general interest to be assumed?
- In interpreting the requirement meeting needs ... not having an industrial or commercial character, is (a) the existence of significant competition an imperative condition or (b) are the factual or legal circumstances the determinant factors in that respect?

The ECJ decided:

The Directive does not define the term needs in the general interest; but as a result the terms must be given an autonomous and uniform interpretation throughout the Community - it is an autonomous concept of Community law

Needs in the general interest, are generally needs which are satisfied otherwise than by the availability of goods and services in the marketplace and which the State chooses to provide itself or over which it wishes to retain a decisive influence¹⁵.

The activities of funeral undertakers may indeed be regarded as meeting a need in the general interest because these activities are linked to public policy in so far as the State has a clear interest in exercising close control over the issue of certificates such as birth and death certificates.

15 see cases C -223/99 and C-260/99 of 30 January 2001 ("Agorà and Excelsior")

Even if funeral services in the narrow sense of the term constitute only a relatively unimportant part of the services provided by a funeral undertaker, that fact is irrelevant since that undertaking continues to meet needs in the general interest. According to settled case-law, the status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character. Activities of funeral undertakers may meet a need in the general interest.

The fact that a regional or local authority is legally obliged to arrange funerals (or other activities) where they have not been arranged constitutes evidence that there is such a need in the general interest.

Furthermore it is worth to mention, that the existence of competition is not entirely irrelevant to the question whether a need in the general interest is other than industrial or commercial.

The existence of significant competition does not, of itself, permit the conclusion that there is no need in the general interest not having an industrial or commercial character.

3.1.2 In-house –situations

Instruction

In principle PP rules will be applied when a contract is concluded between contracting authority defined in the PP directives and a person legally distinct from that authority. With expression “in-house” in connection of public procurement are usually referred to situations where public purchasers obtain goods, works or services from suppliers or providers, which are more or less closely ‘inter-linked’ with them. In certain circumstances it is allowed to purchase direct from an affiliated undertaking of a contracting authority. In the PP directive there exist no separate rules concerning in-house situations.¹⁶ European Court of Justice has during the recent years given several judgements with regards the issue. With help of them some lines concerning the interpretation can be drawn.

C-107/98, Teckal¹⁷

In the famous Teckal preliminary judgment question was of a direct purchase from the consortium (AGAC) set up by several municipalities and provinces in Italy. Its tasks were to manage energy and environmental services. It has legal personality and autonomy. One of the municipalities, the council of Viano decided to grant on AGAC the management of heating service for a number of municipal buildings. Decision was not made as a result of an open competition. Private enterprise Teckal, who was able to supply same services and goods, complained of the decision. National court asked a preliminary ruling for the ECJ.

¹⁶ The Utilities Directive 2004/17/EC has modified the exemption for awards to ‘affiliated undertakings’; contracts awarded to an affiliated undertaking can be exempted. The exemption requires that, in the preceding three years, the affiliated undertaking has achieved at least 80 per cent of its average turnover with the contracting entity in providing the very services, supplies or works. Contracts awarded by a joint venture, which has been formed for the purpose of carrying out a utilities activity, to one of its parent companies or by one of these companies to such a joint venture can also be exempted. This exemption only applies, if the joint venture is to carry out the activity over a period of at least three years and the instrument setting up the joint venture stipulates that the parent companies will be part thereof for at least the same period.

¹⁷ ECJ 18.11.1999, C-107/98, Teckal

The ECJ ruled that procurement rules may not apply where the public purchaser “exercises over the person concerned a control which is 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 [...] authority”¹⁸. The extent of the participation by the contracting authority in the respective supplier or provider necessary for the ‘in-house privilege’ to apply was however unclear. Also reference to the control, which is similar to that which a contracting authority exercises over its own departments, was left unclear.

Two important criteria after that decision were:

In what situations a contracting authority can be regarded to exercise *a control similar to that which it exercises over its own departments*?

What is meant by “*essential part of its activities*”?

C-26/03 Stadt Halle

- in-house –question
- judicial protection in the event of direct procurement¹⁹

In the Stadt Halle judgment²⁰, the ECJ made it clear that “the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments”.

RPL Lochau was a company in which the majority of the capital is held indirectly by Stadt Halle and the remainder by a private company. Stadt Halle (the City of Halle) asked RPL Lochau to draw up a plan for the construction of a thermal waste disposal and recovery plant for its residual urban waste, without formally issuing a call for tenders. At the same time it decided to enter into negotiations with RPL Lochau with a view to concluding a contract for the management of that waste.

TREA Leuna, a company that was likewise interested in providing those services, contested the decision of Stadt Halle before the competent administrative authority. The Oberlandesgericht Naumburg, hearing the appeal brought by Stadt Halle, stayed the proceedings and referred a number of questions to the Court of Justice.

The Court rules that, where a contracting authority which intends to conclude a contract for pecuniary interest relating to services with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, it must always, regardless of the percentage of that holding, apply the public award procedures laid down by that directive. Otherwise, there would be interference with the objective of free and undistorted competition and with the principle of equal treatment, since an award without a call for tenders would offer a private undertaking with a capital presence in the undertaking in question an advantage over its competitors.

¹⁸ paragraph 50.

¹⁹ Handled in connection of judicial protection

²⁰ ECJ 11.5.2005, C-26/03, Stadt Halle

*C-458/03 Parking Brixen*²¹

- service concession
- in-house - question

In 2001, the Municipality of Brixen²² (Municipality) converted Stadtwerke Brixen, a municipal undertaking, into a company limited by shares, Stadtwerke Brixen AG. The company's nominal capital was 100% owned by the municipality which, however, was allowed under national legislation to remain the sole shareholder for only the following two years.

In 2002, the Municipality of Brixen concluded an agreement with Stadtwerke Brixen AG for the management, for a nine-year term, of a car park with about 200 spaces. In consideration of the management of the car park, Stadtwerke Brixen AG collects the parking charges. In addition, it provides a free bicycle hiring service and accepts that the weekly market continues to be held on the area in question. Finally, the routine and nonroutine maintenance of the area is the task of that company which takes full responsibility in that regard.

Parking Brixen GmbH, the company, which managed another car park in the Municipality, challenged the award of the management of the car park to Stadtwerke Brixen AG. In its submission, the Municipality should have issued a public call for tenders. The Municipality maintained that it completely controls Stadtwerke Brixen AG and that there was therefore no award of a contract or concession to a third party. There was no obligation to proceed by way of a public call for tenders.

In that context the competent authority of Italy referred two questions to the ECJ for a preliminary ruling. The questions concerned whether the award in question constitutes a public service contract or service concession and if the award was permitted to conclude without a public call for tenders. The EC Court points out, that the Directive relating to the coordination of procedures for the award of public service contracts does not apply to service concessions. In this case, the service provider's remuneration comes from the sums paid by third party users of the car park concerned. That method of remuneration means that the provider takes the risk of operating the services in question and is thus characteristic of a public service concession. Therefore, since it is a **public service concession**, the **directive does not apply**.

Nevertheless, the Court makes clear that a public authority is, as a rule, bound to comply with the general rules of the EC Treaty such as freedom of establishment and freedom to provide services, as well as the principles of equal treatment, nondiscrimination and transparency.

The Court referred to the Teckal-case²³ and stated that the application of those rules is excluded only if the concession-granting public authority exercises over the concessionaire a control similar to that which it exercises over its own departments and if that concessionaire carries out the essential part of its activities with the controlling authority. Such control must enable the concession-granting authority to have a decisive influence over both the concessionaire's strategic objectives and its significant decisions.

In this case, Stadtwerke Brixen AG enjoys a high degree of independence which precludes the municipality from exercising over it control similar to that which it exercises over its own

²¹ ECJ 13.10.2005, C-458/03 Parking Brixen

²² Municipality in Italy

²³ C-107/98 Teckal

departments. Indeed, the company's objects were broadened to other fields such as the carriage of persons and goods, its activities expanded to the whole of Italy and abroad, and its capital had to be opened to other shareholders. In addition, broad powers were conferred on its Administrative Board with, in practice, no management control by the municipality. Consequently, the award cannot be regarded as an 'in-house' transaction to which the rules and principles of Community law do not apply.

The Court concludes therefore that **the complete failure to put out to tender the award of a public service concession such as that in question is not compatible with Community law.**

NOTE!

