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COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES
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HOF VAN JUSTITIE VAN DE EUROPESE GEMEENSCHAPPEN
TRYBUNAŁ SPRAWIEDLIWOŚCI WSPÓLNOT EUROPEJSKICH
TRIBUNAL DE JUSTIÇA DAS COMUNIDADES EUROPEIAS
CURTEA DE JUSTIȚIE A COMUNITĂȚILOR EUROPENE
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EUROOPAN YHTEISÖJEN TUOMIOISTUIN
EUROPEISKA GEMENSKAPERNAS DOMSTOL
CVRIA
LUXEMBOURG

JUDGMENT OF THE COURT (Third Chamber)

15 October 2009 *

(Articles 43 EC, 49 EC and 86 EC – Award of public contracts – Award of water service to a semi-private company – Competitive procedure – Appointment of the private partner responsible for operating the service – Award made without regard to the rules governing the award of public contracts)

In Case C-196/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale della Sicilia (Italy), made by decision of 13 March 2008, received at the Court on 14 May 2008, in the proceedings

Acoset SpA

v

Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa,

Provincia Regionale di Ragusa,

Comune di Acate (RG),

Comune di Chiaramonte Gulfi (RG),

Comune di Comiso (RG),

Comune di Giarratana (RG),

Comune di Ispica (RG),

Comune di Modica (RG),

Comune di Monterosso Almo (RG),

* Language of the case: Italian.

Comune di Pozzallo (RG),

Comune di Ragusa,

Comune di Santa Croce Camerina (RG),

Comune di Scicli (RG),

Comune di Vittoria (RG),

intervening parties:

Saceccav Depurazioni Sacede SpA,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Second Chamber, acting as President of the Third Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 April 2009,

after considering the observations submitted on behalf of:

– Acoset SpA, by A. Scuderi and G. Bonaventura, avvocati,

– Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and others, by N. Gentile, avvocato,

– Comune di Vittoria (RG), by A. Bruno and C. Giurdanella, avvocati,

– the Italian Government, by R. Adam, acting as Agent, and G. Fiengo, avvocato dello Stato,

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

– the Polish Government, by M. Dowgielewicz, acting as Agent,

– the Commission of the European Communities, by C. Zadra and D. Kukovec, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 June 2009,

gives the following

Judgment

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

2 The reference was made in proceedings between Acoset SpA ('Acoset') and the Conferenza Sindaci e Presidenza Prov. Reg. Ragusa (Conference of Mayors and of the President of the Regional Province of Ragusa, 'the Conferenza') and others concerning the cancellation by the Conferenza of the tendering procedure for the selection of the private minority participant in the semi-public company which was directly awarded the integrated water service ('servizio idrico integrato') for the province of Ragusa.

Legal context

Community legislation

Directive 2004/18

3 Article 1 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) provides as follows:

'…

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

...

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

…

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

…'

4 Article 3 of Directive 2004/18 is worded as follows:

‘Where a contracting authority grants special or exclusive rights to carry out a public service activity to an entity other than such a contracting authority, the act by which that right is granted shall provide that, in respect of the supply contracts which it awards to third parties as part of its activities, the entity concerned must comply with the principle of non-discrimination on the basis of nationality.’

5 Article 7 of the directive provides as follows:

‘This Directive shall apply to public contracts … which have a value exclusive of value added tax (VAT) estimated to be equal to or greater than the following thresholds:

…

(b) EUR 249 000:

– for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV [“central government authorities”],

…’

6 Commission Regulation (EC) No 2083/2005 of 19 December 2005 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2005 L 333, p. 28) amended Article 7(b) of Directive 2004/18 in the version resulting from Commission Regulation (EC) No 1874/2004 of 28 October 2004 (OJ 2004 L 326, p. 17) by replacing the amount of EUR 236 000 with that of EUR 211 000 for the period from 1 January 2006 to 1 January 2007.

7 In accordance with Article 2 of Commission Regulation (EC) No 1422/2007 of 4 December 2007 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2007 L 317, p. 34), that amount was EUR 206 000 with effect from 1 January 2008.

8 Article 17 of Directive 2004/18 provides as follows:

‘Without prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4).’

9 Article 21 of Directive 2004/18 is worded as follows:

‘Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).’

10 ‘Other services’ fall within category 27 of Annex II B to that directive, with the exception of employment contracts, contracts for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time.

Directive 2004/17

11 Article 1(2) and (3) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) provides as follows:

‘2. …

(b) “Works contracts” are contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex XII or a work, or the realisation by whatever means of a work corresponding to the requirements specified by the contracting entity. A “work” means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function;

(c) “Supply contracts” are contracts other than those referred to in (b) having as their object the purchase, lease, rental or hire-purchase, with or without the option to buy, of products.

