OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 4 June 2008 [1]

1. The reference by the Conseil d'État (Council of State), Belgium, concerns the scope of Community procurement law. It concerns the question as to whether procurement law is applicable where a regional authority, in this case a municipality, delegates the management of its cable television network to a body that is purely an inter-municipal cooperative entity [2] with the involvement of that municipality, yet without drawing on any private capital. The present case involves inter-municipal cooperation in the form of a cooperative and the questions submitted by the referring court concern the first of the well-known *Teckal* criteria: control similar to that exercised over an entity's own department.

2. In the dispute in the main proceedings the Belgian cable television company Coditel Brabant SPRL ('Coditel') is proceeding against three defendants: the Municipality of Uccle (also 'the municipality'), the cooperative Sociéte Intercommunale pour la Diffusion de la Télévision (inter-municipal company for television broadcasting) ('Brutélé') and the region of Brussels capital, represented by its government.

I — Legal framework

A — *Community law*

3. Article 12(1) EC provides as follows:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

1 — Original language: German.

2 — The terms 'inter-municipal cooperative' or 'inter-municipal cooperative entity' encompass very different forms of administrative cooperation, of both an informal and formal legal nature (see, Schmidt: *Kommunale Kooperation, Der Zweckverband als Nukleus des öffentlichen Gesellschaftsrechts* [The ad hoc association as the nucleus of the law on public partnerships], Tübingen 2005, p. 2 et seq.). It ranges from ordinary municipal project collaboration to large scale legally institutionalised forms such as for example associations of municipalities or cooperatives. See, the concept of 'situation involving a number of public entities' and 'public-public entities' inter alia in the Opinion of Advocate General Stix-Hackl of 12 January 2006, C-340/04 *Carbotermo and Consorcio Alisei* [2006] ECR I-4137), points 29 et seq.; see also Egger, *Europäisches Vergaberecht* [European Procurement law], 2007, p. 167 et seq.

4. Article 43 EC provides as follows:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. …

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.'

5. Article 49(1) EC provides as follows:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

B — *National law*

6. Under Article 162 of the Belgian Constitution, municipalities have the right to form associations.

7. The details of inter-municipal cooperation are governed by the Law on inter-municipal cooperatives (Law of 22 December 1986 on inter municipal cooperatives). Under Article 1 of this Law, in accordance with the provisions of this Law, two or more municipalities may form associations with specific objects in the municipal interest. Article 3 of this Law provides that inter-municipal cooperatives are to be legal persons governed by public law that, irrespective of their form or object, are not to have a commercial character. Article 10 of this Law provides that the component bodies ('statutory bodies') of any inter-municipal cooperative are a general assembly, a governing board and a board of auditors. Under Article 12 of the Law, the general assembly representatives are to be appointed by the municipal council of each municipality from among the municipal councillors, the mayor and the aldermen. It is further laid down therein that for each municipality the voting rights at the general assembly are to correspond to the number of shares held.

II — Facts of the main proceedings and questions referred for a preliminary ruling

8. The cable television network of the Municipality of Uccle was administered by the cable television company Coditel on the basis of contracts dating from 1969 to 1999. As at the end of the contracts on 31 December 1999, the municipality made use of its contractual right to buy the cable television network situated on its territory from Coditel.

9. In October 1999, the Uccle municipal council decided, first, to put out the operation and improvement of the municipal cable television network to tender by a concessionaire for the period from 1 July 2000 to 30 June 2009. Second, the draft was approved for a further additional contract with Coditel to secure the public cable television service pending appointment of the future concessionaire. Finally, provision was made by way of the additional contract for Coditel to administer the network until 31 December 2001.

10. Coditel applied at the end of 1999 for the concession to operate the cable television network of the Municipality of Uccle. At the request of the municipality in April 2000 Coditel also lodged an offer to buy the cable television network, [3] as moreover did the other companies that had participated in the tender.

11. In May 2000, the Uccle municipal council resolved to sell the network rather than grant a concession. Under the terms of the relevant tender Coditel in October 2000 submitted a purchase bid. The prices offered in response to the tender ranged from BEF 750 million to 1 billion; the only offer which was in conformity with the tender and permissible, namely the Coditel bid, was the lowest.

12. Brutélé also responded to the call for tenders but not with a purchase bid but with an offer of affiliation.

13. Since the prices offered to the Municipality of Uccle were clearly lower than the

3 — Following the request by the Municipality of Uccle Coditel enquired of it whether the offer to buy the network was a criterion in the evaluation of the bids submitted in the context of the tendering procedure for the award of the network operating concession, whether such offer replaced the current tendering procedure and whether it had been addressed to the other participants involved in the tendering procedure. On 28 April 2000, the Municipality of Uccle replied that it had made the same enquiry of four companies that had submitted bids in the context of the tendering procedure, that the offer to buy the network did not replace the tendering procedure and was also not a criterion for evaluating the bids submitted and finally that 'as the College has received a purchase proposal (conditional at present), it considers that this option cannot be excluded a priori and may be one of the factors in the current considerations about the future of the network; hence, before submitting a proposal to the Council for a decision to award (or not to award) an operating concession, it has been decided, in the interests of full information and equality between the candidates, to consult each of them'.

prices previously mentioned as possible,[4] it resolved by resolution of its municipal council dated 23 November 2000 not to sell the municipal cable television network (first decision challenged in the main proceedings).

14. Also on 23 November 2000, the Uccle municipal council resolved that the municipality should become a member of Brutélé (second decision challenged in the main proceedings). This resolution states inter alia that Brutélé has made an offer of affiliation to the Municipality of Uccle involving the municipal network as capital contribution and the subscription of company shares, the payment of an annual fee[5] together with the offer to create, if it were to join, an independent operational sub-sector of its own with decision-making powers.[6] The municipal council further stated in that resolution that affiliation to Brutélé would produce a number of advantages for the Uccle municipality: autonomy in decision-making, considerable revenues, retention of ownership of the network and agreement of the option of a rapid and uncomplicated withdrawal in the event of a future interesting purchase bid.

15. On 30 November 2000 Coditel lodged with the First Minister of the Government of the Bruxelles-Capitale region substantiated a complaint seeking the setting aside of the resolution of the Uccle municipal council of 23 November 2000 concerning the affiliation of that municipality to Brutélé.

16. On 7 December 2000, the extraordinary general assembly of Brutélé voted in favour of the affiliation of the Municipality of Uccle (third decision challenged in the main proceedings).

4 — See on that point resolution of the municipal council of 23 November 2000. This difference may doubtless be accounted for by reference to the prevailing economic situation: the share prices of some of the foremost high-technology companies had fallen to a historical low in the previous months, thus rendering conditions for a time extremely unfavourable.

5 — According to the relevant resolution of the municipal council of 23 November 2000, the annual fee payable is made up as follows: (a) fixed fee equal to 10% of the income from basic subscriptions for cable television (on the basis of 31 000 subscribers and an annual subscription fee of BEF 3 400 (before VAT and royalties): BEF 10 540 000 per year); (b) payment of 5% of the turnover of Canal+ and of the bouquet; (c) payment of the entire profit on all the services provided.