It is worth to note that the advocate general had an opposite opinion. According to him first of all the principle of legal certainty requires that the obligation to conduct an award procedure must always be assessed *ex ante*, that is to say in the context of the time when the legal transaction was carried out.²⁴ When the transaction was carried out the municipality's holding in its subsidiary was 100 %. So long as there is only an obligation to open up the capital of the subsidiary subsequently, but no particular third party has yet emerged, the contracting authority still has no reason to take into account the interests of the a private investor.²⁵

About the control exercised over a subsidy the advocate general stated that only where an undertaking has been made independent to such an extent that the contracting authority is no longer able to pursue its interests in full can be said that the contracting authority can no longer exercise a control similar to that which it exercises over its own departments.²⁶

In addition concerning the second Teckal criterion²⁷ concerning the essential part of activities the advocate general stated that it is sufficient to be guided by the actual activities of the undertaking concerned.²⁸ If account were taken only of the fields of activities stated i.e. in the company's statute, it would be practically impossible to fulfill the criterion. Usually the fields of activity have been described relatively extensive in those statutes.

*C-29/04 Mödling*²⁹

On 21 May 1999 the town of Mödling (municipality in Austria) decided to create a legally independent body to carry out its obligations under the waste management legislation. On 16 June 1999, an instrument of incorporation was drawn up relating to the creation of the waste management company³⁰ (Abfall). The share capital of the company was held totally by the town of Mödling. On 25 June 1999, the municipal council decided to make the Abfall company exclusively responsible for waste management in the municipality. Later in September 1999, the town of Mödling transferred exclusive responsibility for the collection and treatment of its waste to the company, by means of a contract. The contract was concluded for an unlimited period and came into force with retrospective effect from 1 July 1999. That contract stipulated the amount of the remuneration, which the town of Mödling was to pay to the Abfall company.

²⁴ paragraph 56 of the opinion of advocate general

²⁵ paragraph 60 of the opinion of advocate general

²⁶ paragraph 72 of the opinion of advocate general. In addition good argumentation in paragraphs 63 - 76

²⁷ paragraph 50 of the C-107/98 Teckal

²⁸ paragraph 81 of the opinion

²⁹ ECJ 10.11.2005, C-29/04 Mödling

³⁰ Stadtgemeinde Mödling AbfallwirtschaftsgmbH

On 1 October 1999, the municipal council decided to transfer 49 % of the shares in the Abfall company to the company Saubermacher Dienstleistungs-Aktiengesellschaft (hereinafter 'Saubermacher'). On 6 October 1999, Abfall's instrument of incorporation was amended in order to allow the general assembly to adopt the majority of decisions by a simple majority and in order to set the quorum at 51% of the share capital. It was also decided that that company would be represented, in respect of its internal and external dealings, by two managing directors, each appointed by a partner, who would have joint authority to sign. The abovementioned share transfer in fact took place on 13 October 1999. Abfall, however, began its operational activities only on 1 December 1999, that is to say at a time at which Saubermacher already held some of the shares in that company.

From 1 December 1999 to 31 March 2000, AbfallgmbH carried out its activities exclusively on behalf of the town of Mödling. Subsequently, after a waste transfer centre was put into operation, it also provided services to third parties, mainly to other municipalities in the district.

Commission started an infringement procedure and brought an action to the ECJ. According to the Commission there should have been a call for tender for the purpose of awarding the waste disposal contract in question. Austrian government claimed that the contract involved an in-house transaction and thus didn't belong at all to the scope of the PP directives.

ECJ repeated its justification given in the case of Stadt Halle and regarded that "the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority concerned is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments".³¹

ECJ didn't approve an allegation of in-house conditions based on the situation of the actual date when the contract at issue was awarded. Then the municipality of Mödling's holding of the whole of the capital in AbfallgmbH. The court reminded that the transfer of 49% of the shares in Abfall took place 2 weeks after that company was made responsible, exclusively and for an unlimited period, for the collection and treatment of the town of Mödling's waste. Furthermore, Abfall became operational only after Saubermacher took over some of its shares.

The court considered that a public service contract was concluded by means of an artificial construction comprising several distinct stages - namely the establishment of AbfallgmbH, the conclusion of the waste disposal contract with that company and the transfer of 49% of its shares to Saubermacher.³² Accordingly, the award of that contract must be examined taking into account all those stages as well as their purpose.

*C-410/04 ANAV*³³

- service concession
- in-house

³¹ C-26/03, *Stadt Halle*, paragraph 49.

³² Paragraph 40 of the judgment

³³ ECJ 4.4.2006, C-410/04, ANAV

According to the Italian legislation concerning local bodies right to provide services could be granted “to 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”.

[In the present case the municipality of Bari had, on 17 July 2003, initiated a tendering procedure for the award of the service contract for public transport in that municipality. It however had abandoned that procedure a couple months later, to subsequently award the service contract directly to AMTAB Servizio, a company wholly owned by the Municipality. ANAV³⁴ applied for annulment of this later decision on the ground that it constituted an infringement of Community law. The national court referred for a preliminary ruling.

The EC Court, held that public service concessions are excluded from the scope of PP directives, but reiterated that the public authorities concluding those concessions must nevertheless comply with the fundamental rules of the EC Treaty, in general, and Articles 43 EC, 49 EC and 86 EC, and the principles of equal treatment, non-discrimination on grounds of nationality and transparency, in particular.

The Court however reiterated that these principles do not apply “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.”^{35]}

The Court of Justice held that national legislation of Italy 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 is compatible with Articles 43, 49 and 86 EC or the principles of equal treatment and non-discrimination. This is provided however that the public authority exercises over that company a control which is similar to that exercised over its own departments. Furthermore, the company concerned must carry out the essential part of its activities with the controlling authority.

*C-340/04 AGESP*³⁶

In this case the EC Court answered both the question concerning the control similar to that exercised over contracting authorities own departments and the question of carrying out the essential part of business with the controlling authority. A municipality awarded a direct contract to a company (AGESP) owned 100 % by a holding company (AGESP Holding) owned 99,98 % by the municipality in question.

The Court of Justice holds that *the control criterion didn't fulfilled* since the statutes of both companies confer the Board of Directors in both companies broadest possible managerial powers which they may exercise independently. Statutes didn't reserve for the municipality any control or specific voting powers for restricting the freedom of actions of the Board of Directors. In addition any influence, which the municipality might have on AGESP's decisions, was through a holding company.

³⁴ the Associazione Nazionale Autotrasporto Viaggiatori

³⁵ para. 24, see also Parking Brixen, para. 62

³⁶ ECJ 11.5.2006, C-340/04 Carbotermo SpA, Concorzia Alise v Comune di Busto Arsizio, AGESP SpA

In addition the Court stated that when determining whether the undertaking carries out the essential part of its activities with the controlling authority, account must be taken of all the activities which that undertaking carries out on the basis of an award made by the contracting authority. This is regardless of:

- who the beneficiary is – the CA itself or the user of the services
- who pays the undertaking – the controlling authority or user of the services
- the territory where the activities are carried out.

On 18 December 2003, the municipality of Busto Arsizio (Italy) awarded a contract for the supply of fuel, maintenance and management of the heating installations in municipality's buildings, directly to AGESP. The municipality regarded that there exists in-house-relation between itself and AGESP.

The municipality holds 99.98% of the share capital of AGESP Holding, which in turn holds 100% of the share capital of AGESP. Other municipalities hold the remaining 0.02%.

Two undertakings brought actions against the decisions before the competent authority of that region. The authority referred questions concerning the interpretation of the directive on public supply contracts to the Court of Justice for a preliminary ruling.

The requirement of similar control

The Court recalls that the successful tenderer must be subject to a control enabling the contracting authority to influence that company's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions of that company. The Board of Directors of AGESP and AGESP Holding have broad managerial powers, which they may exercise independently and the municipality does not have any particular control with which to restrict their freedom of action. Accordingly, the Court concludes that the municipality does not exercise over AGESP a control similar to that which it exercises over its own departments.

The requirement that the successful tenderer must carry out the essential part of its activities with the controlling authority

The requirement that the undertaking in question must carry out the essential part of its activities with the controlling authority is aimed at ensuring that the directive remains applicable whenever such an undertaking does not limit its activities to the controlling authority or authorities, but is active in the market and therefore likely to be in competition with other undertakings.