A contract having as its object the supply of products, which also covers, as an incidental matter, siting and installation operations shall be considered to be a “supply contract”;

(d) “Service contracts” are contracts other than works or supply contracts having as their object the provision of services referred to in Annex XVII.

A contract having as its object both products and services within the meaning of Annex XVII shall be considered to be a “service contract” if the value of the services in question exceeds that of the products covered by the contract.

A contract having as its object services within the meaning of Annex XVII and including activities within the meaning of Annex XII that are only incidental to the principal object of the contract shall be considered to be a service contract.

3. (a) A “works concession” is a contract of the same type as a works contract except for the fact that the consideration for the works to be

carried out consists either solely in the right to exploit the work or in that right together with payment;

(b) A "service concession" is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.'

12 Article 4 of Directive 2004/17 is worded as follows:

'1. This Directive shall apply to the following activities:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water; or

(b) the supply of drinking water to such networks.

…'

13 Article 9(1) of Directive 2004/17 provides as follows:

'A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.

However, the choice between awarding a single contract and awarding a number of separate contracts may not be made with the objective of excluding it from the scope of this Directive or, where applicable, Directive 2004/18/EC.'

14 Article 18 of Directive 2004/17 is worded as follows:

'This Directive shall not apply to works and service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7, where those concessions are awarded for carrying out those activities.'

National legislation

15 Article 113(5) of Legislative Decree No 267 laying down the consolidated text of the laws on the organisation of local authorities (testo unico delle leggi sull'ordinamento degli enti locali) of 18 August 2000 (Ordinary Supplement to GURI No 227 of 28 September 2000), as amended by Decree-Law No 269 laying down urgent measures to promote development and correct the state of public finances (disposizioni urgenti per favorire lo sviluppo e per la correzione dell'andamento dei conti pubblici) of 30 September 2003 (Ordinary Supplement to GURI No 229 of 2 October 2003) converted into a law, after amendment, by Law No 326 of 24 November 2003 (Ordinary Supplement to GURI No 274 of 25 November 2003) ('Legislative Decree No 267/2000'), provides as follows:

‘The service contract [for the provision of local public services by a local authority] shall be awarded in accordance with the rules of the sector and in compliance with the legislation of the European Union, entitlement to provide the service being granted to:

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

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

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

The dispute in the main proceedings and the question referred for a preliminary ruling

16 On 10 July 2002, the Provincia Regionale di Ragusa (Regional Province of Ragusa) and the municipal councils of south-east Sicily concluded a cooperation agreement establishing the ‘Ambito Territoriale Ottimale’ (Optimal Territorial Ambit) (‘ATO’) Idrico di Ragusa (ATO for water for Ragusa), the local body responsible for Ragusa’s integrated water service.

17 On 26 March 2004, the Conferenza, the governing body of the ATO, selected as the form of management for the service in question a ‘semi- public company with share capital which is predominantly publicly owned’, as provided for in Article 113(5)(b) of Legislative Decree No 267/2000.

18 On 7 June 2005, the Conferenza approved the draft deeds of incorporation of the company to be formed and of its articles of association as well as the draft contract for the management of the service, Article 1 of which provided that the service was to be entrusted directly and exclusively to the semi-public company that was to be formed (which was to operate the integrated water service).

19 Subsequently, a contract notice was published, inter alia, in the *Official Journal of the European Communities* of 8 October 2005 (OJ 2005 S 195) for the selection of the undertaking which would be entrusted, as private minority shareholder, with the operation of the integrated water service and the execution of the works relating to the exclusive management of the service, namely the works referred to,

inter alia, in the Three-year operating plan approved by the mayors at their meeting on 15 December 2003.

20 Article 1(8) of the tendering rules states that 'the works to be carried out are those provided for in the Three-year operating plan, as amended and/or extended by the bid, and in the subsequent information project provided for in the development plan …' and 'for the award of the works which are not to be directly carried out by the private participant, recourse must be had to the public and open tendering procedures laid down by law'.

21 Three temporary groups of undertakings acting on behalf of their respective parent companies, namely Saceccav Depurazioni Sacede SpA, Acoset and Aqualia SpA, participated in the bidding. The contracting authority excluded Aqualia SpA and admitted the two others to the procedure. The person responsible for the procedure then invited the latter to indicate whether they were still interested. Only Acoset answered in the affirmative.