6 — In that connection the resolution of the municipal council of 23 November 2000 states as follows:
This autonomy relates, inter alia, to:
— choice of programmes transmitted;
— the subscription and joining rates;
— investment and works policy;
— the rebates or benefits to be granted to specific groups of persons;
— the nature and terms relating to other services to be provided via the network and the possibility of entrusting the inter-municipal cooperative with projects of interest to the municipality that accord with the objectives defined in its statutes, such as the creation of a municipal intranet and a website as well as the training and further training of staff for this purpose.
In this context:
— Brutélé would draw up an accounting and operating balance sheet for activities on Uccle's network;
— [The Municipality of] Uccle would have a director on the governing council of Brutélé as well as three directors on the board of the Brussels operating sector, one auditor and one municipal expert.

17. On 19 December 2000, the First Minister of the Brussels city region informed the Municipality of Uccle that its conditional affiliation [7] with Brutélé gave rise to no objection (fourth decision challenged in the main proceedings). On 2 January 2001 the First Minister of the Bruxelles-Capitale region informed the applicant that he had raised no objection to the affiliation of the Municipality of Uccle with Brutélé.

18. Coditel brought an action on 22 January 2001 for a declaration that the four abovementioned decisions were null and void.

19. In the main proceedings the referring Conseil d'État has already dismissed the proceedings against two of these decisions (the third and fourth contested decisions) as inadmissible. To the extent to which the action is in its view admissible, it is in particular important to assess the decision by which the Uccle municipal council resolved to become a member of Brutélé.

20. By order of 3 July 2007, the Conseil d'État referred the following questions to the Court of Justice:

'(1) May a municipality, without calling for competition, join a cooperative society grouping together exclusively other municipalities and associations of municipalities (a so-called pure intermunicipal cooperative) in order to transfer to that cooperative society the operation of its cable television network, in the knowledge that the cooperative society carries out the essential part of its activities for and with its own members and that decisions regarding those activities are taken by the board of directors and the sector boards within the limits of the delegated powers granted to them by the board of directors, those statutory bodies being composed of representatives of the public authorities and the decisions of those corporate bodies being taken in accordance with the vote expressed by the majority of those representatives?

(2) Can the control thus exercised over the decisions of the cooperative society, via the statutory bodies, by all the members of the cooperative society — or, in the case of operational sectors or subsectors, by some of those members — be regarded as enabling them to exercise over the cooperative society control similar to that exercised over their own departments?

(3) For that control to be regarded as similar, must it be exercised individually by each member, or is it sufficient that it be exercised by the majority of the members?'

7 — According to the resolution dated 23 November 2000, the affiliation was expressed to be subject to the condition that a resolution be passed by the general assembly of Brutélé, in which all members agreed not to oppose any subsequent withdrawal of the Municipality of Uccle.

21. The referring court explains that the affiliation of the Municipality of Uccle to Brutélé falls not within the sector of public contracts for services but within that of public service concessions. In that connection, even though the Community directives on public contracts are not applicable, the fundamental rules of primary Community law in general and the prohibition on discrimination on grounds of nationality in particular, which entails inter alia a transparency obligation, do apply.

22. From the referring court's perspective there is much to be said for the fact that the Municipality of Uccle as awarding authority was not entitled directly and immediately to have recourse to affiliation to Brutélé without conducting a tendering procedure or a comparative examination of bids submitted. Specifically, the municipality, in order to satisfy the requirements of Community law, ought to have conducted a fresh tendering procedure in order to examine whether the grant of a concession over its cable television network service to Coditel or another economic operator would not have been a more favourable possibility than that finally chosen.

23. However, in order to enable it to conduct a definitive analysis, it is essential to obtain further clarification as to criteria arising out of the *Teckal*[8] judgment, in particular in regard to the nature of the control exercised by the concession-granting authority over the concessionaire. For under that case law, the transparency requirements under Community law could only be suspended if two conditions that were to be narrowly interpreted were separately met, first that the control exercised by the concession-granting authority over the concessionaire is similar to that exercised over its own departments and, second, that the latter body essentially performs its activity for the authority controlling it.

24. In that connection Brutélé claimed that it was a purely inter-municipal entity whose activities were intended for the affiliated municipalities and reserved to them, and that its statutes permitted the Municipality of Uccle to create an independent operational subsection of its own with decision-making powers, which enabled the latter to exercise precisely the same direct control over the activities of the cooperative society in this subsection as over its own departments. The Municipality of Uccle has a member on the governing council of Brutélé and three members on the board of the Brussels operating section, an auditor and a municipal expert. Moreover, the Municipality of Uccle could at any time withdraw from the cooperative entity which was further evidence indicating that it was completely in control of the operation of its cable television network.

25. According to the referring court, the statutes of Brutélé provide that the cooperative members are municipalities together

8 — Case C-107/98 [1999] ECR I-8121, paragraph 50.

with an inter-municipal body, which in its turn is made up solely of municipalities. The cooperative society is not open to private individuals. The governing council comprises representatives of the municipalities — a maximum of three per municipality — who are appointed by the general assembly which in itself comprises representatives of the municipalities. The governing council has the widest powers. The municipalities are divided into two sections of which one comprises the Brussels region municipalities that may be divided into sub-sectors. Within each sector a sector board is set up consisting of board members appointed on a proposal by the municipalities by the general assembly and sitting in various compositions that reflect proportions of shares held in respect of each sector. The governing council may delegate to the sector boards powers in respect of specific questions concerning the sub-sectors — such as the conditions for the application of tariffs, the extension and investment plan, the financing of investments and advertising campaigns — and problems common to the various sub-sectors within the operational sector. The other statutory bodies are the general assembly whose decisions are binding on all members, the Director General, the board of experts consisting of municipal experts, and the auditors. The Director General, the experts and the auditors are appointed on a case-by-case basis by the governing council or the general assembly, as the case may be.

26. The referring court draws from this the inference that the decision-making autonomy of the Municipality of Uccle is not as comprehensive as Brutélé alleges. For example, the governing council exercises the widest powers whilst this municipality is represented by only one representative. It is true that all decisions are taken by bodies of the cooperative society that consist solely of representatives of affiliated municipalities and inter-municipal bodies, yet that does not result in a situation in which each of those members individually has the same decisive influence in regard to the cooperative society as in the case of an autonomous internal organisation of activity.

27. In light of the second condition arising out of the *Teckal* judgment [9] — 'in the case where … at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities' — the referring court explains that it is not disputed that the cooperative society conducts its activity essentially for its members. On this precondition the referring court has raised no question for a preliminary ruling.

III — Parties' submissions

28. Coditel, the Municipality of Uccle, Brutélé, the Belgian, German and Netherlands Governments and the Commission

9 — Set out above in footnote 8, paragraph 50.

of the European Communities submitted written statements pursuant to Article 23 of the Statute of the Court of Justice. They presented oral argument at the sitting on 9 April 2008, with the exception of the Municipality of Uccle, which was not represented.

29. Essentially, all parties agree that this is a case involving the sector of the award of public concessions that is not subject to the directives on procurement but to the general requirement of transparency. [10]

30. Except for *Coditel* all are agreed that the second *Teckal* criterion would appear to be satisfied on the basis of the particulars provided in the request for a preliminary ruling.