The Court holds that that requirement is fulfilled only if that undertaking's activities are devoted principally to the controlling authority or authorities and any other activities are only of marginal significance. In that regard, account must be taken of all the activities which that undertaking carries out on the basis of an award made by the authority, regardless of who pays for those activities, whether it be the authority itself or the user of the services provided. The territory where the activities are carried out is irrelevant in this context

3.1.3 Public-public-co-operation

*C-84/03 Commission v Spain*³⁷

According to the Spanish Law on contracts awarded by public authorities cooperation agreements concluded between public authorities and the other public undertakings were excluded from the scope of that law. Those agreements constitute also contracts for the purpose of PP directives. (In addition the case concerned incorrect implementation of the definition of body governed by public law. Besides the law permits the use of negotiated procedure in two cases not provided in PP directives.)³⁸

The codified law excludes from its scope ‘cooperation agreements between the State authorities, on the one hand, and the Social Security, autonomous communities, local bodies, their autonomous bodies and any other public body, on the other hand, or between these bodies’.³⁹

ECJ referred to *Teckal*-case and stated that it is sufficient, in principle, if the contract was concluded between a local authority and a person legally distinct from it. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is 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.⁴⁰ The ECJ considered that the approach adopted in *Teckal* must be applied to inter-administrative agreements covered by Directive 93/37.

Consequently ECJ regarded that so far as the law excluded, from the scope of the codified law relations between public authorities, their public bodies and non-commercial bodies governed by public law, whatever the nature of those relations, the Spanish law at issue in this case constitutes an incorrect transposition of Directives 93/36 and 93/37.

3.2. MATERIAL SCOPE

3.2.1 Definition of works contract and the Use of lots

*C-16/98 Commission v. France/ Syndicat d’électrification de la Vendée*⁴¹

- definition of works
- dividing procurement into lots

In this case Sydev, the French organisation comprising the various joint municipal groupings, sent for publication in the French bulletin (BOAMP) of notices a series of 37 notices of invitation to tender for electrification or street lighting works to be carried out over a three-year period in the département of Vendée. Those notices, published in the BOAMP concerned

³⁷ ECJ 13.1.2005, C-84/03 *Commission v Spain*

³⁸ These issues have not been handled in this connection

³⁹ Paragraph 9 of the judgment.

⁴⁰ Judgment in *Teckal*, paragraph 50.

⁴¹ ECJ 5.10.2000, C-16/98 *Syndicat d’électrification de la Vendée*; Commission has referred to this case on 2. answers October 2004 concerning question of difference between “Building” and “civil engineering” and answer 7. concerning the expression “one or more contracting authorities”

works amounting in total to FRF 609 000 000 over the three years, FRF 483 000 000 of which was for contracts for electrification and FRF 126 000 000 for contracts for street lighting. In addition the six main contract notices concerning electrification was sent for publication at Community level. In all notices Sydev was described as the body, which awarded the contract.

The description of the work to be carried out on the electricity supply networks was the same in all the cases. They were electrification work and associated generated work such as, for example, civil engineering on the telephone network, civil engineering on the cable television network, the public address system. The description of the work to be done on the lighting networks was also the same in the relevant notices: street lighting work and associated generated work such as, for example, the public address system.

The Commission regarded that the contested contracts were lots of a single work, which originated with a single contracting entity, Sydev, and that the rules of the Directive should have been applied to all of them, not merely to the six main lots. The Commission complained that the French Republic had split the work concerned both on a technical basis (separate contracts for electrification and street lighting) and a geographical basis (separate contracts for each joint municipal grouping).

The French authorities stated that the contested contracts had not been artificially split but had genuinely been concluded by each of the joint municipal electrification groupings concerned and that, therefore, the threshold for publication of a notice in the OJEC had to be applied to each of the contracts individually.

EC Court's view

In order to determine whether several lots of a single work have been artificially split⁴², must be taken into account in conjunction with Article 14(10), first subparagraph, (of former utility directive. In that connection, it is clear from the definition of work⁴³ that the existence of a work must be assessed in the light of *the economic and technical function of the result of the works concerned*.

The complaint that the work was artificially split into electrification works and street lighting works

An electricity supply network is intended, from a technical point of view, to transport the electricity produced by a supplier to individual end consumers; in terms of economics, they must pay the supplier for what they consume.

A street lighting network, on the other hand, is intended, from a technical point of view, to light public places using the electricity provided by the electricity supply network. The authority providing the street lighting assumes the cost itself, but subsequently recovers the amounts spent from the population served, without adjusting the sums demanded according to the benefit derived by the individuals concerned.

⁴² within the meaning of Article 14(3) of Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

⁴³ Article 14(10), first subparagraph, second sentence, of Directive 93/38; "*The basis for calculating the value of a works contract for the purposes of paragraph 1 shall be the total value of the work. "Work" shall mean the result of building and civil engineering activities, taken as a whole, which are intended to fulfil an economic and technical function by themselves.*"

It follows that an electricity supply network and a street lighting network have a different economic and technical function and that works on the electricity supply and street lighting networks cannot be considered to constitute lots of a single work artificially split. Difference of function is the same, whether at the level of the whole département or of the joint municipal groupings.

The complaint that the electrification work was artificially split

The Commission complains that the French authorities artificially split the work in respect of electrification works. The French Government contends that each joint municipal grouping concluded a separate contract for the network falling within its authority. It explains that the joint municipal groupings are responsible for the low voltage electricity supply networks radiating from transformer substations, which supply consumers in their territory with electricity. The fact that those transformers may themselves be linked to a network of high-voltage lines does not mean that the whole system constitutes a single network and that, therefore, all the action taken on that network must be viewed as part of a single work

The Court stated that, those networks are interconnectable and, taken as a whole, they fulfill one economic and technical function, which consists in the supply and sale to consumers in the département of Vendée of electricity produced and supplied by Électricité de France. It referred to the fact the definition of the term work does not make the existence of a work dependent on matters such as the number of contracting entities or whether the whole of the works can be carried out by a single undertaking.⁴⁴

Court also referred that for administrative or other reasons, a program of works for the execution of a work might be the subject of several procedures originating with various contracting authorities. This might be so, for example, in the case of the construction of a road crossing the territory of several local authorities, each having administrative responsibility for a section of the road. In such a case, the above objective would be thwarted if the applicability of the Directive were ruled out on the ground that the estimated value of each section of the work was below the threshold of ECU 5 000 000.⁴⁵

A Community undertaking may wish to be informed of the value of all the lots making up a work, even if it is not in a position to carry out all of them. It may only in that way assess the exact scope of the contract and adjust its prices according to the number of lots for which it proposes to tender, including, if necessary, those whose value is below the threshold of ECU 5 000 000.⁴⁶

In addition Court observed that each tender for a contract must be assessed according to its context and its particular characteristics.

In the present case, there are important factors, which militate in favour of those contracts being aggregated at that level, such as

- the fact that the invitations for tenders for the contested contracts were made at the same time,
- the similarities between the contract notices,
- a single geographical area and

⁴⁴ Paragraph 64 and 43 of the judgment

⁴⁵ paragraph 64 and 45 of the judgment

⁴⁶ paragraph 46 of the judgment

- the fact that Sydev, the body comprising the joint municipal groupings responsible for electrification within the département, initiated and coordinated the contracts.⁴⁷

The complaint that the street lighting work was artificially split

The court stated that unlike electricity supply networks, street lighting networks are, from a technical point of view, not necessarily interdependent. They can be restricted to built-up areas and no interconnection between them is necessary. Similarly, it is possible, in economic terms, for each of the local entities to assume the financial burden arising from the operation of such a network.

It follows that, even if the economic and technical function of each street lighting network is the same as that of all the others within the département, it is not possible to consider all those networks to form a whole with a single economic and technical function within the département.

*C-399/98 Ordine degli Architetti and Others (La Scala)*⁴⁸

- Definition of works contract - National legislation under which the holder of a building permit or approved developing plan may execute infrastructure works directly, by way of set-off against a contribution – National legislation permitting the public authorities to negotiate directly with an individual the terms of administrative measures concerning him - Pecuniary nature of the contract

This judgment concerned the interpretation of Directive 93/37/EEC on public works contracts. The Court ruled that the directive precludes national urban development legislation under which the holder of a building permit or approved development plan may execute infrastructure works directly, by way of total or partial set-off against the contribution payable in respect of the grant of the permit, in cases where the value of that work is the same as or exceeds the ceiling fixed by the directive.