22 It is apparent from the order for reference that, instead of taking formal note of the award and going on to form the semi-public management company in order to launch the service in question and benefit from Community funding, the Conferenza – fearing that the procedure followed might be contrary to Community law and therefore illegal — decided at its meeting on 26 February 2007 to take the steps necessary to cancel the tendering procedure which had concluded with the selection of Acoset. The Technical Operations Secretariat of the ATO accordingly informed Acoset by memorandum of 28 February 2007 of the launch of the cancellation procedure and Acoset made its submissions in that regard by memorandum of 26 March 2007.

23 On 2 October 2007, the Conferenza approved the cancellation of the tendering procedure in question and adopted the consortium model as the management model for the integrated water service for Ragusa. By memorandum of 9 October 2007, Acoset was informed that the tendering procedure had been cancelled.

24 In its action in the main proceedings against the decision of 2 October 2007 and the other acts which had given rise to it, Acoset seeks recognition of its entitlement to compensation in the form of the award of the contract and to compensation commensurate with the damage suffered as a result of the contested acts. Acoset also seeks the interim suspension of those acts.

25 According to Acoset, the direct attribution, under Article 113(5)(b) of Legislative Decree No 267/2000, of the management of local public services to semi-public companies in which the private partner is selected by means of public and open tendering procedures which comply with Community competition rules is compatible with Community law.

26 On the other hand, the defendants in the main proceedings are of the view that Community law permits such a direct attribution, without any call for tenders for

works and services, only to wholly publicly owned companies which carry out the essential part of their activities with the local authority or authorities which control them and over which those authorities exercise a form of control comparable with that exercised over their own departments. The participation, even a minority participation, of a private undertaking in the capital of a company in which the contracting authority in question also participates in any event precludes the possibility of the contracting authority exercising control over that company which is comparable to that which it exercises over its own departments (see, inter alia, Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1).

27 The Tribunale amministrativo regionale della Sicilia considers that the question raised by Acoset as to whether the direct award of the contract in question is compatible with Community law is relevant and that the answer to that question cannot be clearly deduced from the Court's case-law.

28 In those circumstances, the Tribunale amministrativo regionale della Sicilia decided to stay the application for suspension of operation in the main proceedings and to refer the following question to the Court for a preliminary ruling:

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

Admissibility

29 The Austrian Government maintains that the reference for a preliminary ruling should be declared inadmissible on the ground that the order for reference does not provide sufficient information on the legal and factual background to the main proceedings to enable the Court to provide an answer to the question referred that will be of use to the national court. In particular, no information is provided on the specific details of the service or services in question, the content of the invitation to tender, the award procedure or some of the concepts referred to in the question.

30 It should be recalled that the information that must be provided to the Court in the context of a reference for a preliminary ruling does not serve only to enable the Court to provide answers which will be of use to the national court; it must also enable the governments of the Member States, and other interested parties, to submit observations in accordance with Article 23 of the Statute of the Court of Justice. For those purposes, according to settled case-law, it is necessary, first, that

the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. Second, the referring court must set out the precise reasons why it was unsure as to the interpretation to be given to Community law and why it considered it necessary to refer questions to the Court for a preliminary ruling. In consequence, it is essential that the referring court provide at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute in the main proceedings (see, inter alia, Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 34).

31 The order for reference of the Tribunale amministrativo regionale della Sicilia satisfies those requirements.

32 The referring court refers to the applicable provisions of national legislation and the order for reference contains a description of the facts which, albeit succinct, is sufficient to enable the Court to give a ruling. Moreover, that court sets out the reasons which led it to consider that it was necessary to make a reference for a preliminary ruling to the Court, since the order for reference contains a detailed description of the opposing views held by the parties to the main proceedings concerning the interpretation to be given to the provisions of Community law which form the subject-matter of the question referred and makes it clear that it is the view of that court that the answer to that question cannot be clearly deduced from the Court's case-law.

33 In addition, the Conferenza objects that, since the procedure for the selection of the private participant in question in the main proceedings was annulled, Acoset has no legal interest in bringing proceedings in order to obtain an answer to the question referred.

34 It is sufficient to point out, in that connection, that Article 234 EC established direct cooperation between the Court of Justice and the courts and tribunals of the Member States by way of a procedure which is completely independent of any initiative of the parties, who are simply invited to be heard in the course of the procedure in relation to questions which the national court alone can initiate (see, to that effect, inter alia, Case 44/65 *Singer* [1965] ECR 965).

35 Accordingly, it is necessary to examine the question referred by the Tribunale amministrativo regionale della Sicilia.