31. On the first *Teckal* criterion there are opposing viewpoints.

32. *Coditel* and the C*ommission* consider that this criterion is not satisfied; the direct affiliation of the Municipality of Uccle to the Brutélé cooperative society conflicts with the transparency requirement.

33. *Coditel* points out that before affiliation to Brutélé the Municipality of Uccle had no relationship with the cooperative, with the result that the Teckal case-law is in no way relevant. Moreover, the Municipality of Uccle holds only 8.26% of Brutélé's shares (76 out of a total of 920). In addition, Brutélé provides its services such as cable television, telephone and Internet on a commercial basis and in competition with other private service providers. The internal structure of Brutélé is essentially similar to the internal structure of a private undertaking. The Municipality of Uccle does not have the capacity to control Brutélé; rather it is questionable whether there can be actual collective control by the cooperative members owing to the large number of members and possible divergences of interests. In light of the judgment in *Carbotermo*, [11] it is not a determinant factor that 100% of the capital in Brutélé is owned by municipalities and regional authorities. In that connection it is in particular not sufficient that the Municipality of Uccle was granted an operating sub-sector.

34. The C*ommission* also deals in its submissions with the internal decision-making structures of Brutélé and considers in that

10 — The Netherlands Government explains that the particulars in the order for reference are not comprehensive enough to be able in fact to evaluate this aspect.

11 — Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 37.

connection that it is unable to discern a power of decisive influence [12] on the part of an individual municipality such as Uccle. Brutélé's board of directors possesses wide-ranging powers and in particular also determined tariffs. The Municipality of Uccle has in each respect only a shared influence and is not freely in a position to enforce its will, which is however a precondition for satisfying the first Teckal criterion.

35. The *Municipality of Uccle* and *Brutélé*, who conversely are of the view that the first Teckal criterion is satisfied, underscore the aspect of the absolute inter-municipal nature of the cooperative society, both under its statutes and under Belgian law.

36. The *Municipality of Uccle* points out that by its affiliation it retained 'similar control' over the municipal cable television network as laid down in *Teckal*. It should be emphasised that the Court does not allude to 'identical' but to 'similar' control. To require complete and individual control by a municipality over an inter-municipal form of cooperation would render such cooperation impossible, which by definition is dependent on the collaboration of a multiplicity of persons.

37. *Brutélé* makes reference only in the alternative to satisfaction of the first *Teckal* criterion, and points in particular to the judgment in *Asemfo,* paragraphs 57 et seq. Primarily, Brutélé argues that Articles 43 EC and 49 EC and the principles of equal treatment, non-discrimination and transparency are to be interpreted in such a way as not in themselves to preclude a municipality from joining, without calling for competition, a purely inter-municipal cooperative, without any involvement of private capital and as constituted in particular to attain deliberate aims in the municipal and the general interest. It may be inferred from the judgment in *Stadt Halle und RPL Lochau*, paragraph 48, that municipalities are entitled themselves to perform their tasks that are in the general interest. However, to apply the rules of Community procurement law to inter-municipal cooperation would force the municipalities to outsource their functions using the market. Belgian law expressly grants municipalities the option of engaging in inter-municipal cooperation. [13] The relationship between the Municipality of Uccle and the Brutélé cooperative society was not founded in contract but by affiliation which is governed by law and by Brutélé's statutes. Brutélé is purely built on inter-municipal cooperation, according to its statutes is not open to private capital and performs its functions in the interest of the municipalities. The aim of the cooperation is to make available to

12 — In this connection the Commission refers to judgments in Case C-458/03 *Parking Brixen* [2005] I-8585, paragraph 65, and *Carbotermo and Consorcio Alisei* (cited in footnote 11 above).

13 — Brutélé refers to the Belgian constitution and to the Belgian law on inter-municipal cooperatives (cited in points 6 and 7 of this Opinion above).

users as wide as possible a selection of television programmes under the most favourable conditions and in appropriate cases to extend the services offered to radio and various communications media. Finally and thirdly, Brutélé contends that the Municipality of Uccle within the context of the cooperative society, in particular also through the internal decision-making structure and with the separate sub-sector, exercises the control at issue here that is similar to that exercised over its own departments.

38. The *Belgian Government* is of the opinion that the first question referred is to be replied to affirmatively. Without a tendering procedure a municipality may affiliate itself to a cooperative society such as Brutélé which consists solely of other municipalities and regional authorities, in order to transfer to it the management of its cable television network, if the cooperative conducts its activity essentially only for and with its members, and the decisions in connection with that activity are taken by the governing council and the sector boards, within the limits of the delegated powers granted to them by the governing council, and those statutory bodies being consist of representatives of the public authorities and decisions are passed by a majority of the latter.

39. Brutélé, which is not open to private capital, cannot be regarded as a third party in relation to the Municipality of Uccle. The concession for the cable television network was not awarded externally but retained its internal nature.

40. The other questions referred for a preliminary ruling arise solely out of the fact that inter-municipal cooperation is a form of cooperation, which in the nature of things associates different municipalities that cooperate together. In this connection it should be emphasised that decentralised administrations have the right to opt for cooperation in order to secure efficient management. This involves inter alia cooperation between small and larger regional authorities. In regard to smaller regional authorities there is often an inherent necessity to tackle overlapping tasks jointly in an overarching larger structure. To determine how such cooperation between regional authorities are organised and controlled internally, is a matter for the applicable law and the relevant administrations of the Member States. In this respect there is wide variety of internal models of organisation and control. It cannot be inferred from a form of cooperation that takes account of the different size of the cooperating regional authorities in relation to control that the control is not similar to that exercised over its own departments. In addition it follows from the nature of inter-municipal cooperation that within this context a municipality does not decide on its own but that decisions are taken by majority, indeed with a view to the common purpose. Control by majority decisions may be deemed to constitute 'similar control' within the meaning of the case-law. In regard to the Municipality of Uccle, that is represented in the decision making bodies

of Brutélé by its representatives, it may in the final analysis be stated that it exercises over Brutélé a similar control to that exercised over its own departments.

41. The *German Government* is of the view that the principles and rules of procurement law do not apply to a case such as the present one ab initio since both *Teckal* criteria are satisfied. In the case of several 'controlling authorities' those criteria are to be construed as meaning that if the public awarding body jointly owns the contractor together with other legal persons, no dilution of control can be inferred from the jointly exercised control by the various authorities. For example, departments that are organisationally uniform could be established by several regional authorities in common and jointly 'operated'; in such cases it would be aberrant to take the view that the control exercised by individual regional authorities is deficient or incomplete. In German law governing administrative organisation there are many examples of that, thus the financial authorities ('Oberfinzanzdirektionen') are both departments of the Federation and of the Land. In some Länder states district administrative authorities are both departments of the district and at the same time lower state authority of the Land. Many Länder, for example Brandenburg and Berlin operate a joint supreme administrative court ('Oberverwaltungsgericht'). It would be regarded as completely aberrant to assume deficient or incomplete degree of control by the regional authority over authorities that are operated jointly by several regional authorities. Exactly in the same way control exercised over a contractor in the ownership of several public legal persons is jointly exercised but no less effective for that. That is so in the case of Brutélé because only municipalities are involved which jointly exercised their powers of control as over a (joint) department.