In reaching that conclusion, the Court found that the direct execution of infrastructure works in the circumstances provided for by the Italian legislation on urban development constitutes a 'public works contract' within the meaning of the directive. The necessary conditions for concluding that there is a public contract (a contracting authority, the execution of works or of a work, the existence of a contract for pecuniary interest concluded in writing, the tenderer's status as contractor) were met here.

In paragraphs 57 to 97 of the judgment, the Court provided clarification concerning those elements of the concept of a public contract. Municipal authorities are under an obligation to comply with the procedures laid down in the directive whenever they award a contract, which is found to be a public works contract. However, the directive is still given full effect if the national legislation allows the municipal authorities to require the developer holding the building permit to carry out the work contracted for in accordance with the procedures laid down in the directive.

⁴⁷ paragraph 65 of the judgment

⁴⁸ ECJ 12.7.2001, C-399/98 *Ordine degli Architetti and others* (so called *La Scala*-case); Commission has referred to this case in connection of answer 3. with regard compensation for supply from October 2004.

3.3 PUBLIC PROCUREMENT PARTIALLY OR TOTALLY OUTSIDE THE SCOPE OF PUBLIC PROCUREMENT REGULATION

3.3.1 Service concessions

C-324/98 Telaustria

- **Scope of the EU procurement directive** - Public service concession – Excluded – Obligation of transparency of the contracting authority

Notwithstanding the fact that, as Community law stands at present, public service concessions are excluded from the scope of the EU procurement directive, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and *the principle of non-discrimination* on the ground of nationality, in particular.

Principle of non-discrimination implying, in particular, *an obligation of transparency* in order to enable the contracting authority to satisfy itself that the principle has been complied with.

That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, *a degree of advertising sufficient to enable the services market to be opened up to competition* and the impartiality of procurement procedures to be reviewed.

*C-231/03 Coname*⁴⁹

- *Concession for Management, Distribution and Maintenance of a Public Gas Distribution Installations*
- *Interpretation of Articles 43 and 49 of EC Treaty*
- *In-house -question*

The consortium Coname had concluded a contract with the municipality of Cingia de' Botti (Italy) for the award of the service covering the maintenance, operation and monitoring of the methane gas network. The award of that service was afterwards made without an invitation to a tender to Padania. Padania was a company with predominantly public share capital held by the province of Cremona and by almost all the municipalities of that province. The municipality of Cingia de' Botti holds a 0.97% share in it.

Coname contested that award, claiming that it should have been made following an invitation to tender.

The court hearing the case (Lombardy Regional Administrative Court) asked the EC Court of Justice whether Community law precludes the direct award by a municipality of a concession for the management of the public gas-distribution service to a company with predominantly public share capital in which that municipality holds a 0.97% share.

⁴⁹ ECJ 21.7.2005, C-231/03 Coname

The Court points out, that the PP directives do not govern the award of concessions and that the case must therefore be examined in the light of in particular two fundamental freedoms provided for by the EC Treaty (freedom of establishment and freedom to provide services). As the concession may also be of interest to an undertaking located in an other Member State than Italy. Therefore, the absence of transparency when awarding such a concession amounts to a difference in treatment of domestic and foreign undertakings, to the detriment of the latter. In the absence of any transparency, an undertaking located in another Member State has no real opportunity of expressing its interest in obtaining that concession.

Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in other Member States, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 and 49 of the EC Treaty.

With regard to the objective circumstances that could justify such a difference in treatment, the Court adds that the fact that the municipality of Cingia de' Botti has a 0.97% holding in the share capital of Padania does not, by itself, constitute one of those objective circumstances. Since the 0.97% holding is very small, it is not such as to enable the municipality to exercise any control over Padania.

In addition, the Court observes that it is apparent from the file that Padania is a company open to private capital, which precludes it from being regarded as a structure for the 'in-house' management of a public service on behalf of the municipalities, which form part of it.

According to ECJ transparency requirements do not necessarily mean an obligation to carry out an invitation to tender. However, such transparency requirements are, in particular, such as to enable an undertaking located in a Member State other than that of the municipality in question to have access to appropriate information regarding that concession, so that if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession.

3.3.2 Secret contracts and contracts requiring special security measures⁵⁰

The protection of basic interests of a state
C-3/88 Commission v Italy⁵¹

- public supply contract in the ITC-sector - states security interests - threat to public policy

According to legislation then force in the Italy, state could conclude contracts in certain sectors as taxation, health, agriculture and urban property only with companies of which the

⁵⁰ Public procurement directive 92/50 shall not apply to services

- which are declared secret or
- the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or
- when the protection of the basic interests of that State's security so requires.

⁵¹ ECJ 5.12.1989. C-3/88 Commission v. Italy, This case was referred by Yves Alain from commission in connection of question concerning purchase of computer software (30.10.2003)

state of Italy owns directly or indirectly over 50 % of shares. That kind of exception is possible in certain conditions according to EC Treaty.

The infringement case raised by the commission concerned design, programming and operation of *data-processing systems* for the public authorities. According to the commission legislation in Italy was against the fundamental rules of the Treaty and especially freedom of establishment and freedom to provide services⁵². In addition the commission regarded that Italian legislation infringe the provisions of supply directive⁵³ as regards the purchase of the equipment necessary for the establishment the data-processing system in question.

The Italian Government referred to confidential data in question⁵⁴ and necessity to protect it. It claimed that it is necessary for the public authorities to control the performance of the contracts in order to adapt the work to meet developments, which were unforeseeable at the time when the contracts were signed. It also claimed that for certain types of activity which the companies have to carry out, particularly in strategic sectors, which involve confidential data, the State must be able to employ an undertaking in which it can have complete confidence.

The court stated that in order to protect the confidential nature of the data the Government could have adopted measures less restrictive of freedom of establishment and freedom to provide services than those in issue, in particular by imposing a duty of secrecy on the staff of the companies concerned, breach of which might give rise to criminal proceedings.⁵⁵

With regards the infringement against the supply directive the Italian government stated that in addition to the purchase of the hardware a data-processing system comprises the creation of software, the planning, installation, maintenance and technical commissioning of the system and sometimes its operation. Those activities were interdependent and complete responsibility for the establishment of the data-processing must be given to a single company. Therefore, and bearing in mind that the hardware is an ancillary element, the directive is inapplicable. According to Article 1(a) of the directive the concept of public supply contracts covers only contracts the principal object of which is the delivery of products.⁵⁶

The court didn't accept that argument. The purchase of the equipment required for the establishment of a data-processing system can be separated from the activities involved in its design and operation. The Italian Government could have approached companies specializing in software development for the design of the data-processing systems in question and, in compliance with the directive, could have purchased hardware meeting the technical specifications laid down by such companies.⁵⁷

C-252/03 Commission v Kingdom of Belgium

Application of the public procurement regulation – secret service contract

⁵² Articles 52 and 59 of the Treaty

⁵³ Supply directive then in force 77/62/EEC

⁵⁴ Particularly in the areas of taxation, public health and fraud in agricultural matters

⁵⁵ Paragraph 11 of the judgment

⁵⁶ Paragraph 18 of the judgment

⁵⁷ Paragraph 19 of the judgment

The service procurement in question concerned surveillance of the Belgian coast by means of aerial photography. Contracting authority was Belgian waterways and maritime affairs authority. Contract was awarded consequent periods to same undertaking without publication any contract notice.

Belgium authorities managed to proof that such special security measures meant in the directives existed concerning the purchase of aerial photography. The stress was put also to the fact that in addition of Belgium's own security interests NATO's needs had to take also into account.

Court stated that directive 92/50 does not apply to the services covered by the contract in issue.

*C-79/94 Commission v Hellenic Republic*⁵⁸

By a decree of 19 July 1991, the Greek Ministry for Industry, Energy and Technology ratified the framework agreement⁵⁹, which it had signed with six Greek textile undertakings. Under that agreement, all hospitals and health-care units, as well as the Greek army, were required to purchase certain types of dressing material from the above undertakings under the conditions set out in the framework agreement. No tendering procedure was set in motion for those supplies and no notice relating to the contract in question was published in the Official Journal.

Greek Government states that the framework agreement is no more than a structure within which numerous supply contracts are awarded, the value of none of which exceeds the threshold of ECU 200 000. Government also states that the dressing material in question could have been supplied only by the six Greek producers which were parties to the framework agreement since no producer established in any other Member State has as yet expressed any interest in this type of contract. For those reasons, the Greek Government argues, that the framework agreement was concluded in accordance with the derogation provided for in Article 6(4)(c)⁶⁰ of the directive 77/62 /EEC.

