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JUDGMENT OF THE COURT (Fifth Chamber)

18 November 1999 [\(1\)](#)

(Public service and public supply contracts — Directives 92/50/EEC and 93/36/EEC — Award by a local authority of a contract for the supply of products and provision of specified services to a consortium of which it is a member)

In Case C-107/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunale Amministrativo Regionale per l'Emilia-Romagna, Italy, for a preliminary ruling in the proceedings pending before that court between

Teckal Srl

and

Comune di Viano,

Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia

on the interpretation of Article 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevón, J.-P. Puissochet, P. Jann (Rapporteur) and M. Wathelet, Judges,

Advocate General: G. Cosmas,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Teckal Srl, by A. Soncini and F. Soncini, of the Parma Bar, and P. Adami, of the Rome Bar,

— Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, by E.G. Di Fava, of the Reggio d'Emilia Bar, and G. Cugurra, of the Parma Bar,

— the Italian Government, by Professor U. Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, assisted by P.G. Ferri, Avvocato dello Stato,

— the Belgian Government, by J. Devadder, General Adviser in the Legal Service of the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

— the Austrian Government, by W. Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,

— the Commission of the European Communities, by P. Stancanelli, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Teckal Srl, represented by A. Soncini and P. Adami; Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, represented by G. Cugurra; the Italian Government, represented by P.G. Ferri; the French Government, represented by A. Bréville-Viéville, Chargé de Mission in the Legal Directorate of the Ministry of Foreign Affairs, acting as Agent; and the Commission, represented by P. Stancanelli, at the hearing on 6 May 1999,

after hearing the Opinion of the Advocate General at the sitting on 1 July 1999,

gives the following

Judgment

1. By order of 10 March 1998, received at the Court on 14 April 1998, the Tribunale Amministrativo Regionale per l'Emilia-Romagna (Regional Administrative Court for Emilia Romagna) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 6 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2. That question has arisen in proceedings between Teckal Srl ('Teckal'), on the one hand, and the Municipality of Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia ('AGAC'), on the other, concerning the award by that municipality of the contract for the management of the heating services for certain municipal buildings.

Community legislation

3. Article 1(a) and (b) of Directive 92/50 provides as follows:

'For the purposes of this Directive:

(a) *public service contracts* shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority ...

(b) *contracting authorities* shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

...'

4. Article 2 of Directive 92/50 provides:

'If a public contract is intended to cover both products within the meaning of Directive 77/62/EEC and services within the meaning of Annexes I A and I B to this Directive, it shall fall within the scope of this Directive if the value of the services in question exceeds that of the products covered by the contract.'

5. Article 6 of Directive 92/50 provides that:

'This Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.'

6. Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) repealed Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1). References to the repealed directive are, pursuant to Article 33 of Directive 93/36, to be construed as references to the latter directive.

7. Article 1(a) and (b) of Directive 93/36 provides as follows:

'For the purpose of this Directive:

(a) "*public supply contracts*" are contracts for pecuniary interest concluded in writing involving the purchase, lease [,] rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations;

(b) "*contracting authorities*" shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

...'

National legislation

8. Under Article 22(1) of Italian Law No 142 of 8 June 1990 on the organisation of local authorities (GURI No 135 of 12 June 1990) ('Law No 142/90'), municipalities are to provide for the management of public services involving the production of goods and the performance of activities designed to achieve social purposes and to promote economic and civil development of local communities.

9. Article 22(3) of Law No 142/90 provides that municipalities may ensure the performance of these services on a work-and-materials basis, by way of concession to third parties, or by having recourse to special undertakings, non profit-making institutions or companies in which local public authorities hold the majority of shares.

10. Article 23 of Law No 142/90, which defines special undertakings and non-profit making institutions, provides as follows:

'1. A special undertaking is a body (ente strumentale) established by a local entity, having legal personality, commercial autonomy and its own statutes, approved by the municipal or provincial council.

...

3. The organs of the undertaking and of the institution shall be the board of management, the chairman and the director who assumes managerial responsibility. The detailed arrangements for appointment and removal of

members of the board of management shall be laid down by the statutes of the local authority.

4. In performing their activities, the undertaking and institution must satisfy criteria of effectiveness, efficiency and profitability, and must achieve a balanced budget by balancing costs and receipts, including transfers.

...

6. The local administration shall provide the start-up capital, define objectives and policy, approve the documents of constitution, exercise supervision, monitor management results, and cover any social costs which may arise.

...

11.

Under Article 25 of Law No 142/90, the municipalities and provinces may, for purposes of the joint management of one or more services, set up a consortium in accordance with the provisions governing the special undertakings referred to in Article 23. To that end, each municipal council must approve, by absolute majority, an agreement at the same time as the statutes of the consortium. The general meeting of the consortium shall be composed of the representatives of the member entities, represented by the mayor, the chairman or their deputies. The general meeting shall elect the board of management and approve the documents of constitution prescribed by the statutes.

12.