42. If, because the public awarding body has to exercise control over the contractor jointly with other principals, one were to conclude that there was inadequate control and the rules of procurement law were therefore applicable, that would have serious consequences for the requisite margin of discretion in the configuration of inter-municipal cooperation. The option in favour of such a form of inter-municipal cooperation would then always be subject to a tendering procedure. That would be to set back inter-municipal cooperation as a form of arrangement for organising the tasks of the State as opposed to the performance of tasks independently, which would render procurement law never applicable. Procurement law would then be exerting an entirely nonsensical pressure on the municipalities to desist in applicable cases from cooperating with other

municipalities. Yet that was never the objective of procurement law. Rather procurement law applies only when the municipality calls on the market for the purposes of fulfilling its tasks.

43. Finally, the German Government points out that the right to municipal self-administration is protected at European level by the European Charter of municipal self-administration. [14] It enshrines the right of municipalities to perform tasks on their own and also to engage in inter-municipal co-operation without first conducting a competitive tendering procedure.

the fact that the municipalities and municipal associations are entirely in control of the decision-making bodies of Brutélé, for the latter comprise their representatives. In that way the municipalities and municipal associations are in a position to exercise decisive influence both on the strategic aims and on important decisions such as for example the fixing of tariffs. Brutélé has no autonomy and therefore cannot be regarded as a third party in relation to the municipalities and municipal associations. As to the third question it should be said that it is sufficient in regard to 'control similar to that exercised over its own departments' for the municipalities and municipal associations concerned to exercise control jointly.

IV — Legal assessment

44. The *Netherlands Government* proposes that the reply to the first question referred should be affirmative. On the second question it must be pointed out against the background of the first of the two criteria in the *Teckal* judgment, the subsequent case-law and the particulars contained in the order for reference that in regard to Brutélé the municipalities involved and the municipal associations are in the position to exercise decisive influence. That is borne out by the fact that they jointly hold the whole of the share capital and private capital is excluded. The finding of decisive influence is confirmed by

45. Since the questions referred relate to different aspects of the same question I shall examine them together.

14 — The European Charter on Local Self-Government, opened for signature by the Member States of the Council of Europe on 15 October 1985 in Strasbourg, has been in force since 1 September 1988 (for more particulars see: http://conventions.coe.int).

46. The question is whether the affiliation of a municipality such as Uccle to a purely inter-municipal cooperative society such as

Brutélé and the attendant transfer or administration of the municipal cable television network to that cooperative is to be regarded as the award of a concession governed by the Community principles of procurement law, or whether it is a situation that can be equated with in-house performance of tasks and is therefore exempt from the requirement to call for tenders. The aspects exercising the referring court concern in particular the internal decision-making structures, that is to say decisions by statutory bodies such as the governing council and sector boards on the one hand and decisions essentially of an individual nature but adopted by way of majority decision-making on the other hand. Can such decision-making structures comply with the criterion in the case-law of 'control similar to that exercised over its own departments'?

47. The referring court considers that dominant control over the cooperative society and its decisions is exercised by the regional authorities jointly by way of the cooperative statutory organs which thereby enjoy a certain autonomy vis-à-vis their members. That does not constitute 'control similar to that exercised over its own departments' and the referring court is therefore inclined to regard the first grounds of action as substantiated.

48. In order to classify the questions it should be stated in advance that, as the referring court has already rightly stated, under settled case-law, none of the Community directives in the sector of public procurement [15] applies [16] to the award of public service concessions. [17] The fact that the situation in the main proceedings occurred in the sector of service concessions and not in the sector of contracts for services, may be inferred from the fact that it is not the regional authority that pays the remuneration for the service provided but that the consideration consists of the right to exploit its own service, [18] which is associated with the assumption of operating risk. [19]

15 — Inter alia 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 principal aim of the Community provisions on public contracts is to promote free movement of services and the opening up of undistorted competition in all Member States, see Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 44).

16 — Neergaard, 'The Concept of Concession in EU Public Procurement Law versus EU Competition Law and National Law', in: Nielsen/Treumer (ed.), *The New EU Public Procurement Directives*, 2005, points to the fact that there are very different concepts of concessions according to the legal context and that the concept of the concession in Community procurement law differs significantly from the concept in competition law and to some extent also in national law.

17 — See judgments in Cases C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745 paragraphs 56 and 57; C-231/03 *Coname* [2005] ECR I-7287, paragraphs 9 and 16; *Parking Brixen* (cited in footnote 12 above, paragraph 42), and C-382/05 *Commission* v *Italy* [2007] ECR I-6657, paragraph 29).

18 — See, on the difference between criteria used the judgment in *Telaustria and Telefonadress* (cited in footnote 17 above, paragraph 58). See also legal definition in Article 1(4) 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) which was not applicable at the time of the events in the main proceedings: ' "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'. This relates to the operation and maintenance of existing bodies, see, Trepte, Public Procurement in the EU, A Practitioner's Guide, 2007, 4.42. In principle it must be observed that classification as the award of a service concession is an issue that is to be determined in accordance with Community law, see *Commission* v *Italy* (cited in footnote 17 above, paragraph 31).

19 — *Parking Brixen* (cited in footnote 12 above, paragraph 40). See also in more detail Arrowsmith, *The Law of Public and Utilities Procurement*, 2005, 6.62 and 6.63.

49. Since at the material time in regard to the events in the main proceedings concerning the award of service concessions by public agencies no directive coordinating the proceedings was in existence, [20] the consequences under Community law of the award of such concessions fall to be examined as before solely in light of primary law and in particular of the fundamental freedoms laid down in the EC Treaty. [21]

50. Accordingly requirements are imposed concerning equal treatment and transparency, [22] for the award of public service concessions in particular in regard to the prohibition on indirect discrimination on grounds of nationality under Articles 12 EC, 43 EC and 49 EC, [23] which as a rule render a call for tenders essential.

51. Case law permits an exception for quasi in-house performance of tasks, [24] beginning with *Teckal* [25] and further elaborated [26] and applied to all Community provisions in the sector of public contracts or public service concessions, [27] in the case of a procedure that is configured in such a way as to constitute an internal administrative measure. [28] Under settled case-law a call for tenders is not mandatory — even if the contractual partner is an establishment legally distinct from the public awarding body — if two preconditions are met. First, the public body that is an awarding authority must exercise over the establishment in question a degree of control similar to that which it exercises over its own departments, and, secondly, that establishment must perform its activity essentially for the public body or bodies which own its shares. [29]

20 — The situation was hardly altered by the subsequent Directive 2004/18 (cited in footnote 18 above) since although it defines the concept of a service concession; this none the less does not apply to such concessions under Article 17 of this Directive. See, in more detail, Flamme/Flamme/Dardenne, *Les marchés publics européens et belges*, 2005, p. 19 f.