The EC Court states that the framework agreement turns into a whole the various contracts, which it governs and the total value of those contracts is greater than ECU 200 000. Any other interpretation would allow contract awarders to circumvent the obligations, which the directive imposes.

With regard to the Greek Government's assertion that only the six producers party to the framework agreement could supply the products in question, even if this were proved, this circumstance would not come within the scope of the derogations provided for in Article 6(4) of the directive 77/62 /EEC and, in particular, that under heading (c).

⁵⁸ ECJ 4.5.1995, C-79/94 Com v. Hellenic Republic; Commission refers to this case as an example in connection of question 7. concerning Article 1, paragraph 2a – expression “one or more contracting authorities”; Commission answers from October 2004. In the case CA (the ministry) acted for several other contracting authorities, but that was not the target of the dispute.

⁵⁹ Framework agreement was awarded in the classical sector. There were no arguments about whether such agreements were allowed or not in time being. Framework agreements were not regulated in the directive.

⁶⁰ According to the Article 6(4)(c) of the directive 77/62 /EEC amended by directive 80/767/EEC the contracting authorities may award their supply contracts by negotiated procedure without prior publication of a tender notice among other things “ when for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the goods supplied may be manufactured or delivered only by a particular supplier”

3.3.3 Exclusive rights

*C-275/98 Unitron Scandinavia*⁶¹

- **Contract award procedures - Contracting authorities** - Where the contracting authority grants to a body other than such an authority the right to engage in a public service - Obligatory to require compliance with the principle of non-discrimination - No obligation to require compliance with tendering procedures

Article 3 of the EU procurement directive⁶² is to be interpreted as follows:

- it requires a contracting authority which grants to a body other than such a contracting authority special or exclusive rights to engage in a public service activity to require of that body, in relation to the public supply contracts which it awards to third parties in the context of that activity, that it comply with the principle of non-discrimination on grounds of nationality;
- it does not, however, require in those circumstances that the contracting authority demand that, in awarding such public supply contracts, the body in question comply with the tendering procedures laid down by the Directive.

3.3.4 Contracts below the threshold value

Case C-412/04 Commission v Italy

(Public procurement – Criteria for the application of Community rules to mixed contracts – Application of the principles of transparency and equal treatment to contracts excluded on grounds of value – Award of contracts for urban development works; of contracts for the design, supervision and inspection of works the value of which is below the Community thresholds; of contracts for the supervision and inspection of works; and of public works contracts to private promoters)

4. DEFINITION OF THE CONTRACT AND USE OF TECHNICAL SPECIFICATIONS

*Case 45/87, Commission v Ireland (Dundalk)*⁶³

Technical specifications - Free movement of goods – Invitation to tender - Technical specification requiring the materials used to comply with a national standard - Not permissible

Question was of procurement of pressure pipes for the augmentation of *Dundalk*'s drinking water supply. In technical specifications there were clause of specifications: „cement pressure pipes shall be certified as complying with Irish Standard Specification 188:1975 in accordance with the Irish Standard Mark Licensing Scheme“. Statement allowing equivalent certification

⁶¹Case C-275/98 of 18 November 1999 (Unitron Scandinavia)

⁶² Article 3 of the Directive 2004/18/EC

⁶³ Case 45/87 of 22 September 1988

was missing.

Products of a Spanish bidder had not been certified although its pipes complied with international standards (ISO 160-1980).

Irish Government alleged that the requirement of compliance with Irish standards is the usual practice. EC court of Justice referring to Art 28 EC stated that the clause had the effect of restricting the supply of the pipes needed for the *Dundalk* scheme to Irish manufacturers alone.

Member States may not allow a public body to include in the contract specifications a clause stipulating that the materials used must be certified as complying with a national technical standard, which may cause economic operators utilizing materials equivalent to those certified as complying with the relevant national standards to refrain from tendering.

*C-359/93 Commission v Netherlands (UNIX)*⁶⁴

- Contract award procedures – Tender notices - Information which must be given in tender notices - **Information concerning the opening of tenders - Technical specifications** - Use of technical specifications defined by reference to a trade mark - Condition

It was against the PP directives to fail to indicate in a tender notice

- the persons authorized to be present at the opening of tenders or
- the date, time and place of opening,

when that information is compulsorily and unconditionally required by the directive in order to enable potential suppliers to discover the identity of their competitors and to check whether they meet the criteria laid down for qualitative selection;

In addition it was against the PP directives and article 30 of the Treaty to fail in such notice *to add the words "or equivalent" after a technical specification defined by reference to a particular trade mark*, when the directive requires them to be added and when failure to do so may impede the flow of imports in intra-Community trade, contrary to the Treaty.

*T-139/99 AICS v Parliament*⁶⁵

- Invitation to tender, defining the technical specifications and contract terms

The European parliament launched an invitation to tender under the open procedure for passenger transport using vehicles with drivers. Intention was to award a framework contract. Contract was divided into two lots, but the action in the Court concerns solely the award of lot nr 1 – the hire of cars and minibuses with drivers.

In the notice there were stated among other things following:

- Criterion for awarding the contract:

⁶⁴ Judgment of 24 January 1995,

⁶⁵ Case C-139/99 of 6 July 2000 (“Alsace International Car Services”)

- “the economically most advantageous tender would be accepted, regard being had to the prices tendered and the tender's technical merit”⁶⁶.
- Specifications for the services:
 - the approximate requirements of the European Parliament were for between 25 and 60 cars and 2 to 4 minibuses on average for the daily provision of services of between 6 and 12 hours' work.
 - services was to begin at 07.30 hrs and to cease with the end of parliamentary business (between 22.00 hrs and 24.00 hrs, depending on the day). In that same paragraph it was further stated (at paragraph 5 (technical clauses)):
 - Given that peak activity is recorded between 7.30 and 9.00 and between 20.00 and 22.00, the contractor shall undertake in its tender that it will be able to deal with a request for reinforcement in case of need. The minimum duration of the service shall be two consecutive hours.
 - the Parliament also stated that the transport in question was to be effected in unmarked vehicles (At paragraph 2.1 (technical clauses)).
 - In the notice were stated also that “*The tender for and provision of the services must be in conformity with the applicable legislation*”.
 - In addition in the contract terms were provided that the contractor shall ensure that “*all national and local rules have to be strictly observed*”.

AICS submitted a tender and informed that it cannot offer services during the peak period (7-9 and 19-22) because it is technically and financially unfeasible. In addition AICS pointed out that only a limousine service could be in compliance with the legislation governing the conveyance of persons for valuable considerations. It was against the French law to use taxis to transport persons in unmarked vehicles.

Following the tenderer had been informed, that its tender had been unsuccessful.

In its application the applicant raises two pleas alleging,

- infringement of the French law applicable to the taxi business and of the description of services to be provided and
- breach of the principle of non discrimination, inasmuch as the Parliament is said to have disregarded French legislation when it issued the invitation to tender.

The court stated among other things that the French legislation concerned only taxi business. Legislation of non-urban private passenger transport services by road could not apply to taxis operating unofficially, where they provide services provided for in the invitation to tender.

However the ECJ decided:

- the contracting authorities are required to ensure that the conditions laid down in an invitation to tender do not induce potential tenderers to infringe the national legislation⁶⁷
- A contracting authority has a wide discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review should be limited to checking that there has been no serious and manifest error.

⁶⁶ Paragraph 5 of the judgement

⁶⁷ Paragraph 41 of the Judgement

5. QUALIFICATION OF CANDIDATES AND TENDERERS

5.1. Qualification criteria

C-360/89 Commission v Italy ⁶⁸

- **Principle of non-discriminatory treatment** - Principle of equal treatment - Covert discrimination - Freedom to provide services - Award of public works contracts
- **Criteria for qualitative selection** - National rules favouring local undertakings - Prohibited

Question was of Italian law concerned special provisions for accelerating the completion of public works. According to that law written invitations to tender must stipulate that the successful tenderer is to entrust a minimum proportion of between 15 and 30 % of the works to undertakings, which have their registered offices in the region in which the works are to be carried out. In addition the same Law provides that, in the selection of the undertakings preference is to be given to temporary associations and consortia made up of undertakings which carry on their main activity in the region in which the works are to be carried out.

The ECJ stated that above-mentioned treatment is in breach of its obligations under the EC Treaty and the EU procurement directive.