AGAC is a consortium set up by several municipalities — including that of Viano — to manage energy and environmental services, pursuant to Article 25 of Law No 142/90. Under Article 1 of its Statutes ('the Statutes'), it has legal personality and operational autonomy. Article 3(1) of the Statutes states that its function is to assume direct responsibility for, and manage, a number of listed public services, which include 'gas for civil and industrial purposes; heating for civil and industrial purposes; activities related and ancillary to the above'.

13.

Under Article 3(2) to (4) of the Statutes, AGAC may extend its activities to other related or ancillary services, hold shares in public or private companies or have interests in bodies for the management of related or ancillary services, and, finally, provide services or supplies to private persons or to public bodies other than the member municipalities.

14.

Under Articles 12 and 13 of the Statutes, the most important managerial acts, which include preparation of accounts and budgets, must be approved by the

general meeting of AGAC, consisting of representatives of the municipalities. The other managerial bodies are the council, the chairman of the council and the director-general. They are not answerable to the municipalities for their managerial acts. The natural persons who sit on these bodies do not exercise any functions in the member municipalities.

15.

Under Article 25 of the Statutes, AGAC must achieve a balanced budget and operational profitability. Pursuant to Article 27 of the Statutes, the municipalities provide AGAC with funds and assets, in respect of which AGAC pays them annual interest. Article 28 of the Statutes provides that any profits in the financial year are to be allocated among the member municipalities, retained by AGAC to increase its reserve funds, or reinvested in other AGAC activities. Under Article 29 of the Statutes, where a loss occurs, the financial deficit may be corrected through, *inter alia*, the injection of new capital by the member municipalities.

16.

Article 35 of the Statutes provides for arbitration to resolve any disputes between the member municipalities or between those municipalities and AGAC.

The dispute in the main proceedings

17. By Decision No 18 of 24 May 1997 ('the Decision'), the municipal council of Viano conferred on AGAC the management of the heating service for a number of municipal buildings. That decision was not preceded by any invitation to tender.
18. The task of AGAC lies, specifically, in the area of the operation and maintenance of the heating installations of the municipal buildings in question, including any necessary repairs and improvements, and the supply of fuel.
19. The remuneration of AGAC was fixed at ITL 122 million for the period from 1 June 1997 to 31 May 1998. Of that amount, the value of the fuel supplied represents 86 million and the cost of operation and maintenance of the installations represents 36 million.
20. Under Article 2 of the Decision, at the expiry of the initial one-year period, AGAC undertakes to continue providing the service for a further period of three years, at the request of the Municipality of Viano, following modification of the conditions set out in the Decision. Provision is also made for a subsequent extension.
21. Teckal is a private company operating in the area of heating services. In particular, it supplies heating oil to individuals and public bodies, purchasing it beforehand from producer undertakings. It also services oil- and gas-operated heating installations.
22. Teckal brought proceedings before the Tribunale Amministrativo Regionale per l'Emilia-Romagna, in which it argued that the Municipality of Viano should have followed the tendering procedures for public contracts required under Community legislation.
23. The national court, which is uncertain as to whether Directive 92/50 or Directive 93/36 is applicable, takes the view that, in any event, the application threshold of ECU 200 000 laid down in both directives was exceeded.
24. In view of the twofold nature of the task entrusted to AGAC, which consists, first, in providing a variety of services, and, second, in supplying fuel, the national court formed the view that it could not discount the applicability of Article 6 of Directive 92/50.
25. In those circumstances, the Tribunale Amministrativo Regionale stayed proceedings and requested the Court to interpret Article 6 of Directive 92/50 'from the points of view set out in the grounds of this judgment'.

Admissibility

26. AGAC and the Austrian Government contend that the question submitted for preliminary ruling is inadmissible. AGAC submits, first, that the amount of the contract at issue in the main proceedings is below the threshold laid down in Directives 92/50 and 93/36. The price of fuel, it argues, should be deducted from the estimated amount of the contract, inasmuch as AGAC, being itself a contracting authority, acquires its stock of fuels through public tendering procedures. Furthermore, the contract in question is not one of indeterminate duration.
27. Second, AGAC contends that the request for a preliminary ruling concerns in reality the interpretation of national law. The national court is in fact asking the Court to interpret certain provisions of national law to enable it to determine whether the exception under Article 6 of Directive 92/50 applies.
- 28.

For its part, the Austrian Government submits that the request for a preliminary ruling is inadmissible on the ground that it does not contain any question. In the area of the law relating to public contracts, it is particularly important that questions should be precisely formulated.

29.

As regards, first of all, the question whether the value of the contract in question exceeds the threshold laid down in Directives 92/50 and 93/36, it should be borne in mind that Article 177 of the Treaty is based on a clear separation of functions between the national courts and the Court of Justice, which means that, when ruling on the interpretation or validity of Community provisions, the Court of Justice is empowered to do so only on the basis of the facts which the national

court puts before it (see, in particular, Case C-30/93 *AC-ATEL Electronics Vertriebs v Hauptzollamt München-Mitte* [1994] ECR I-2305, paragraph 16).

30.

In that context, it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (*AC-ATEL Electronics Vertriebs*, cited above, paragraph 17).

31.

