



## Reports of Cases

### JUDGMENT OF THE COURT (Fifth Chamber)

19 June 2014\*

(Request for a preliminary ruling — Public service contracts — Directive 2004/18/EC — Award of the contract without a procurement procedure (in-house award) — Contractor legally separate from the awarding authority — Centre for hospital assistance and support services — Non-profit association operating in the public interest — Majority of the partners made up of awarding authorities — Minority of the partners made up of entities under private law, non-profit charitable associations — Activity carried out of at least 80% of the annual turnover for the partners' benefit)

In Case C-574/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Portugal), made by decision of 6 November 2012, received at the Court on 7 December 2012, in the proceedings

**Centro Hospitalar de Setúbal EPE,**

**Serviço de Utilização Comum dos Hospitais (SUCH)**

v

**Eurest (Portugal) — Sociedade Europeia de Restaurantes Lda,**

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), A. Rosas, D. Šváby and C. Vajda, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 November 2013,

after considering the observations submitted on behalf of:

- Centro Hospitalar de Setúbal EPE, by M. Real Martins and S. Alves Ribeiro, advogados,
- Serviço de Utilização Comum dos Hospitais (SUCH), by M. Claro, advogada,
- Eurest (Portugal) — Sociedade Europeia de Restaurantes Lda, by M. Lucas Rodrigues, advogada,
- the Portuguese Government, by L. Inez Fernandes and A. Navegas, acting as Agents,

\* Language of the case: Portuguese.

— the Spanish Government, by J. García-Valdecasas Dorrego, acting as Agent,  
— the European Commission, by M. Afonso, A. Tokár and M. Noll-Ehlers, acting as Agents,  
after hearing the Opinion of the Advocate General at the sitting on 27 February 2014,  
gives the following

### **Judgment**

- 1 By the request for a preliminary ruling, the referring court asks the Court to make clear its case-law concerning the award of public contracts by direct in-house award without application 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).
- 2 The request has been made in a dispute between the Centro Hospitalar de Setúbal EPE (Hospital of Setúbal; ‘CHS’) and the Serviço de Utilização Comum dos Hospitais (Joint Hospital Service Provision; ‘SUCH’) and Eurest (Portugal) — Sociedade Europeia de Restaurantes Lda (‘Eurest’) concerning the conformity of the award of a public contract awarded directly by the CHS to SUCH.

### **Legal context**

#### *EU law*

#### Directive 2004/18

- 3 Directive 2004/18 establishes the rules applicable to public contracts awarded by awarding authorities.
- 4 Recital 4 in the preamble to that directive states:  
  
‘Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.’
- 5 Article 1 of that directive, entitled ‘Definitions’, provides in paragraph 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.’
- 6 Article 1(8) of that directive provides:  
  
‘The terms “contractor”, “supplier” and “service provider” mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.  
  
The term “economic operator” shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interests of simplification.  
  
...’

- 7 Article 1(9) defines in detail the entities which are regarded as awarding authorities and which must, when concluding a contract for pecuniary interest with an economic operator, undertake a procurement procedure following the rules laid down in Directive 2004/18.
- 8 Article 7 of Directive 2004/18, entitled ‘Threshold amounts for public contracts’, establishes the thresholds for the estimated values beyond which the award of a contract must be made in accordance with the rules in that directive. Those thresholds are changed at regular intervals by Commission regulations and are adapted to the economic circumstances. At the date of the facts in the main proceedings, the threshold concerning service contracts awarded by awarding authorities other than central governmental authorities was set at EUR 193 000 by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64).
- 9 Article 20 of Directive 2004/18, which forms part of Title II thereof, Chapter III, entitled ‘Arrangements for public service contracts’, provides:
- ‘Contracts which have as their object services listed in Annex II A shall be awarded in accordance with Articles 23 to 55.’
- 10 Under Article 21 of that directive, which forms part of Chapter III thereof:
- ‘Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).’
- 11 In Annex II B to Directive 2004/18, under Category 17, are ‘Hotel and restaurant services’.