The question referred for a preliminary ruling

36 By its question, the referring court asks, in essence, whether Articles 43 EC, 49 EC and 86 EC preclude the direct award of a public service which entails the prior execution of certain works, such as the service at issue in the main proceedings, to

a semi-public company formed specifically for the purpose of providing that service and possessing a single corporate purpose, the private participant in the company being selected by means of a public and open procedure, after verification of the financial, technical, operational and management requirements specific to the service to be performed and of the characteristics of the tender with regard to the particular services to be provided.

37 It should be noted, first, that the direct award of a local public service for the integrated management of water, such as that at issue in the main proceedings, may fall, depending on the specific details of the consideration for that service, within the definition of 'public service contracts' or 'service concession' within the meaning of Article 1(2)(d) and Article 1(4) of Directive 2004/18 respectively or, as the case may be, Article 1(2)(d) and Article 1(3)(b) respectively of Directive 2004/17, Article 4(1)(a) of which provides that that directive is to apply to the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water or the supply of drinking water to such networks.

38 The question whether such an operation is to be classed as a 'service concession' or a 'public service contract' must be considered exclusively in the light of Community law (see, inter alia, Case C-382/05 *Commission* v *Italy* [2007] ECR I-6657, paragraph 31).

39 The difference between a service contract and a service concession lies in the consideration for the provision of services (see, inter alia, Case C-206/08 *WAZV Gotha* [2009] ECR I-0000, paragraph 51). A public service contract within the meaning of Directives 2004/18 and 2004/17 involves consideration which is paid directly by the contracting authority to the service provider (see, inter alia, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 39). A service concession is present where the agreed method of remuneration consists in the right to exploit the service and the provider takes the risk of operating the services in question (see, inter alia, the judgment of 13 November 2008 in Case C-437/07 *Commission* v *Italy*, paragraphs 29 and 31, and *WAZV Gotha*, paragraphs 59 and 68).

40 The Tribunale amministrativo regionale della Sicilia refers to a semi-public company to be formed as the 'concessionaire' (*affidataria in concessione*) for the management of the integrated water service. The documents before the Court show that the operation was intended to last 30 years.

41 Similarly, the Italian Government maintains that what is clearly in issue is the award of a public service by means of a 30-year concession, for which the principal consideration was the possibility of claiming from users the water tariff referred to in the tendering procedure as the consideration for the service provided.

42 The Court will therefore proceed on the assumption that what is at issue is a concession.

43 The Court has recognised the existence of a services concession, inter alia, in cases in which the service provider's remuneration came from payments made by users of a public car park, a public transport system and a cable television network (see *Parking Brixen*, paragraph 40; Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 16; and Case C-324/07 *Coditel Brabant* [2008] ECR I-0000, paragraph 24).

44 Article 17 of Directive 2004/18 provides that, without prejudice to the application of Article 3 thereof, the directive is not to apply to service concessions. Similarly, Article 18 of Directive 2004/17 provides that the directive is not to apply to service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7 of the directive, where those concessions are awarded for carrying out those activities.

45 Moreover, it is not disputed that the execution of the works connected with the exclusive management of the integrated water service at issue in the main proceedings is incidental to the main object of the concession in question, which is to provide that service, so that the latter cannot be characterised as a 'public works concession' (see to that effect, inter alia, Case C-331/92 *Gestión Hotelera Internacional* [1994] ECR I-1329, paragraphs 26 to 28, and Article 9(1) of Directive 2004/17).

46 Notwithstanding the fact that public service concession contracts are excluded from the scope of Directives 2004/18 and 2004/17, the public authorities concluding them are, none the less, bound to comply with the fundamental rules of the EC Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular (see, inter alia, *ANAV*, paragraph 18).

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

48 Besides the principle of non-discrimination on the ground of nationality, the principle of equal treatment as between tenderers is also to be applied to public service concessions, even in the absence of discrimination on grounds of nationality (see, inter alia, *ANAV*, paragraph 20).

49 The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with. That authority's obligation of transparency consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and a review of the impartiality of the procurement procedures (see, inter alia, *ANAV*, paragraph 21).

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

51 However, the application of the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as the general principles of which they are the specific expression, is excluded if the control exercised over the concessionaire by the concession-granting public authority is comparable 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 (see, inter alia, *ANAV*, paragraph 24). In such a case, an invitation to tender is not mandatory, even if the other party to the contract is an entity that is legally distinct from the contracting authority (see, inter alia, Case C-573/07 *Sea* [2009] ECR I-0000, paragraph 36).

52 That case-law is relevant for the interpretation of Directives 2004/18 and 2004/17 as well as Articles 43 EC and 49 EC and also of the general principles of which the latter are the specific expression (see, inter alia, *Sea*, paragraph 37).