21 — *Coname* (cited in footnote 17 above, paragraph 16); *Parking Brixen* (cited in footnote 12 above, paragraph 46), and Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 18 et seq.). Broussy/Donnat/Lambert, Délégations de services publics, *L'actualité juridique — droit administratif* (AJDA) 2005 p. 2340 et seq., p. 2341 suggest that drawing on the principle of non-discrimination creates the risk that procurement law may in the future be expanded well beyond the relevant directives and will even apply to facts where the values do not reach the threshold for the directives to apply.

22 — Trepte, 'Transparency Requirements', in: Nielsen/Treumer (ed.), *The New EU Public Procurement Directives*, 2005, indicates that the concept of transparency in Community procurement law is limited in so far as it relates to the equal treatment of tenderers from the Member States and not to transparency beyond that.

23 — See inter alia *Telaustria and Telefonadress* (cited in footnote 17 above, paragraphs 60 f.); *Coname* (cited in footnote 17 above, paragraphs 18 et seq.), and *Parking Brixen* (cited in footnote 12 above, paragraphs 47 et seq.).

24 — The term is not used uniformly, often the terms (quasi) 'in-house award' or 'in-house business' (in the wider sense) are used.

25 — Cited in footnote 8 above.

26 — See in particular judgments in *Stadt Halle and RPL Lochau* (cited in footnote 15 above, paragraph 49); *Coname* (cited in footnote 17 above, paragraphs 23 to 26); *Parking Brixen* (cited in footnote 12 above, paragraph 56 et seq.); *ANAV* (cited in footnote 21 above, paragraph 24); *Carbotermo and Consorzio Alisei* (cited in footnote 11 above, paragraphs 36 and 37); Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraphs 55 to 57, and Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* [2007] ECR I-12175 paragraph 58).

27 — In *Parking Brixen* (cited in footnote 12 above, paragraph 61) the Court of Justice made plain that both the *Teckal* criteria apply not only in the area of Community procurement directives but generally in the area of Community procurement law.

28 — Flamme/Flamme/Dardenne, cited in footnote 20 above, p. 32, paragraph 20 emphasise referring to paragraphs 49 and 50 of the judgment in *Teckal* (cited in footnote 8 above), that the basis of the exception for 'quasi in-house performance of tasks' is the fact that an entity cannot 'contract with itself'.

29 — See judgments in *Teckal* (cited in footnote 8 above, paragraph 50); *Stadt Halle and RPL Lochau* (cited in footnote 15 above, paragraph 49); Case C-84/03 *Commission* v *Spain* [2005] ECR I-139, paragraph 38; Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705, paragraph 34; *Carbotermo and Consorcio Alisei* (cited in footnote 11 above, paragraph 33), and *Asemfo* (cited in footnote 26 above, paragraph 55).

A — *First Teckal criterion*

52. It is however necessary to analyse the first requirement, namely the exercise of 'control similar to that over its own departments'.

1. Exclusion of semi-public undertakings

53. It is unmistakeably to be inferred from settled case-law since the judgment in *Stadt Halle und RPL Lochau* [30] that semi-public undertakings are in no way deemed to be entities over which similar control is exercised as over own departments, irrespective of the degree to which the private capital involvement is a minority holding. [31] In that connection it is enough for there to be a possibility of private capital involvement even if there is (as yet) none. [32] An assignment to private persons of shares occurring shortly after the award must also be taken into consideration. [33]

54. In circumstances such as those of the present case the private capital aspect of the question must plainly be answered in the negative. There is no private capital involvement; nor, further, is Brutélé open to private capital.

2. Other relevant circumstances

55. However, it is plain from the case-law that the mere finding that private capital

30 — The much quoted judgment in *Stadt Halle and RPL Lochau* (cited in footnote 15 above) provides at paragraph 49: 'In accordance with the Court's case-law, it is not excluded that there may be other circumstances in which a call for tenders is not mandatory, even though the other contracting party is an entity legally distinct from the contracting authority. That is the case where the public authority which is a contracting authority exercises over the separate entity concerned a control which is similar to that which it exercises over its own departments and that entity carries out the essential part of its activities with the controlling public authority or authorities (see, to that effect, *Teckal*, [cited in footnote 8 above] paragraph 50). It should be noted that, in the case cited, the distinct entity was wholly owned by public authorities. By contrast, the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments'. Belorgey/Gervasoni/Lambert, 'Qualification de marché public', *AJDA* 2005, p. 1113 et seq., p. 1114, referring to Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, take the view that the judgment in *Stadt Halle* confirmed expressly what the case-law had until then implied.

31 — See also *Coname* judgments (cited in footnote 17 above, paragraph 26); *Commission* v *Austria* (cited in footnote 29 above, paragraph 46); *ANAV* (cited in footnote 21 above, paragraph 31), and Case C-220/05 *Auroux and Others* [2007] ECR I-389, paragraph 64. It remains unclear how the involvement of private persons or non-profit organisations, for example in the social or cultural fields, is to be regarded (See on this Egger, cited in footnote 2 above, p. 170, paragraph 637).

32 — In this connection see *Coname* judgments (cited in footnote 17 above, paragraph 26), and *ANAV* (cited in footnote 21 above, paragraphs 30 to 32).

33 — *Commission* v *Austria* (cited in footnote 29) paragraphs 38 to 42: in a case such as this the award of a contract is to be examined in light of all the steps taken (award and capital restructuring), and of their purpose.

is not involved or permitted does not adequately satisfy in each case the *Teckal* criterion 'similar control to that exercised over its own departments'. [34] It is plainly against this background that the questions of the referring court are to be interpreted.

56. It appears from some of the judgments that deal with the first of the two Teckal criteria that the assessment must 'take account of all the legislative provisions and relevant circumstances'. [35] 'It must follow from that examination that the concessionaire in question is subject to a control enabling the concession-granting public authority to influence the concessionaire's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions.' [36]

57. The range of criteria that may be relevant in this regard is apparent in particular from the judgment in *Parking Brixen*: conversion into a company limited by shares, broadening of the objects of the company, obligatory opening up of the company in the short term to other capital, significant expansion of the geographical area of the company's activities and considerable powers conferred on the administrative board in this judgment taken as a whole meant that the relevant company had in the view of the Court of Justice become market orientated and achieved a degree of autonomy with the result that the concession-granting public authority was not exercising control over the concessionaire similar to that exercised over its own departments. [37]

58. Two basic criteria were therefore plainly decisive in determining the relevant questions in the *Parking Brixen* case: the degree to which the concessionaire was market orientated and the degree of its autonomy. [38] These categories equate to those in the *Teckal* judgment, which, in paragraph 51, also stated as a criterion the degree of independent decision-making capacity present or absent in the relevant body as compared to the public authority or authorities. [39]

59. In its case-law on the *Teckal* criteria thus far the Court of Justice has however only drawn attention in a small number of cases to such further circumstances. In both the cited cases, *Parking Brixen* and *Carbotermo*,

34 — See, inter alia, also Probst/Wurzel, 'Zulässigkeit von In-house-Vergaben und Rechtsfolgen des Abschlusses von vergaberechtswidrigen Verträgen' [Permissibility of In-house awards and legal consequences of the conclusion of contracts contrary to procurement law], in: *European Law Reporter* 2007, p. 257 et seq., p. 261.

35 — *Parking Brixen* (cited in footnote 12 above, paragraph 65) and *Carbotermo and Consorcio Alisei* (cited in footnote 11 above, paragraph 36).