The award of a contract without application of the procedures laid down in Directive 2004/18 — in-house award

- 12 The conditions for such an award have been established and developed by the case-law of the Court, which has held that a contracting authority is exempted from initiating a procedure for the award of a public contract in accordance with Directive 2004/18 where it exercises over the contractor control similar to that which it exercises over its own departments and the tenderer carries out the essential part of its activities with the contracting authorities to which it belongs (see, to that effect, Case C-107/98 *Teckal* EU:C:1999:562, paragraph 50).
- 13 The Court has also held that the investment, however small, of a private undertaking in the capital of an undertaking of which the awarding authority also forms part prevents, in any event, the awarding authority from being able to exercise a control over it similar to that which it exercises over its own departments, given that any private capital investment in an undertaking follows considerations proper to private interests and pursues objectives of a different kind from those pursued by a public authority (see Case C-26/03 *Stadt Halle and RPL Lochau* EU:C:2005:5, paragraphs 49 and 50).

#### *Portuguese law*

- 14 Directive 2004/18 was enacted in the Portuguese legal order by the Public Procurement Code, approved by Decree-Law No 18/2008 of 29 January 2008, as amended and republished as an annex to Decree-Law No 287/2009 of 2 October 2009 (*Diário da República*, 1st series, No 192, 2 October 2009).

- 15 Applying the case-law of the Court as referred to in paragraphs 12 and 13 of the present judgment, Article 5(2) of that code is worded as follows:

‘Section II to this Code shall also not apply to contracts, regardless of their purpose, concluded between contracting authorities and another entity, where:

- (a) the contracting authority, on its own or in conjunction with other contracting authorities, exercises over the activity of that entity a control which is similar to that which it exercises over its own departments; and
- (b) that entity carries on the essential part of its activities for the benefit of one or more contracting authorities which exercise control over the entity similar to that which is referred to in the preceding paragraph.’

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 16 On 27 July 2011, CHS, which is a public hospital, concluded with SUCH a contract concerning the supply by SUCH of meals to patients and staff of CHS (‘the 2011 contract’). That contract concerns a service contract awarded directly to SUCH, without application of the award procedures laid down in Directive 2004/18, in the light, according to the contracting parties, of the in-house relationship between SUCH and the public hospitals, which are the same in number as the partners of SUCH, and with a view to meeting the hospitals’ needs by internal means.
- 17 The contract was concluded for the period from 10 August 2011 to 9 August 2016 and is renewable. Its annual price is EUR 1 295 289, totalling EUR 6 476 455 over the five-year life of the contract.
- 18 As is apparent from the file provided to the Court, SUCH was created by Decree-Law No 46/668 of 24 November 1965. Its statutes were approved in October 2010 by the Secretary of State for Health. In accordance with Article 2 of those statutes, SUCH is a non-profit organisation the aim of which is to carry out a public service mission. It is an instrument able internally to meet the needs of its partners and, to that end, it is required to take charge of initiatives that are capable of contributing to the better, more efficient functioning of its partners, providing them with economies of scale, and to contribute to the financial sustainability of the national social security service.
- 19 Under Article 7 of the statutes of SUCH, public sector and social sector entities may be its partners, that is to say, non-profit social support institutions, including the services and institutions of the Ministry of Health and of other ministries. In addition, SUCH is to ensure that the majority of the voting rights at the general meeting are held by its public entity partners which are subject to the management, supervision and guidance powers of the member of the Government responsible for health.
- 20 Article 5(3) of the statutes of SUCH provides that SUCH is also able to provide services under competitive market conditions to non-member public entities or private entities, be they national or foreign, provided that there is no harm to the interests of its partners, and that it is beneficial to them and to SUCH, whether economically or in terms of technical enhancement. However, the provision of those services must be accessory to the activity of SUCH and must not represent an invoice volume of more than 20% of its overall annual turnover for the previous financial year.
- 21 At the date on which the 2011 contract was concluded, SUCH had 88 partners, including 23 social support institutions, all of them non-profit organisations, of which 20 were charitable organisations (‘Misericórdias’).

