

JUDGMENT OF THE COURT (Fourth Chamber)

18 December 2007\*

In Case C-357/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 16 June 2006, received at the Court on 30 August 2006, in the proceedings

**Frigerio Luigi & C. Snc**

v

**Comune di Triuggio,**

intervening party:

**Azienda Servizi Multisettoriali Lombarda — A.S.M.L. SpA,**

THE COURT (Fourth Chamber),

composed of G. Arestis, President of the Eighth Chamber, acting as President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

\* Language of the case: Italian.

Advocate General: D. Ruiz-Jarabo Colomer,  
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 October 2007,

after considering the observations submitted on behalf of:

- Frigerio Luigi & C. Snc, by M. Boifava, avvocato,
  
- the Commission of the European Communities, by C. Zadra and X. Lewis, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

### **Judgment**

- <sup>1</sup> The reference for a preliminary ruling concerns the interpretation of Article 26 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), as

amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1) ('Directive 92/50'), Article 4(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), Articles 39 EC, 43 EC, 48 EC and 81 EC, Article 9 of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32) ('Directive 75/442'), and Article 7 of Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9).

- 2 That reference has been submitted in the course of proceedings between Frigerio Luigi & C. Snc ('Frigerio'), a partnership under Italian law, and the Comune di Triuggio (Municipality of Triuggio) concerning the award of a contract for the operation of environmental hygiene services.

## **Legal context**

### *Community legislation*

- 3 Directive 92/50 seeks to coordinate procurement procedures for the award of public service contracts. According to the second recital in the preamble thereto, the directive contributes to the progressive establishment of the internal market, which consists of an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

- 4 The sixth recital in the preamble to that directive states, *inter alia*, that obstacles to the free movement of services are to be avoided and that, therefore, service providers may be either natural or legal persons.
  
- 5 Pursuant to the twentieth recital in the preamble to that directive, in order to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular, it is necessary to improve the access of service providers to procedures for the award of contracts.
  
- 6 Article 26 of Directive 92/50 is worded as follows:

'1. Tenders may be submitted by groups of service providers. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.

2. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to carry out the relevant service activity, shall not be rejected solely on the grounds that, under the law of the Member State in which the contract is awarded, they would have been required to be either natural or legal persons.

3. Legal persons may be required to indicate in the tender or the request for participation the names and relevant professional qualifications of the staff to be responsible for the performance of the service.'

- 7 Directive 92/50 was repealed, with the exception of Article 41 thereof, with effect from 31 January 2006 and replaced by Directive 2004/18. The wording of Article 26 of Directive 92/50 was essentially reproduced in Article 4 of Directive 2004/18.

### *National legislation*

- 8 Legislative Decree No 267 laying down the consolidated text of the laws on the organisation of local bodies (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 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'), regulates, inter alia, the procedure for the award of contracts relating to the operation of local public services of economic interest. Article 113(5) of Legislative Decree No 267/2000 provides:

'5. The service contract is to be awarded in accordance with the rules of the sector and the legislation of the European Union, with 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 is selected by means of public and open tendering

procedures that have ensured compliance with domestic and Community legislation on competition in accordance with guidelines issued by the competent authorities in specific regulations 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’.

9 As regards the specific sector of waste, Article 2(6) of Law No 26 of the Lombardy Region laying down rules for local services of general economic interest — Provisions regarding waste management, energy, use of the subsoil and water resources (*disciplina dei servizi locali di interesse economico generale. Norme in materia di gestione dei rifiuti, di energia, di utilizzo del sottosuolo e di risorse idriche*) of 12 December 2003 (Ordinary supplement to the *Bollettino Ufficiale della Regione Lombardia* No 51 of 16 December 2003; ‘Regional Law No 26’) provides:

‘Entitlement to provide services shall be granted to companies with share capital selected by public and open tendering procedures or procedures compatible with national and Community competition rules; ...’

10 Under Article 198(1) of Legislative Decree No 152 on provisions regarding the environment (*norme in materia ambiente*) of 3 April 2006 (Ordinary Supplement to *GURI* No 88 of 14 April 2006):

‘... the municipalities shall continue to manage urban waste and similar waste for disposal on an exclusive basis on the terms referred to in Article 113(5) of Legislative Decree [No 267/2000]’.