While it is true, therefore, that the method for calculating the amount of the contract is defined in the Community provisions, that is to say, Article 7 of Directive 92/50 and Article 5 of Directive 93/36, on the interpretation of which the national court may, if necessary, submit questions for a preliminary ruling, it is, none the less, by virtue of the division of functions provided for by Article 177 of the Treaty, for the national court to apply the rules of Community law to a specific case. No such application is possible without a comprehensive appraisal of the facts of the case (see Case C-320/88 *Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraph 11).

32.

It follows that the Court cannot substitute its own appraisal in regard to the calculation of the value of the contract for that of the national court and conclude, on the basis of its appraisal, that the reference for a preliminary ruling is inadmissible.

33.

Next, it must be pointed out that in the context of Article 177 of the Treaty the Court has no jurisdiction to rule either on the interpretation of provisions of national laws or regulations or on their conformity with Community law. It may, however, supply the national court with an interpretation of Community law that will enable that court to resolve the legal problem before it (Case C-17/92 *Federación de Distribuidores Cinematográficos v Spanish State* [1993] ECR I-2239, paragraph 8).

34.

Finally, according to settled case-law, it is for the Court alone, where questions are formulated imprecisely, to extract from all the information provided by the national court and from the documents in the main proceedings the points of Community law which require interpretation, having regard to the subject-matter of those proceedings (Case 251/83 *Haug-Adrion v Frankfurter Versicherungs-AG* [1984] ECR 4277, paragraph 9, and Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 21).

35.

In the light of the information contained in the order for reference, the national court must be understood to be asking, essentially, whether the provisions of Community law governing the award of public contracts are applicable in a case where a local authority entrusts the supply of products and the provision of services to a consortium of which it is a member, in circumstances such as those in point in the main proceedings.

36.

The reference for a preliminary ruling must therefore be declared admissible.

Substance

37. It is clear from the order for reference that the Municipality of Viano entrusted to AGAC, by a single measure, both the provision of certain services and the supply of certain products. It is also common ground that the value of those products is greater than that of the services.
38. It follows *a contrario* from Article 2 of Directive 92/50 that, if a public contract relates both to products within the meaning of Directive 93/36 and to services within the meaning of Directive 92/50, it will fall within the scope of Directive 93/36 if the value of the products covered by the contract exceeds that of the services.
39. In order to provide a satisfactory answer to the national court which has referred a question to it, the Court of Justice may deem it necessary to consider provisions of Community law to which the national court has not referred in its question (Case 35/85 *Procureur de la République v Tissier* [1986] ECR 1207, paragraph 9, and Case C-315/88 *Bagli Pennacchiotti* [1990] ECR I-1323, paragraph 10).
40. It follows that, in order to provide an interpretation of Community law which will be of assistance to the national court in this case, it is necessary to interpret the provisions of Directive 93/36, not Article 6 of Directive 92/50.
41. In order to determine whether the fact that a local authority entrusts the supply of products to a consortium in which it has a holding must give rise to a tendering procedure as provided for under Directive 93/36, it is necessary to consider whether the assignment of that task constitutes a public supply contract.
42. If that is the case, and if the estimated amount of the contract, without value added tax, is equal to or greater than ECU 200 000, Directive 93/36 will apply. Whether the supplier is or is not a contracting authority is not conclusive in this regard.
43. It should be pointed out that the only permitted exceptions to the application of Directive 93/36 are those which are exhaustively and expressly mentioned therein (see, with reference to Directive 77/62, Case C-71/92 *Commission v Spain* [1993] ECR I-5923, paragraph 10).
44. Directive 93/36 does not contain any provision comparable to Article 6 of Directive 92/50, which excludes from its scope public contracts awarded, under certain conditions, to contracting authorities.
45. It should also be noted that this finding does not affect the obligation on those contracting authorities to apply in turn the tendering procedures laid down in Directive 93/36.
46. In its capacity as a local authority, the Municipality of Viano is a contracting authority within the meaning of Article 1(b) of Directive 93/36. It is therefore a matter for the national court to ascertain whether the relationship between the Municipality of Viano and AGAC also meets the other conditions which Directive 93/36 lays down for a public supply contract.
47. That will, in accordance with Article 1(a) of Directive 93/36, be the case if the contract in question is a contract for pecuniary interest, concluded in writing, involving, *inter alia*, the purchase of products.
48. It is common ground in the present case that AGAC supplies products, namely fuel, to the Municipality of Viano in return for payment of a price.
49. As to whether there is a contract, the national court must determine whether there has been an agreement between two separate persons.
50. In that regard, in accordance with Article 1(a) of Directive 93/36, it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority

and, on the other, a person legally distinct from that local authority. 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.

51.

The answer to the question must therefore be that Directive 93/36 is applicable in the case where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority.

Costs

52.

The costs incurred by the Italian, Belgian, French and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Tribunale Amministrativo Regionale per l'Emilia-Romagna by order of 10 March 1998, hereby rules:

Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts is applicable in the case where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority.

Edward
Sevón
Puissochet

Jann Wathelet

Delivered in open court in Luxembourg on 18 November 1999.

R. Grass

D.A.O. Edward

Registrar

President of the Fifth Chamber