36 — *Parking Brixen* (cited in footnote 12 above, paragraph 65) and *Carbotermo and Consorcio Alisei* (cited in footnote 11 above, paragraph 36).

37 — *Parking Brixen* (cited in footnote 12 above, paragraphs 67 to 70). For a critical view of the merits of the criteria which have the effect that bodies which are operated by public authorities to perform their tasks are tied down to particular legal forms, see Kotschy, 'Arrêts "Stadt Halle", "Coname" et "Parking Brixen"' [The judgments in *Stadt Halle, Coname* and Parking Brixen], *Revue du droit de l'Union européenne* 2005, No 4, p. 845 et seq., p. 853.

38 — Probst and Wurzel (cited in footnote 34 above, p. 261) make the point that the clearer the close connection with the awarding or concession-granting authority, and the more limited the contractor or concessionaire's possibilities to work for third parties commercially in the market, the easier it is to justify the assumption of an in-house business.

39 — *Teckal* (cited in footnote 8 above, paragraph 51).

several of these factors coincided, only one of which in each case was the transfer of full authority or significant powers to the administrative board.

60. In *Parking Brixen* the Court of Justice took the view that *Stadtwerke Brixen AG* had become so market oriented as to render it difficult for the municipality to control it and listed a total of five reasons why that was so, [40] including the obligatory opening of the company, in the short term, to other capital and the expansion of the geographical area of the company's activities, to the whole of Italy and abroad. [41]

61. In the judgment in *Carbotermo* the possible influence that might be exercised by the Italian municipality in that case, Busto Arsizio, over the decisions of the undertaking AGESP SpA, which was providing a very varied range of services of public utility through the intermediary of a holding company, was an essential factor. [42] The Court stated in this connection that the intervention of such an intermediary may, depending on the circumstances of the case, weaken any control possibly exercised by the contracting authority over a joint stock company merely because it holds shares in that company. [43]

62. It must therefore be observed that in these cases various special circumstances came together which led to an overall view being formed. [44]

3. Mere internal cooperation is generally, though not automatically, exempt from the tendering requirement

63. However, the situations that gave rise to the judgments in *Parking Brixen* and *Carbotermo* may be said to have been

40 — Ferrari talks in this connection abut indications of independence which is incompatible with the concept of control similar to that exercised over its own departments (Ferrari, '"Parking Brixen": Teckal da totem a tabù?', in: *Diritto pubblico comparato ed europeo* 2006, p. 271 et seq., in particular p. 273).

41 — *Parking Brixen* (cited in footnote 12 above, paragraph 67). Jennert, in 'Das Urteil "Parking Brixen"' [The judgment in *Parking Brixen*], *Neue Zeitschrift für Baurecht und Vergaberecht* (NZBau) 2005, p. 623 et seq., p. 626, notes that there is no question in such a case of securing the home market by an in-house award that is not subject to the procurement procedure while at the same time participating in competition by supralocal expansion.

42 — Advocate General Stix-Hackl says in her Opinion in *Carbotermo and Consorcio Alisei* (cited in footnote 11 above), at points 22 and 23, that one characteristic of the procedure at issue in this case has to do with the fact that as in the *Stadt Halle* case, the contract was not awarded directly to the entity in which the local authority has a direct shareholding but there is a situation involving an indirect shareholding.

43 — *Carbotermo and Consorcio Alisei* (cited in footnote 11 above, paragraph 39).

44 — Jennert refers pertinently to the 'overall view' (cited in footnote 41 above, p. 625).

one-off cases in which the Court of Justice regarded a boundary as having been crossed and that the outsourcing of general-interest tasks to an entity constituting a pure co-operative association of public bodies, without any participation of private capital, though not automatically, [45] should in principle be regarded as exempt from the tendering requirement. This is supported by the implications of developments in the case-law of the Court of Justice set out below.

64. The exact wording of the *Carbotermo* judgment mentioned above in which there were further circumstances that precluded the situation in that case from being deemed exempt from the tendering requirement, is as follows: '[t]he fact that the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer tends to indicate, without being decisive, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments, as contemplated in paragraph 50 of *Teckal*.' [46]

65. In the subsequent paragraphs of the *Carbotermo* judgment it becomes apparent that this qualification of the words 'without being decisive' constitutes a reference to the further circumstances mentioned namely: dilution of control owing to the intermediary of a holding company even if the capital of the latter is held as to 99.98% by the local or regional authority in question, as well as too far-reaching powers on the part of the boards in both the holding company and in the public limited company established by the holding company, in a situation where the latter were to be entrusted with the performance of tasks. [47] In the view of the Court of Justice, the applicable articles of association did not reserve to the regional authority concerned any control or specific voting powers in order to circumscribe the freedom of action conferred on those boards of directors. The control exercised by the regional authority over those two companies consisted essentially in the latitude conferred by company law on the majority of shareholders, which appreciably limited its power to influence the decisions of those companies. [48]

66. In contrast the more recent judgment in *Asemfo* shows that mere cooperation between municipalities is in general to be regarded as fulfilling the first *Teckal* criterion — 'similar control to that exercised over its own departments' — without further analysis of the internal decision-making structures and majority shareholding relationships being called for. For while the wording reproduced above [49] from the judgment in *Carbotermo* was repeated in the later judgment in *Asemfo* in paragraph 57,

45 — *Commission* v *Spain* (cited in footnote 29 above, paragraph 40).

46 — *Carbotermo and Consorcio Alisei* (cited in footnote 11 above, paragraph 37).

47 — *Carbotermo and Consorcio Alisei* (cited in footnote 11 above, paragraphs 38 to 40).

48 — *Carbotermo and Consorcio Alisei* (cited in footnote 11 above, paragraph 38).

49 — *Carbotermo and Consorcio Alisei* (cited in footnote 11 above) paragraph 37: 'The fact that the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer tends to indicate, without being decisive, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments, as contemplated in paragraph 50 of *Teckal* [cited in footnote 8 above].'

it was however slightly changed. The phrase in *Carbotermo* 'without being decisive', was replaced in *Asemfo* by 'generally'. Thus '… tends to indicate, without being decisive …' became '… tends to indicate, generally …'.

67. There are therefore many reasons for taking the view that where the awarding authority or concession-awarding authority, either alone or in conjunction with other public authorities,[50] owns the entire share capital in a body that is awarded a contract or concession this as a rule shows that it or they exercise control over that body as over their own departments within the meaning of paragraph 50 of the judgment in *Teckal*. This rule can be displaced,[51] but, as demonstrated above,[52] only by the concurrence of special circumstances.

4. Criteria for a detailed analysis of the power of control

68. In so far as the question of the power of control enjoyed by individual public authorities within pure cooperative groupings of public authorities plays a role in the case-law of the Court of Justice, the following matters may be deduced.