- 22 Eurest, a company active in the sector of the provision of services such as those covered by the 2011 contract, brought an action before the Tribunal Administrativo e Fiscal de Almada (Administrative and Tax Court, Almada). By judgment of 30 January 2012, that court declared the 2011 contract to be null and void because of the lack of any relationship of control between CHS and SUCH which could justify the direct award of the contract in question.
- 23 That court based its finding in that regard on a judgment of the Tribunal de Contas (Court of Auditors) which held that, notwithstanding the changes to the statutes of SUCH, the number of its non-public partners, its broad autonomy and independence vis-à-vis public authorities, the particular working dynamics of its management board, and the fact that SUCH is a business organisation of considerable size and complexity, did not permit the view to be taken that the requirements under Article 5(2)(a) of the Public Procurement Code had been met. That decision was upheld by the Tribunal de Contas, in plenary session, in a judgment of 3 July 2012.
- 24 CHS and SUCH appealed against the judgment of the Tribunal Administrativo e Fiscal de Almada before the Tribunal Central Administrativo do Sul (Central Administrative Tribunal, South), which, by judgment of 26 April 2012, dismissed the appeal and upheld the judgment under appeal, basing its finding on the reasoning followed by the Tribunal de Contas in its abovementioned judgment. Following that decision, CHS and SUCH appealed on a point of law before the Supremo Tribunal Administrativo, repeating their line of argument regarding the existence of an internal relationship between SUCH and the public hospitals, which are its majority partners.
- 25 The Supremo Tribunal Administrativo points out that a public hospital such as CHS, being a legal person under public law, constitutes an awarding authority and that the contract for pecuniary interest entered into between CHS and SUCH, an entity distinct from the awarding authority, constitutes a public service contract within the meaning of Article 1(2)(a) of Directive 2004/18. In order to ascertain whether the contract could be awarded directly in-house, the referring court notes that the ‘similar control’, required to that end by the case-law of the Court, may be exercised over the contractor jointly by a number of awarding authorities and that that control implies an effective power of intervention by one or more of the awarding authorities not only in the strategic decisions of the contractor but also in its ordinary management.
- 26 However, the referring court points out that the particular legal nature of SUCH, having regard to the fact that its partners also include private social solidarity institutions, raises new questions in the light of the Court’s case-law resulting from the judgment in *Stadt Halle and RPL Lochau* EU:C:2005:5. It therefore asks whether that case-law presupposes that a private undertaking participating in the capital of a company in which the awarding authority also participates must necessarily be profit making.
- 27 The referring court is also doubtful, in the light of the concerns expressed by the Tribunal de Contas, whether the requirement for ‘similar control’ is met in the present case, having regard to the number of non-public partners of SUCH, the nature of the guidance exercised over SUCH by the awarding authorities which are its partners and by the public authorities, its size and the complexity of its operation and the possibility of its acting autonomously as regards the public authorities.
- 28 With regard to the second condition established by the case-law of the Court, namely the requirement that the entity in question carry out the essential part of its activities with the controlling authority or authorities, the referring court notes that, in accordance with that case-law, the contractor must act as an operator whose activities are intended exclusively or almost exclusively to meet the needs of the awarding authority or authorities and any other activities are of only marginal significance. It asks whether that condition is met where an entity such as SUCH can provide services, under conditions of competition, to third party entities up to 20% of its overall annual turnover for the previous financial year.