When a preference is to be accorded by a national legislation to temporary associations or consortia which include undertakings carrying on their main activity in the region where the works are to be carried out, such preference constitutes a criterion of selection which is not mentioned in the directive and, in particular, does not relate to any of the economic and technical standards provided for. Consequently, this national provision infringes the EU procurement Directive.

5.2 Possibilities to rely on the capacities of the other entities

C-389/92, Ballast Nedam Groep I ⁶⁹

- **Criteria for qualitative selection** - Registration of contractors - Suitability to pursue the professional activity - Relevant entity - Application by a holding company not itself carrying out the works but availing itself, for the purpose of proving its standing and competence, of references relating to its subsidiaries - Whether permissible – Conditions

Ballast Nedam Groep (BNG) was a holding company governed by Netherland's law. It didn't carried out works by itself but referred to works carried out by its subsidiaries, which were

⁶⁸ Case C-360/89 of 3 June 1992 (BFI Holding)

⁶⁹ ECJ of 14 April 1994, case C-389/92 Ballast Nedam Groep I

separate legal persons. The Minister of Public Works of Belgium decided not to renew the registration of BNG as a contractor.

It was clear from the actual wording of Directive 71/304 that public works contracts may be awarded to persons covered by that directive who carry out the work through agencies or branches. It is also clear that Directive 71/305, expressly authorizes groups of contractors to submit tenders and the awarding authority may not require such groups to assume a specific legal form before the contract is awarded.

The sole purpose of the criteria for qualitative selection laid down in the directive to which article 28 on official lists of recognized contractors refers, is to define the rules relating to the objective assessment of the standing and, in particular, technical knowledge and ability of contractors. A statement of the technicians or technical divisions which the contractor can call upon for carrying out the work, whether or not they belong to the firm, may be furnished as proof of such technical knowledge or ability.

In consequence it is clear from all those provisions that

- not only a natural or legal person who will himself carry out the works,
- but also a person
 - o who will have the contract carried out through agencies or branches or
 - o will have recourse to technicians or outside technical divisions, or
 - o even a group of undertakings, whatever its legal form,

may seek to be awarded public works contracts.

It should be noted that Directive 89/440/EEC⁷⁰ expressly stated in Article 1 that works contracts have

- as their object either the execution, or
- both the execution and design, of works or a work, or
- "the execution by whatever means of a work corresponding to the requirements specified by the contracting authority".

That definition confirms that a contractor who has neither the intention nor the resources to carry out the works himself may participate in a procedure for the award of a public works contract.

In consequence a holding company which does not itself execute works may not, because its subsidiaries which do carry out works are separate legal persons, be precluded on that ground from participation in public works contract procedures.

According to the ECJ account should be taken of companies belonging to that group, provided that the legal person in question establishes that it actually has available the resources of those companies which are necessary for carrying out the works.

*C-5/97 Ballast Nedam Groep II*⁷¹

- **Criteria for qualitative selection** - Suitability to pursue the professional activity - Economic and financial standing - Technical and/or professional ability - Registration of contractors - Relevant entity – Obligation to take into accounts the resources of

⁷⁰ in particular with the aim of defining more precisely what is meant by public works contracts

⁷¹ Case C-5/97 Ballast Nedam Groep II of 18 December 1997

companies belonging to a holding in assessing suitability of dominant legal person of this group

In this case the Belgian relevant court asked preliminary ruling concerning the interpretation of ECJ's former judgement C-389/92.

The ECJ confirmed its former ruling and stated that the EU procurement directive is to be interpreted as meaning that *the authority competent to decide on an application for registration* submitted by a dominant legal person of a group *is under an obligation*, where it is established that that person actually has available to it the resources of the companies belonging to the group that are necessary to carry out the contracts, to take into account the references of those companies in assessing the suitability of the legal person concerned, in accordance with the criteria mentioned in the directive.

*C-176/98 Holst Italia*⁷²

- **Criteria for qualitative selection** - Suitability to pursue the professional activity - Economic and financial standing - Technical and/or professional ability - Service provider relying on the standing of another company as proof of its own standing – Conditions.

Municipality of Cagliari conducted a negotiated tendering procedure for the award of a three-year contract for the management of water purification and sewage disposal plants. The invitation to tender provided that interested undertakings were to provide proof of an average annual turnover equal to or greater than ITL 5 000 million during the period from 1993 to 1995 in the field of the management of water purification and sewage disposal plants

Ruhrwasser, which had been registered as a company since only 9 July 1996, was unable to show any turnover for the period from 1993 to 1995. In order to establish its standing to take part in the tender procedure it provided documentation relating to the financial resources of another entity. The contract was awarded to *Ruhrwasser*.

Holst Italia was one of the participants in the procedure whose offer was regarded as less advantageous. It appealed of the decision and claimed that references concerning an entity other than the candidate undertaking may be relied on only if there is existence of a clear structural link connecting it with the company possessing the standing

The ECJ stated the the EU procurement directive is to be interpreted as permitting a service provider to establish that it fulfils the economic, financial and technical criteria for participation in a tendering procedure for the award of a public contract by relying on the standing of other entities, regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities which are necessary for performance of the contract.

5.3 Group of tenderers

⁷² Case C-176/98 of 2 December 1999 (Holst Italia)

*C-57/01 Makedoniko Metro*⁷³

- Contract award procedures - **Group of tenderers** – National rules prohibiting a change in the composition of the group after submission of tenders – Whether permissible

The Greek State decided to issue an international invitation to tender in respect of the planning, construction, self-financing and operation of an underground railway for Thessaloniki. Budget was of GRD 65 000 000 000. It opted for a restricted procedure.⁷⁴ Procedure comprised six stages: preselection of candidates who would be invited to tender, submission of tenders by the preselected candidates, evaluation of their technical proposals, evaluation of their economic and financial proposals, negotiations between the contracting authority and the tenderer provisionally selected and signature of the contract.⁷⁵

In the first stage (*preselection of candidates*) eight consortia, which had put themselves forward as candidates, including *Makedoniko Metro*, were authorised to submit a tender. *Makedoniko Metro*'s members were the companies Mikhaniki, Edi-Stra-Edilizia Stradale SpA, Fidel SpA and Teknocenter-Centro Servizi Administrativi Srl, which held respectively 70 %, 20 %, 5 % and 5 % interests.

In the second stage (*submission of tenders by preselected candidates*) the Greek Minister approved the tender documentation, including, in particular, the supplementary contract notice (the supplementary notice) and the specific contract documents. Supplementary notice specified among other things that

- the preselected consortia were authorised to take part in the form that they had taken during the first stage of the procedure
- the creation of groupings or other forms of cooperation between them was strictly precluded
- it was possible for a consortium to be enlarged by the addition of a new member, provided that the new member had not been included in any other consortium preselected; such enlargement was possible only until the deadline for submission of tenders.

During the second stage of the procedure, the *Makedoniko Metro* group was extended by one additional member and that was the composition of *Makedoniko Metro* when it was provisionally designated as the successful tenderer on 14 June 1994.⁷⁶

Following the formation of the negotiating committee and following the commencement of negotiations, *Makedoniko Metro* changed further the composition of its group of contractors.

Greek Minister took the view that MM had departed substantially from the requirements laid down for the contract and terminated negotiations with the consortium. Finding that *Makedoniko Metro* had substantially departed from the requirements laid down for the contract, the Minister took the view that the negotiations had failed and, by decision of 29 November 1996, terminated negotiations between the Greek State and *Makedoniko Metro*.

⁷³ Case C-57/01 of 23 January 2003 (*Makedoniko Metro*)

⁷⁴ Note! From the court's ruling it can be seen that rather negotiated procedure has been used.

⁷⁵ Paragraph 15 of the judgement. It was unclear whether the question was of ordinary works contract or works concession.

⁷⁶ Paragraph 25 of the judgement

Makedoniko Metro and Mikhaniki brought an action for annulment of the Ministers' decision. The relevant court asked for a preliminary ruling of the ECJ

- whether Directive 93/37⁷⁷ precludes national rules prohibiting a change in the composition of a group of contractors taking part in a procedure for the award of a public-works contract which occurs after submission of tenders, and
- whether and to what extent Directive 89/665 confers rights of recourse on such a group of contractors.

ECJ preliminary ruling for the first question:

The EU procurement directive does not preclude national rules, which prohibit a change in the composition of a group of contractors taking part in a procedure for the award of a public works contract or a public works concession, which occurs after submission of tenders.