## **The factual background and the questions referred for a preliminary ruling**

- 11 By Resolution No 53 of 29 November 2005 ('Resolution No 53'), the Municipal Council of the Comune di Triuggio entrusted for a period of five years from 1 July 2006 the operation of environmental hygiene services within the municipality to Azienda Servizi Multisetoriali Lombarda — A.S.M.L. SpA ('ASML').
- 12 By the same resolution, that Council undertook to acquire a shareholding allowing the municipal administration to 'become a member for all purposes and also to restructure and regulate, from both the organisational and functional points of view, relations with [ASML] for the purpose of creating for the [Comune di Triuggio] a power of supervision and control of that undertaking comparable to the power it has over its own departments'.
- 13 Frigerio, which had operated the services in question from 1 January 1996 to 30 June 2006 by way of a temporary joint venture with another partnership under Italian law, brought an action against Resolution No 53 before the Tribunale amministrativo regionale per la Lombardia (Lombardy Regional Administrative Court). In that action, it submitted that the Municipal Council of the Comune di Triuggio was not entitled directly to award the contract at issue, but was required to put it out to tender, in accordance with the Community legislation applicable to public procurement and with Article 113(5) of Legislative Decree No 267/2000.
- 14 The Comune di Triuggio and ASML contended that that action should be dismissed, but also, in the alternative, that it was inadmissible. In this respect, they maintain, inter alia, that the action is inadmissible because of Frigerio's lack of legal interest in bringing proceedings, since that entity, which is constituted in the legal form of a (general) partnership, is not entitled to put itself forward for the award of

the contract in question, since Article 113(5) of Legislative Decree No 267/2000 allows only companies with share capital to be awarded local public service contracts, such as the environmental hygiene contract.

- 15 In those circumstances, the Tribunale amministrativo regionale per la Lombardia decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Does Article 4(1) of Directive [2004/18], or the analogous Article 26(2) of Directive [92/50] (in the event that the latter is regarded as the legislative point of reference), according to which candidates or tenderers who, on the basis of the legislation of the Member State in which they are established, are authorised to provide the service at issue may not be rejected solely because, under the provisions in force in the Member State in which the contract is to be awarded, they would be required to be natural persons or legal persons, lay down a fundamental principle of Community law such as to override the formal limitation laid down by Article 113(5) of Legislative Decree No 267/2000 and by Articles 2(6) and 15(1) of Regional Law [No 26], and is it therefore capable of compelling compliance in such a way as to allow persons not having the status of companies with share capital to participate in tendering procedures?
- (2) In the event that the Court does not consider the above rules to be the expression of a fundamental principle of Community law, does Article 4(1) of Directive [2004/18] or the analogous Article 26(2) of Directive [92/50] (in the event that the latter is regarded as the legislative point of reference) constitute,



rather, an implicit corollary or a “derivative principle” of the principle of competition, viewed in conjunction with those concerning administrative transparency and non-discrimination on grounds of nationality, and does it therefore, as such, have immediate binding effect and take precedence over any possibly conflicting domestic provisions laid down by Member States to govern public works contracts falling outside the scope of the direct applicability of Community law?

- (3) Are Article 113(5) of Legislative Decree No 267/2000 and Articles 2(6) and 15(1) of Regional Law [No 26] compatible with the Community principles set out in Article 39 [EC] (principle of free movement of workers within the Community), Article 43 [EC] (freedom of establishment), Articles 48 [EC] and 81 [EC] (agreements restricting competition) ... , and therefore, in the event of a conflict being identified, must the abovementioned national provisions be disapplied as conflicting with Community provisions that have direct binding effect and take precedence over domestic provisions?
- (4) Are Article 113(5) of Legislative Decree No 267/2000 and Articles 2(6) and 15(1) of Regional Law [No 26] compatible with Article 9(1) of Directive [75/442] or the analogous Article 7(2) of Directive [2006/12] (in the event that the latter is regarded as the legislative point of reference), which provide, respectively, that “... any establishment or undertaking which carries out the operations specified in Annex II A [to Directive 75/442] must obtain a permit from the competent authority referred to in Article 6 [of that directive]” and that “[t]he plans referred to in paragraph 1 [of Article 7 of Directive 2006/12] may, for example, cover: (a) the natural or legal persons empowered to carry out waste management ... ”?

## The questions referred

### *The first and second questions*

- 16 As a preliminary point, it should be observed that it is settled case-law that, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in a case is a matter for the national court (see, *inter alia*, Case C-235/95 *Dumon and Froment* [1998] ECR I-4531, paragraph 25; Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 32, and Case C-251/06 *ING. AUER* [2007] ECR I-9689, paragraph 19).
- 17 In this connection, it is apparent from the order for reference, and in particular from the first and second questions referred, that the national court is basing its decision on the premise that the contract at issue in the main proceedings falls within the scope of one of the Community directives on public service contracts, that is, either Directive 92/50 or Directive 2004/18. That premise is also supported by the evidence submitted to the Court, such as Resolution No 53, the text of which is attached to Frigerio's observations and which shows that the value of the contract at issue in the main proceedings is greater than the threshold laid down in those directives. In addition, it is apparent from the observations submitted at the hearing that the consideration for that contract is provided by the Comune di Triuggio, with the result that it cannot be deemed to be a concession of a public service.
- 18 In those circumstances, and having regard to the fact that that resolution dates from 29 November 2005, it must be held that Directive 92/50 applies *ratione materiae* and *ratione temporis* to the facts of the case in the main proceedings.
- 19 Therefore, the first and second questions, which should be examined together, should be reformulated as meaning that the referring court is asking, primarily,

whether Article 26(2) of Directive 92/50 precludes national provisions, such as those at issue in the main proceedings, which restrict the submission of tenders in a procedure for the award of a public service contract to parties having the legal form of a company with share capital. As a subsidiary question, that court is inquiring as to the consequences of an affirmative answer on the interpretation and application of the national law.