69. The *Teckal* case already related to a situation of inter-municipal cooperation,[53] in which the question of control against the background of the size of shareholdings was alluded to: it concerned a consortium of 45 municipalities in Reggio Emilia, in which the municipality of Viano, to which the case related, held a 0.9% shareholding. Advocate General Cosmas observed in this regard that it was 'unlikely that it could be maintained that the Municipality of Viano exercises over that consortium the kind of control which an entity exercises over an internal body'.[54] The judgment itself is silent on this point and in particular the criterion for control in paragraph 50[55] does not go into this aspect. However, it must be noted that the Court of Justice did not in this judgment answer in the negative the question of the power of control enjoyed by a municipality with a relatively

50 — For majority control is not precluded from the outset, see also Fenoyl, Contrats 'in house' — état des lieux après l'arrêt Asemfo [In-house contracts — situation following *Asemfo*], AJDA 2007, p. 1759 et seq., p. 1761.

51 — Egger (cited in footnote 2 above, p. 169, paragraph 626) rightly speaks of a rebuttable presumption.

52 — See point 55 et seq. of this Opinion.

53 — This is also pointed out by Pape/Holz, 'In-house-transactions exempt from the tendering requirement', *NJW* 2005, p. 2264 et seq. p. 2265. Their perspective is that on a purely formal view a cooperative comprising several public authorities cannot be deemed to be an in-house transaction because owing to the rights of co-determination enjoyed by the other shareholders it could not be determined beyond peradventure that every shareholder could exercise control similar to that exercised over its own departments; yet, on a functional view it was reasonable to regard it as an in-house transaction.

54 — Opinion of Advocate General Cosmas of 1 July 1999 in *Teckal* (cited in footnote 8 above, point 61).

55 — *Teckal* (cited in footnote 8 above).

small shareholding and voting rights, and thereby allowed the referring court to find that the control criterion was in fact satisfied in the main proceedings.

70. In the meantime, however, this issue was answered to the opposite effect in the *Coname* judgment in 2005 inasmuch as a 0.97% holding in the share capital was adjudged to be insufficient. [56]

71. However, the judgment in *Asemfo* clarified that the size of the shareholding of an individual public body in a cooperative of public bodies no (longer) acts as the relevant yardstick as regards the possibility of control. The Court of Justice expressly stated that even a share in a cooperative of as little as 0.25% of the capital of such a cooperative (1% of the capital was held by four autonomous regions which each held one share) does not prevent the tasks from being regarded as performed on a 'quasi-in house basis' as regards all the bodies which hold shares. [57]

72. Moreover, it is noteworthy in regard to the main proceedings giving rise to the abovementioned judgment that the power of control over the entity entrusted with the relevant tasks clearly lies with the central state administration, which is the main shareholder and not with the four autonomous communities whose shareholdings together amount to 1% of the capital. [58] This fact did not prevent the Court of Justice from regarding the first criterion in *Teckal*

56 — Judgment in *Coname* (cited in footnote 17 above), paragraphs 23 and 24. In addition, in the main proceedings the company at issue was open — at any rate in part — to private capital, see paragraph 26 of the judgment in *Coname*.

57 — *Asemfo* (cited in footnote 26 above), paragraphs 58 to 60. Paragraph 59 states: 'In that regard, the argument cannot be accepted that that condition is met only for contracts performed at the demand of the Spanish State, excluding those which are the subject of a demand from the Autonomous Communities as regards which Tragsa must be regarded as a third party.' It is clear from paragraph 61 that this finding does not refer to all Spanish autonomous regions, although Tragsa acts for all of them (see the Opinion of Advocate General Geelhoed of 28 September 2006, *Asemfo,* cited in footnote 26 above, points 13 and 14), but to those which hold a share in the capital of Tragsa.

58 — In *Asemfo* (cited in footnote 26 above, paragraph 13, paragraph 5 therein) it is stated in regard to national law that: 'The functions of organisation, supervision and control concerning Tragsa and its subsidiaries shall be exercised by the Ministerio de Agricultura, Pesca y Alimentación (Ministry of Agriculture, Fisheries and Food) as well as by the Ministerio de Medio Ambiente (Ministry of the Environment)'. Thus competence for control lies with central government and not with the autonomous regions. Thus, Advocate General Geelhoed observes in his Opinion of 28 September 2006 in *Asemfo* (cited in footnote 26 above, point 51), that the autonomous regions themselves exercised no powers of control and that such powers could not be inferred from their capacities as shareholders. Powers of control all resided with the principal shareholder, the Spanish State, that is to say the central government. Thus the judgment itself states in paragraph 51: 'Finally, under Article 3(6) of Royal Decree 371/1999, Tragsa's relations with those public bodies, inasmuch as that company is an instrument and a technical service of those bodies, are not contractual, but in every respect internal, dependent and subordinate.' Furthermore, in paragraphs 59 to 61 arguments quite different from the internal decision-making structures are deployed in regard to the question of the power of control enjoyed by the autonomous regions, such as namely the legal requirement to perform contracts, the fact that tariffs are fixed by the State and that the relationship is not contractual.

as being satisfied not only in the case of the Spanish state but also expressly in the case of the autonomous communities which hold part of the capital. [59] However, on the power of control by the autonomous communities it is not possible to discern from the judgment whether it constitutes a new departure in the case-law or whether rather the particular circumstances of the case were decisive, as seems likely. [60] In any event it is plain that in the case of pure cooperatives of public bodies, excessive importance should not be attached to the question of the internal power of control and determination.

73. From the clarifications in regard to the size of shareholdings it may be inferred, by way of systematic interpretation, [61] and from use of the plural in the wording of the second *Teckal* criterion — 'where … at the same time, the person carries out the essential part of its activities together with the controlling local authority or authorities' — by way of grammatical interpretation, [62] that complete individual power of control on the part of the relevant public authority is not required but that a collective majority power of control is sufficient. [63]

74. The deciding factor ought to be whether the participating public authorities have collectively control over the person in question in this case the Brutélé cooperative, or whether this cooperative acts separately from that collective control.

5. Interim conclusion

75. It is clear from the legal analysis that pure inter-municipal cooperation as a rule ought to be possible without being subject to the tendering requirement, if there are no other specific circumstances which show that the degree of market orientation and the degree of autonomy of the inter-municipal body has exceeded the bounds of inter-municipal cooperation that are neutral in procurement law terms in order to complete tasks that are in the general interest.

59 — The Opinion of Advocate General Geelhoed of 28 September 2006 in *Asemfo* (cited in footnote 26 above) specifically highlights this problematical aspect in detail and finds that there is a complete lack of influence on the part of the regions (point 98 to 101). On the same problem see also Broussy/Donnat/Lambert, 'Actualité du droit communautaire', Marché in house [In-house transactions] *AJDA* 2007 p. 1125 et seq. p. 1126.

60 — As Müller, 'Interkommunale Zusammenarbeit im Weg der In-House-Vergabe?' [Inter-municipal cooperation by way of the in-house transaction?], *Zeitschrift für Vergaberecht und Beschaffungspraxis* (ZVB) 2007, p. 197, p. 202 rightly emphasises, specific circumstances applied, in particular the legal obligation to accept and perform the contracts and the fixing of tariffs by the State. See also Piazzoni, Précisions jurisprudentielles sur les contrats 'in house' [Findings of the courts on in-house contracts], *Revue Lamy de la Concurrence: droit, économie, régulation* 2007, No 12, p. 56 et seq., p. 58, and Mok, 'Hof van Justitie van de Europese Gemeenschappen Case C-295/05', *Nederlanse jurisprudentie; Uitspraken in burgerlijke en strafzaken* 2007, No 417, p. 4413 et seq., p. 4423.