Rules about the composition of such consortia are a matter for the Member States, since the only provision of the directive dealing with groups of contractors is confined, first, to stating that tenders may be submitted by such groups and, second, to preventing them from being required to assume a specific legal form before the contract has been awarded to the group selected, and contains no provision about the composition of such groups.

ECJ answer for the second question:

– Member States are required, under Article 1(3) Remedy Directive, to ensure that the review procedures are available at least to any person having an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement; consortium must be able to avail itself of the review procedures provided by the Remedy Directive

5.4 Exclusion criteria

C-21/03 and C-34/03 Fabrice SA

Conflict of interest as an exclusion criterion⁷⁸

In these joined cases disputes concerned Belgian PP legislation which

- Prohibited to apply to participate or submit a tender by *a person who has contributed to the development* of the works, supplies or services concerned; and
- It was prohibited to apply to participate in or to submit a tender by *an undertaking connected to any person referred above* if an undertaking did not prove that it had not obtained an unfair advantage capable of distorting the normal conditions of competition.

Fabrice SA, who brought the suit to the court, was a contractor who regularly submitted tenders for public contracts. It stated, among other things, that the above expressed provision is contrary to the equal treatment and to the proportionality principle. It also prevents the use of judicial remedies.

⁷⁷ former PP directive for works

⁷⁸ ECJ 3.3.2005, C-21/03 Fabrice; The Commission has referred to this case in connection of the answer to written question 2. concerning exclusion criteria listed in article 45 of the directive 2004/18/EC. Commission answers 25.1.2006

According to the EC Court legislation prohibiting a person to participate in proceedings in all circumstances was against the PP directives. Such a rule goes beyond what is necessary to attain the objective of equal treatment. However the court mentioned that a person who has carried out some preparatory works could be at an advantage when formulating his tender. Taking account different situations the principle of equal treatment does not require that a person who has contributed to the development of certain procurement shall be treated in the same way as any other tenderer.^{79 80}

In addition EC Court stated that it was against to remedies directives to prohibit an undertaking to participate in the procedure or submit a tender until the end of the procedure in spite of that the contracting authority has all the information which it needs in order to make a decision concerning possibilities to participate in the procedure.

5.5 Qualification criteria

See also case C-315/01 GAT⁸¹ in chapter 6.2. Evaluation criteria

6. EVALUATION OF TENDERS

6.1. Principle of equal treatment and late tenders

*T-40/01 Scan Office Design*⁸²

- late tenders with regard equal treatment

The Commission published an invitation to tender for the supply of hierarchical office furniture.

The applicant states that, after a information meeting on 10 July 1997, with the deadline for tenders set at 18 August 1997, he heard that the deadline had been postponed to 28 August 1997 because the specifications had been erroneously sent to Frezza Italie instead of to Frezza. However, the responses to the questions asked by the Court show that it was only by letter dated 21 August 1997 that Frezza asked for an extension of the deadline. That letter was posted on 22 August 1997 and received by the contracting authority on 25 August 1997. It follows that both the request made by Frezza for extension of the deadline for submission of tenders and the extension were made only after expiry of that deadline.

The Commission committed a fault in accepting Frezza's late tender.

The ECJ decided:

⁷⁹ See paragraphs 28 – 31 of the judgment

⁸⁰ As the Austrian and Finnish Governments claimed prohibition stated in Belgian legislation is disproportionate. Equal treatment for all tenderers is also ensured where there is a procedure whereby *an assessment is made, in each specific case*, of whether carrying out certain preparatory works has conferred on the person who carried out that work a competitive advantage over other tenderers. Such a measure is less restrictive for a person who has carried out certain preparatory work. (paragraph 32)

⁸¹ Case C-315/01 of 19 June 2003 (“GAT”)

⁸² Case T-40/01 of 28 November 2002 (“Scan Office Design”)

Both the submission of Frezza's tender as well as its request for an extension of the deadline occurred after expiry of the deadline set for the submission of tenders.

The acceptance of a late tender is standing in contradiction to the principal of equal treatment of all tenderers.

It is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

6.2 Evaluation criteria

*C-19/00 SIAC Construction*⁸³

- *must be mentioned in the contract documents and/or in the contract notice*

In this case the Irish Supreme Court referred to the Court asking for a preliminary ruling. The court is asking essentially whether an awarding authority which has chosen to award a contract to the most economically advantageous tender is allowed to award that contract to the tenderer who has submitted the tender the ultimate cost of which is likely to be the lowest according to the professional opinion of an expert.

Procurement in question concerned a public works contract to be awarded by open procedure involving the laying of sewers, storm overflows, and water supply pipes etc. Contract was a measure-and-value contract, under which the quantities estimated for each item are set out in the bill of quantities. For this type of contract, the tenderer completes the bill of quantities by filling in a rate for each item and a total price for the estimated quantity. The price payable is determined by measuring the actual quantities on completion of the work and valuing them at the rates quoted in the tender.

The contract award criteria was:

- "the contract shall be awarded to the competent contractor submitting a tender which is adjudged to be the most advantageous to the Council in respect of cost and technical merit, subject to the approval of the Minister for the Environment"

One of the lowest tenders was submitted by SIAC.

For the evaluation the contracting authority was hired a consulting engineer. By evaluating the tenders, the consulting engineer stated that the tender submitted by SIAC should not be accepted on the following grounds:

- SIAC's failure to submit a time for completion the works;
- SIAC's failure to price major items

The County Council accordingly entered into a contract with an other tenderer. SIAC complained to the court.

The ECJ decided:

It has to be provided that (in the case that the contract should be awarded to the most advantageous tender) the equal treatment of tenderers has been ensured, which presupposes

⁸³ Case C-19/00 of 18 October 2001 ("SIAC Construction")

that the transparency and objectivity of the procurement procedure have been guaranteed and in particular that the award criteria were clearly stated in the contract notice or contract documents.

Following conclusions:

- This means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.
- This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure.
- Tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority.
- According to the judgment of the Court in C-31/87 Beentjes in selecting the most economically advantageous tender contracting authorities may choose the criteria which they intend to apply, but their choice may relate only to criteria designed to identify the most economically advantageous tender.
- That judgment, which concerns public works contracts, also applies to public supply contracts in so far as there is no difference in this respect between the two types of contract.

The reliability of supplies is one of the criteria, which may be taken into account in determining the most economically advantageous tender.

When tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers. Recourse by an adjudicating authority to the opinion of an expert for the evaluation of a factual matter that will be known precisely only in the future is in principle capable of guaranteeing compliance with that condition. The professional opinion has to base in all essential points on objective factors

*Case C-324/93 Evans Medical*⁸⁴

- Reliability as contract award criteria - Limitations are justified if they are concerning health and life of humans, but not only on commercial reasons

Procedure for the award of public supply contracts concerning medicaments (diamorphine). Diamorphine, which is an opium derivative, is occasionally used as an analgesic in medical treatment. This was particularly so in the United Kingdom.

Until 1992, under the policy prevailing at that time in the United Kingdom, the Secretary of State prohibited importation of diamorphine and *allowed Macfarlan to have the exclusive right to manufacture the product*. According to the Secretary of State, this practice was justified by the need to avoid the risk of diamorphine being diverted to illicit trade and to ensure that supplies were reliably maintained in the United Kingdom.

In September 1990 the Secretary of State rejected an application by Generics for a licence to import a consignment of diamorphine from the Netherlands.

⁸⁴ Case C-324/93 of 28 March 1995 (“The Queen / Secretary of State for the Home Department, ex parte Evans Medical and Macfarlan”)

The ECJ decided:

It is the question whether a Member State is entitled to refuse a licence for importation of narcotic drugs from another Member State on the ground that importation of such drugs from another Member State threatens them viability of the sole licensed manufacturer in the first State and jeopardizes reliability of supply of diamorphine for medical purposes.

The answer to this question must therefore be that a national practice of refusing licences for importation of drugs from another Member State is

- not covered by the derogation provided for in the Treaty if it is based on the need to safeguard an undertaking's survival
- but that *derogation may apply to it if protection of the health and life of humans requires a reliable supply of drugs for essential medical purposes to be safeguarded*

It follows that reliability of supplies is one of the criteria which may be taken into account under Article 53 of the Directive 2004/18/EC in order to determine the most economically advantageous tender for a contract for the supply, to the authorities concerned, of a product such as that in question in the main proceedings.