29 Having regard to those considerations and taking account of the fact that it is called upon to rule at final instance, the Supremo Tribunal Administrativo has decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Is it compatible with Community doctrine on in-house procurements that a public hospital, having dispensed with the procedure provided for by law for concluding the relevant contract, should award to a non-profit organisation, which it is in partnership with, and whose aim is to carry out a public service mission in the area of health with a view to enhancing the effectiveness and efficiency of its partners, a contract for the provision of hospital catering services within its area of competence, thereby transferring to that organisation responsibility for its functions in that area, if, under the provisions of its statutes, partners of that organisation may be, not only entities from the public sector, but also those from the social sector, given that on the date of the award, out of a total of 88 partners, there were 23 non-governmental organisations (IPSS) from the social sector, all of which were non-profit making and included charitable associations?
2. Can it be considered that the contractor is subordinate to the decisions of its public partners, in that the latter, on their own or as a whole, exercise a control which is similar to that which they exercise over their own departments, if, under the provisions of its statutes, the contractor must ensure that the majority of the voting rights are held by member partners and are subject to the management, supervision and guidance powers of the member of the Government responsible for health, given that the majority of the Management Board is also made up of public partners?
3. In the light of Community doctrine on in-house procurements, can it be considered that the requirement of “similar control” has been fulfilled, if, under the provisions of its statutes, the contractor is subject to the guidance powers of the member of the Government responsible for health who is in charge of appointing the President and Vice-President of the Management Board, approving the resolutions of the General Meeting on taking out loans involving a net debt equal to or greater than 75% of the equity recorded in the previous financial year, approving resolutions on amendments to the statutes, approving resolutions of the General Meeting on the dissolution of the contractor and determining how the assets are to be distributed in the event of a dissolution?
4. Does the fact that the contractor is a large and complex organisation, which operates throughout Portuguese territory, is in partnership with most departments and institutions of the SNS, including the majority of the country’s hospitals, has an estimated turnover in the order of EUR 90 000 000, has a business that includes varied and complex areas of activity, with very impressive activity indicators, and more than 3 300 workers, and participates in two additional enterprise groupings and in two commercial companies, mean that its relations with its public partners may be described as merely internal or in-house?
5. Does the fact that the contractor, under the provisions of its statutes, is able to provide services on a competitive basis to non-partner public entities or private entities, be they national or foreign (i) provided that there is no resulting loss or harm caused to the partners, and that it is beneficial to them and to the contractor, whether economically or in terms of enhancement or technical performance, and (ii) provided that the provision of those services does not represent a volume of invoicing that is greater than 20% of its overall annual turnover recorded in the previous financial period, mean that the requirement for in-house procurements, in particular the requirement for the “essential purpose of the activity” under Article 5(2)(b) of the CCP, has been fulfilled?
6. If the response to any of the above questions is not in itself sufficient to conclude whether or not the requirements under Article 5(2) of the CCP have been fulfilled having regard to Community doctrine on in-house procurements, does an overall assessment of these responses imply the existence of that type of procurement?

## Consideration of the questions referred

### *Preliminary observation*

- 30 It must be observed as a preliminary point that, in accordance with the provisions of Chapter III, Title II, of the directive, the application of its provisions varies according to the categorisation of the services in question. According to the information contained in the file made available to the Court, it appears that the services covered by the 2011 contract fall within the scope of Annex II B to that directive.
- 31 Such an assessment is, however, for the referring court to make on the basis of the facts of the case before it and, in any event, it is not likely to affect either the application of Directive 2004/18 as such or the application of the exception concerning in-house operations where the conditions laid down in that regard by the case-law of the Court are met.