- 20 In accordance with Article 26(2) of Directive 92/50, the adjudicating authorities may not reject candidates or tenderers who, under the law of the Member State in which they are established, are entitled to carry out the relevant service activity solely on the ground that, under the law of the Member State in which the contract is awarded, they would have been required to be either natural or legal persons.
- 21 It stems from that provision that the adjudicating authorities also cannot exclude candidates or tenderers who are entitled, under the law of the Member State concerned, to carry out the relevant service activity from a tendering procedure solely on the ground that their legal form does not correspond to a specific category of legal persons.
- 22 It follows that Article 26(2) of Directive 92/50 precludes any national legislation which excludes candidates or tenderers entitled under the law of the Member State concerned to carry out the relevant service activity from the award of public services contracts with a value greater than the threshold for the application of Directive 92/50 solely on the ground that those candidates or tenderers do not have the legal form corresponding to a specific category of legal persons.
- 23 Consequently, national provisions such as those at issue in the main proceedings, which restrict to companies with share capital the award of local public service contracts of economic interest with a value greater than the threshold for the application of Directive 92/50, are not compatible with Article 26(2) of that directive.

- 24 As regards the facts at the origin of the dispute in the main proceedings, the file shows that Frigerio brought the action in the main proceedings as the principal entity in a temporary joint venture which had provided environmental hygiene services for the Comune di Triuggio between 1 January 1996 and 30 June 2006.
- 25 In that regard, it also follows from Article 26(1) of Directive 92/50 that adjudicating authorities cannot require groups of service providers to assume a specific legal form in order to submit a tender.
- 26 Furthermore, it is not disputed before the Court that, under Italian law, Frigerio was entitled in its legal form, that is to say, as a partnership, to provide the environmental hygiene services. In this respect, the referring court states *inter alia* that Frigerio is registered as being entitled to operate within the waste sector.
- 27 As has been pointed out in paragraph 19 of this judgment, the referring court is also inquiring, as a subsidiary question, as to the consequences of a finding that national provisions such as those at issue in the main proceedings are not in conformity with Directive 92/50.
- 28 Suffice it to note in that regard that, according to established case-law, it is for the national court, to the full extent of its discretion under national law, to interpret and apply national law in conformity with the requirements of Community law. Where such an application is not possible, the national court must apply Community law in its entirety and protect rights which the latter confers on individuals, disapplying, if necessary, any contrary provision of domestic law (see, to that effect, Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 11, and Case C-208/05 *ITC* [2007] ECR I-181, paragraphs 68 and 69).

29 In the light of the foregoing, the answer to the first and second questions referred is that Article 26(1) and (2) of Directive 92/50 precludes national provisions, such as those at issue in the main proceedings, which exclude candidates or tenderers entitled under the law of the Member State concerned to provide the service in question, including those composed of groups of service providers, from submitting a tender, in a procedure for the award of a public service contract with a value greater than the threshold for application of Directive 92/50, solely on the ground that those candidates or tenderers do not have a legal form corresponding to a specific category of legal persons, namely that of a company with share capital. It is for the national court, to the full extent of its discretion under national law, to interpret and apply national law in accordance with the requirements of Community law and, in so far as such an interpretation is not possible, to disapply any provision of national law which is contrary to those requirements.

*The third and fourth questions*

30 By its third and fourth questions, the referring court is essentially asking whether national provisions such as those at issue in the main proceedings are in conformity with Articles 39 EC, 43 EC, 48 EC and 81 EC and Directives 75/442 and 2006/12.

31 Since, as is apparent from paragraph 18 above, the facts at issue in the main proceedings fall within the scope of application of Directive 92/50 and the interpretation of that directive provides the information necessary to enable the referring court to resolve the case before it, an examination of the abovementioned Community provisions would be of purely academic interest. Consequently, in accordance with established case-law, there is no need to answer the third and fourth questions referred (see, to that effect, Case C-144/04 *Mangold* [2005] ECR I-9981, paragraphs 36 and 37, and Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraphs 42 and 43).

## Costs

- 32 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 (Fourth Chamber) hereby rules:

**Article 26(1) and (2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001, precludes national provisions, such as those at issue in the main proceedings, which exclude candidates or tenderers entitled under the law of the Member State concerned to provide the service in question, including those composed of groups of service providers, from submitting a tender, in a procedure for the award of a public service contract with a value greater than the threshold for application of Directive 92/50, solely on the ground that those candidates or tenderers do not have a legal form corresponding to a specific category of legal persons, namely that of a company with share capital. It is for the national court, to the full extent of its discretion under national law, to interpret and apply national law in accordance with the requirements of Community law and, in so far as such an interpretation is not possible, to disapply any provision of national law which is contrary to those requirements.**

[Signatures]