However, in such a case reliability of supplies must be clearly indicated as a criterion for the award of a contract.

In selecting the most economically advantageous tender contracting authorities may choose the criteria which they intend to apply, but their choice may relate only to criteria designed to identify the most economically advantageous tender.

*C-315/01 GAT*⁸⁵

A number of references

- *not as a contract award criterion*
- *as a criterion for establishing tenderers suitability*

A reference list must be more detailed than only the name and numbers of previous customers

Invitation to tender for the supply of a special motor vehicle: new, ready-to-use and officially approved road sweeper for the A9 motorway in an open procedure.

The invitation to tender concerning evaluation of the tenders provided:

- The determination of which tender is technically and economically the most advantageous shall be made in accordance with the best tenderer principle.
- Other criterion: *Reference list of road sweeper vehicle customers*

ÖSAG eliminated GAT's tender on the ground that that tender did not comply with the conditions in the invitation to tender inasmuch as the pavement cleaning machine tendered could be operated only down to temperatures of 0°C, whereas the invitation to tender had required a minimum operating temperature of -5 °C.

⁸⁵ Case C-315/01 of 19 June 2003 (“GAT”)

The ECJ decided:

Furthermore, a *simple list of references*, such as that called for in the invitation to tender at issue in the main proceedings, which contains only the names and number of the suppliers' previous customers without other details relating to the deliveries effected to those customer cannot provide any information to identify the offer which is the most economically advantageous, and therefore

- *cannot in any event constitute an award criterion within the meaning of the directive.*

The contracting authority *is allowed* to take into account *the number of references* relating to the products offered by the tenderers to other customers

- *as a criterion for establishing their suitability for carrying out the contract but*
- *not as a criterion for awarding the contract.*

*T-4/01 Renco*⁸⁶

- *Experience and technical capacity as contract award criteria*
- *Not all award criteria must be of a pure economic nature*

This case concerned restricted invitation to tender for general renovation and maintenance works in the Council's buildings in Brussels. Contract award criterion was a most advantageous tender. Following criteria were regarded as especially important:

- the conformity of the tender;
- the price of the tender;
- *the experience and competence of the permanent team in providing services similar to those described in the contract documents;*
- *the experience and technical competence of the undertaking;*
- the proposal made with regard to the safety coordinator;
- the quality of any subcontractors and suppliers proposed;
- the technical quality of the equipment and materials proposed;
- the measures proposed for observing the prescribed time-limits for completion.

Following an initial examination of the applicant's, Renco SpA, tender, the Council considered that some of the prices seemed abnormally low and that others did not even cover the supply of materials and equipment. After having given the applicant possibility to clarify its prices

Applicant's tender was considered not successful.

The applicant argued that the infringements attributable to the Council arise from:

- the reference in the contract documents to vague selection criteria permitting too wide a discretion having regard to the subject-matter of the contract;
- the use of criteria which are not specified in the contract documents;
- the failure to state reasons for rejecting its tender.

The ECJ decided:

When a contract is awarded to the most economically advantageous tender,

⁸⁶ Case T-4/01 of 25 February 2002 ("Renco")

- all the criteria on which the contracting authority intends to base the award must be stated in the contract documents.
- It is up to the contracting authority to choose the criteria on which it proposes to base its award of the contract, provided that the criteria chosen are aimed at identifying the offer which is economically the most advantageous.
- In order to determine the economically most advantageous tender, the contracting authority must be able to exercise its discretion, taking a decision on the basis of qualitative and quantitative criteria that vary according to the contract in question
- But this does not mean that each of the award criteria must necessarily be of a purely economic nature, because it cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority
- award criteria have not necessarily to be either quantitative or related solely to the prices. Various factors which are not purely quantitative may affect the execution of work and, as a result, the economic value of a tender. Such as:
 - the experience and technical competence of a tenderer and its team,
 - the familiarity with the kind of work covered by the contract in question
- the quality of the subcontractors proposed are all qualitative factors which, if they do not reach the level required by the contract, may cause delays in the execution of the work or make additional work necessary.

6.3 Possibilities to take into account environmental aspects

In the field of "green" public procurement⁸⁷, the Court of Justice has ruled⁸⁸ two important decisions:

*C-513/99 Concordia Bus*⁸⁹

Environmental issue as contract award criteria

Requirement that award criteria must have linked to the subject matter of the contract

Procurement concerned purchasing of bus network of the City of Helsinki. Question was of which extent environmental requirements, specifically low nitrogen oxide emissions and low noise levels, can be taken into consideration at the award stage. The award criteria in this case were possibility to give additional points for 'greener' (in this case lower) emissions and noise levels.

The court considered that award criteria relating to the level of nitrogen oxide emission and the noise level of the buses, did meet the requirement of being linked to the subject matter of the contract. *Also factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority*'. Court also referred to the provisions of

⁸⁷ <http://ec.europa.eu/environment/gpp/index.htm>, (11.6.2006)

⁸⁸ before 11.11.2006

⁸⁹ Case C-513/99 of 17 September 2002 ("Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne")

the Treaty concerning the free movement of services and goods and Article 6 of the EC Treaty. Article 6 of the Treaty lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities

The Court put **four conditions** to the use of such award criteria :

- they should be linked to the subject matter of the contract;
- they should not confer 'unrestricted freedom of choice on the contracting authority',
 - o in this case the award criteria (in relation to emission and noise levels) did not confer an unrestricted freedom of choice on the contracting authority, since they were specific and objectively quantifiable environmental requirements.
- they should be expressly mentioned in the contract documents or in the tender notice; and
- they have to comply with the general EC Treaty principles.

In addition the Court ruled that **the fact that only a small number of undertakings, including the contracting authority's own, could satisfy the award criteria was not in itself a breach of the principle of equal treatment.**

C-448/01 Wienstrom⁹⁰

Supply of energy; award criteria; weighting; absence of the link to the subject

In this case court gave some further information on how the link to the subject matter of the contract should be interpreted. In fact in this case the link

The tender documents specified that bidders should supply electricity stemming from renewable energy sources. *The award criterion and their weighing were:* 1) the price (55 %) and 2) the amount of electricity stemming from renewable energy sources which the bidder would be able to supply - in general - on top of the above mentioned estimated annual consumption of the federal services (22,5 Gwh).

Conclusions: this case confirms that:

- it is acceptable to make use of an ecological award criterion, even if it doesn't provide an immediate economic benefit for the contracting authority;
- it is furthermore possible to give an important weighing to such criteria;
- it is clearly admissible to establish an award criterion which is related to the production method of the purchased product, *if relevant for the product*;
- in order for the criterion to be acceptable, it should be expressly linked to the object of the purchase contract and should be susceptible of control, which would imply that the contracting authority requires - through the production of certificates for example - elements enabling him to control the information forwarded by the bidders in relation to the award criteria. ⁹¹

⁹⁰ Case C-448/01 of 4 December 2003 (EVN AG, Wienstrom G mbH v Republik Österreich, Stadtwerke Klagenfurt AG).

⁹¹ Analysis of the case can be read from the Commission Staff Working Document: Buying Green! (18.8.2004; SEC (2004) 1050)

7. JUDICIAL PROTECTION

C-26/03 Stadt Halle

Judicial protection in the event of direct procurement; (in-house –question⁹²)

RPL Lochau was a company in which the majority of the capital is held indirectly by Stadt Halle (municipality in Germany) and the remainder by a private company. The City of Halle asked RPL Lochau to draw up a plan for the construction of a thermal waste disposal and recovery plant for its residual urban waste, without formally issuing a call for tenders. At the same time it decided to enter into negotiations with RPL Lochau with a view to concluding a contract for the management of that waste.

TREA Leuna, a company that was likewise interested in providing those services, contested the decision of the City of Halle before the competent administrative authority. The Oberlandesgericht Naumburg, hearing the appeal brought by Stadt Halle, stayed the proceedings and referred a number of questions to the Court of Justice. Important issue was whether so called in-house-conditions fulfilled.

The Court of Justice rules that the judicial protection provided for by the relevant provisions of Community law, namely the obligation of the Member States to ensure that effective and rapid remedies are available, extends also to decisions taken by contracting authorities outside a formal award procedure and decisions prior to a formal invitation to tender. That is the case in particular for their decisions on whether or not to initiate a public award procedure.

⁹² Handled in the context of in-house