### *The first question*

- 32 By this question, the referring court asks, in essence, whether the requirement for ‘similar control’, established by the case-law of the Court in order that the award of a public contract may be regarded as an in-house operation and may be made directly, without application of Directive 2004/18, is met where the contractor is a non-profit association operating in the public interest which, in accordance with its statutes, can have as partners not only public sector entities but also private social solidarity institutions carrying out non-profit activities and where, at the date of the award of the contract, the latter formed a large part, although a minority, of the number of partners of the contractor association.
- 33 In that regard, it must be borne in mind, firstly, that the fact that the contractor has the legal form of an association governed by private law and that it is non-profit is irrelevant as regards the application of the rules of EU law on public contracts and, in consequence, of the case-law of the Court concerning the exception for in-house operations. Such a fact does not preclude the contractor in question from carrying out an economic activity (see, to that effect, Case C-573/07 *Sea* EU:C:2009:532, paragraph 41, and Case C-305/08 *CoNISMa* EU:C:2009:807, paragraph 45).
- 34 Next, it must be noted that the question which arises, in essence, in the present case is whether the case-law resulting from the judgment in *Stadt Halle and RPL Lochau* EU:C:2005:5 applies, given that SUCH it is not established in the form of a company and does not therefore hold share capital and that its partners in the social sector are not undertakings in the terms used in that judgment.
- 35 In that regard, it must be pointed out that the exception concerning the in-house awards is based on an approach according to which, in such cases, the awarding public authority can be regarded as using its own resources in order to accomplish its tasks in the public interest.
- 36 One of the reasons which led the Court to the findings established in the judgment in *Stadt Halle and RPL Lochau* EU:C:2005:5 was based not on the legal form of the private entities forming part of the contractor or on their commercial purpose, but on the fact that those entities obeyed considerations particular to their private interests, which were different in nature from that of the objectives of public interest pursued by the awarding authority. For that reason, that authority could not exercise control over the contractor similar to that which it exercised over its own services (see, to that effect, *Stadt Halle and RPL Lochau* EU:C:2005:5, paragraphs 49 and 50).
- 37 Having regard to the fact, pointed out by the referring court, that SUCH is a non-profit association and the private partners which formed part of that association at the time of the award of the contract at issue in the main proceedings were private social solidarity institutions, all of them also non-profit, it

must be noted that the fact that the Court referred, in the judgment in *Stadt Halle and RPL Lochau* EU:C:2005:5, to concepts such as that of ‘undertaking’ or ‘share capital’ is due to the specific facts of the case which gave rise to that judgment and does not mean that the Court intended to restrict its findings to those cases alone where commercial for-profit undertakings form part of the contractor.

- 38 Another reason which led the Court to the findings in the judgment in *Stadt Halle and RPL Lochau* EU:C:2005:5 is that the direct award of a contract would offer a private undertaking with a capital presence in that contractor an advantage over its competitors (see, to that effect, *Stadt Halle and RPL Lochau* EU:C:2005:5, paragraph 51).
- 39 In the main proceedings, SUCH’s private partners pursue interests and objectives which, however positive they may be from a social point of view, are different in nature from the public interest objectives pursued by the awarding authorities which are at the same time partners of SUCH.
- 40 In addition, as the Advocate General noted in point 37 of his Opinion, the private partners of SUCH, despite their status as social solidarity institutions carrying out non-profit activities, are not barred from engaging in economic activity in competition with other economic operators. In consequence, the direct award of a contract to SUCH is likely to offer an advantage for the private partners over their competitors.
- 41 Accordingly, the considerations which led the Court to the findings set out in paragraphs 36 and 38 of the present judgment are also valid in circumstances such as those of the main proceedings.
- 42 The fact that the participation of private partners in the contractor is merely as a minority is not sufficient to call those conclusions into question (see, to that effect, *Stadt Halle and RPL Lochau* EU:C:2005:5, paragraph 49).
- 43 Finally, it must be noted that the fact that, in accordance with its statutes, SUCH was able only to admit private entities as its partners is, in principle, irrelevant. The relevant factor in the present case is that, at the time of the award of the contract at issue in the main proceedings, SUCH was actually made up not only of public partners but also of entities from the private sector.
- 44 Having regard to the foregoing considerations, the answer to the first question is that, where the contractor under a public contract is a non-profit association which, at the time of the award of the contract, has as partners not only public sector entities but also private social solidarity institutions carrying out non-profit activities, the requirement for ‘similar control’, established by the case-law of the Court in order that the award of a public contract may be regarded as an in-house operation, is not met, so that Directive 2004/18 applies.

#### *The second to sixth questions*

- 45 In view of the answer given to the first question, there is no need to answer the other questions referred.

#### **Costs**

- 46 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 (Fifth Chamber) hereby rules:

**Where the contractor under a public contract is a non-profit association which, at the time of the award of the contract, has as partners not only public sector entities but also private social solidarity institutions carrying out non-profit activities, the requirement for ‘similar control’, established by the case-law of the Court in order that the award of a public contract may be regarded as an in-house operation, is not met, so that 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 applies.**

[Signatures]