53 Where a private undertaking has a holding, even a minority holding, in the capital of a company in which the contracting authority in question also has a holding, it is impossible for that contracting authority to exercise over that company control comparable to that which it exercises over its own departments (see, inter alia, *Sea*, paragraph 46).

54 That is the case with the concession at issue in the main proceedings, since the private participant was required to subscribe 49% of the share capital in the semi-public company which was to award the concession in question.

55 In those circumstances, it is necessary to determine more specifically whether the award of the public service in question to the semi-public company without any specific invitation to competitive tendering is compatible with Community law in as much as the tendering procedure for the selection of the private participant responsible for the integrated management of the water service has been conducted in a manner compatible with Articles 43 EC and 49 EC and with the principles of equal treatment and non-discrimination on the ground of nationality, as well as the concomitant obligation of transparency.

56 It is apparent from case-law that the award of a public contract to a semi-public company without a call for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment, in that such a procedure would offer a private undertaking with a capital holding in that company an advantage over its competitors (*Stadt Halle and RPL Lochau*, paragraph 51, and Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705, paragraph 48).

57 Furthermore, as stated at paragraph 2.1 of the Commission Interpretative Communication on the application of Community Law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPPs) (OJ 2008 C 91, p. 4), the fact that a private entity and a contracting entity cooperate within a semi-private entity cannot serve as justification for the contracting entity not having to comply with the legal provisions on concessions when assigning concessions to that private entity or to the respective semi-private entity.

58 However, as the Advocate General stated at point 85 of his Opinion, it is difficult to reconcile the use of a double competitive tendering procedure with the aim of reducing procedural formalities which underlies institutionalised public-private partnerships, such as that at issue in the main proceedings, whose establishment involves the use of the same procedure both to select the private economic participant and to award concessions to the public-private entity to be formed for that sole purpose.

59 While the absence of a competitive tendering procedure in connection with the award of services would appear to be irreconcilable with Articles 43 EC and 49 EC and with the principles of equal treatment and non-discrimination, that situation may be rectified by selecting the private participant in accordance with the requirements set out at paragraphs 46 to 49 above and choosing appropriate criteria for the selection of the private participant, since the tenderers must provide evidence not only of their capacity to become a shareholder but, primarily, of their technical capacity to provide the service and the economic and other advantages which their tender brings.

60 In so far as the criteria for the selection of the private participant are based not only on its capital contribution but also the participant's technical capacity and the characteristics of its tender with regard to the particular services to be provided and, as in the case in the main proceedings, the participant is entrusted with the operation of the service in question and thus with the management of the service, the selection of the concessionaire can be regarded as an indirect result of the selection of that participant which was made at the conclusion of a procedure conducted in accordance with the principles of Community law, so that a second competitive tendering procedure for the selection of the concessionaire is unnecessary.

61 The use in such a situation of a double procedure for, first, the selection of the private participant in the semi-private company and, second, the award of the concession to that company, would be liable to deter private entities and public authorities from forming institutionalised public-private partnerships, such as that in question in the main proceedings, on account of the length of time involved in implementing such procedures and the legal uncertainty attaching to the award of the concession to the previously selected private participant.

62 It should be noted that a company with share capital with mixed public and private ownership, such as that in question in the main proceedings, must retain the same corporate purpose throughout the duration of concession and it will be necessary, if there is any material amendment to the contract, to launch a new competitive tendering procedure (see, to that effect, Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 34).

63 In the light of the foregoing considerations, the answer to the question referred is that Articles 43 EC, 49 EC and 86 EC do not preclude the direct award of a public service which entails the prior execution of certain works, such as that at issue in the main proceedings, to a semi-public company formed specifically for the purpose of providing that service and possessing a single corporate purpose, the private participant in the company being selected by means of a public and open procedure after verification of the financial, technical, operational and management requirements specific to the service to be performed and of the characteristics of the tender with regard to the service to be delivered, provided that the tendering procedure in question is consistent with the principles of free competition, transparency and equal treatment laid down by the Treaty with regard to concessions.

Costs

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

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

Articles 43 EC, 49 EC and 86 EC do not preclude the direct award of a public service which entails the prior execution of certain works, such as that at issue in the main proceedings, to a semi-public company formed specifically for the purpose of providing that service and possessing a single corporate purpose, the private participant in the company being selected by means of a public and open procedure after verification of the financial, technical, operational and management requirements specific to the service to be performed and of the characteristics of the tender with regard to the service to be delivered, provided that the tendering procedure in question is consistent with the principles of free competition, transparency and equal treatment laid down by the EC Treaty with regard to concessions.

[Signatures]