61 — On the systematic interpretation see, in particular, Riesenhuber, *Europäische Methodenlehre* [European Legal Methodology], 2006, p. 253 et seq.

62 — On the grammatical interpretation see, in particular, Riesenhuber, *Europäische Methodenlehre* [European Legal methodology], 2006, p. 250 et seq.

63 — See, amongst others, Dreher, 'Das in-house-Geschäft' [The in-house contract], *NzBau* 2004, p. 14 et seq., p. 17, who puts the emphasis on the lack of any decision-making power on the part of the party awarded the contract. See also Dischendorfer, 'The Compatibility of Contracts Awarded Directly to "Joint Executive Services" with the Community Rules on Public Procurement and Fair Competition: A Note on Case C-295/05, *Asemfo* v *Tragsa*', *Public Procurement Law Review* 2007, p. NA123 et seq., p. NA129.

76. Even if no legal certainty has been achieved hitherto [64] in relation to the exact boundary affecting criteria such as 'degree of market orientation' and 'degree of autonomy', in other words it is not clear where exactly the boundary of inter-municipal cooperation that is neutral in procurement law terms is to be drawn in performing tasks in the general interest, there is no indication that cooperation within Brutélé would go beyond those boundaries.

77. It is a matter for the national courts, in this instance the referring court, to weigh up these matters in the specific case. Such an examination ought not in this case to produce a finding that any of the boundaries indicated above had been exceeded. For the internal decision-making structures of Brutélé are characterised by the collective influence of the regional authorities participating by way of majority decision. They exercise their influence not only in the general assembly but also in the governing council, which is made up of representatives of the municipalities. Thus the question of the power of control is already answered adequately and affirmatively. In addition, in relation to the sub-sectors, a preponderance of individual-municipal decisions may in fact discerned. Brutélé's market orientation relates to tasks which are in the general interest such as cable television, telephone and Internet and does not suggest that any level that is neutral in procurement law terms was exceeded, notwithstanding the imprecision of the relevant criteria in this connection.

78. Everything therefore points in a case such as this to cooperation between public bodies without any requirement for a tendering procedure.

79. Contrary to the view of Coditel in this context, it is of no significance that Brutélé offers its services to users commercially and is therefore automatically in competition [65] with other private bidders.

64 — On the generally lacking legal certainty in regard to a series of unspecified legal concepts and demarcation problems in light of the *Teckal* criteria see, amongst others, also Jennert (cited in footnote 41 above, pp. 625 and 626), who welcomes the increase in legal certainty as a result of the concrete and practical criteria in that judgment. At the same time he points up open questions in particular in regard to the subsequent disposal of shares to private persons by a municipal cooperative mandated long before under the terms of the in-house case-law and suggests that the disposal of shares is subject to the principle of equal treatment and the transparency requirement; Opinion of Advocate General Stix-Hackl of 12 January 2006, *Carbotermo and Consorcio Alisei* (cited in footnote 11 above), point 17; Söbbeke, 'Zur Konzeption des Kontrollerfordernisses bei vergabefreien Eigenschaften' [On the control requirements in the case of tender-exempt in-house transactions], Die Öffentliche Verwaltung [Public Administration] 2006, p. 996 et seq. p. 997, states that the ill-defined areas that have complicated the application of the in-house principle since the *Teckal* judgment as an exception from the tendering requirement, have been successively reduced by the *Stadt Halle* and *Carbotermo* judgments.

65 — Nor, likewise, is it material to the assessment that such quasi in-house performance of contracts would preclude other undertakings that would also be prepared to take on the relevant work from competing for the contract because this effect is inherent in quasi in-house performance of contracts (Egger, cited in footnote 2 above, p. 163, paragraph 600).

6. Value of inter-municipal cooperation

80. Although the questions referred have in my view already been answered, I should like briefly to underscore the conclusion and at the same time to deal with counter arguments advanced by Coditel and the Commission.

81. Public procurement law is and remains one of the most influential policy instruments of the Member States and institutions of the EU in the process of European integration. [66] This potential cannot however be used indiscriminately; rather its purpose must be brought into harmony with the values of other policy areas.

82. If, as the referring court, Coditel and the Commission propose, one were to require the municipalities concerned to have ' comprehensive decision-making autonomy', in the sense that the relevant municipality exercises 'dominance' over the relevant inter-municipal cooperative ('dominance over the cooperative society'), then inter-municipal cooperation would in future be rendered virtually impossible. For it is an important feature of genuine cooperation that decisions are made as equals and that one of the partners in the cooperative does not dominate. It is therefore plain from the observations of Coditel and the Commission in the procedure and at the hearing that the yardsticks proposed by these two parties mean that it is a requirement that an individual regional authority must as it were be able to control a cooperative alone. It is obvious that such a case cannot in fact be regarded as cooperation or collaboration.

83. As stated, that would render virtual impossible even pure inter-municipal cooperation. Inter-municipal cooperating regional authorities would then always have to reckon with the likelihood of having to award their tasks to private third parties making more favourable bids; that would be tantamount to the compulsory privatisation by means of procurement law of public-interest tasks. [67]

84. To construe the first *Teckal* criterion so narrowly would be to attach disproportionate weight to competition-law objectives at the

66 — Bovis, *Public Procurement in the European Union*, 2005, p. 240.

67 — See also the Opinion of Advocate General Kokott in *Parking Brixen* (cited in footnote 12 above), point 68. In this connection Calsolaro also notes in his discussion of the *Parking Brixen* judgment that the Court's case-law is probably not to be construed as a duty to engage in outsourcing (Calsolaro, 'S.p.a. in mano pubblica e in house providing La Corte di giustizia CE torna sul controllo analogo: un'occasione perduta?' in: *Foro Amministrativo (Consiglio di Stato)* 2006, p. 1670 et seq., in particular p. 1674).

same time as interfering too much with the municipalities' right to self-government and with it in the competences of the Member States. [68]

85. This is rightly emphasised by the governments participating in the proceedings before the Court of Justice. The right to municipal self-government is not reflected only in the legal provisions of the Member States but, as the German Government correctly pointed out, also in the European Charter on Local Self-Government drawn up within the framework of the Council of Europe signed by all EU Member States and also ratified by most of them. [69] Article 263 of the EC Treaty makes provision for the Committee of the Regions comprising representatives of regional and local authorities. Inherent in this provision is a certain recognition of self-government alongside the possibility of providing institutionalised machinery for bringing to bear regional and municipal perspectives. Finally the Treaty of Lisbon [70] stresses the role of regional and local self-government for the relevant national identity to which heed is to be paid.

86. Municipalities have themselves to decide whether they wish to carry out their general-interest tasks with their own administrative, technical and other means, without being compelled to have recourse to external establishments that do not form part of their own departments, [71] or whether they wish to carry them out with the assistance of an establishment legally distinct from them in their capacity as public entity awarding the contract or concession. If they opt for the second alternative, it is open to them to carry out these tasks of theirs on their own or in 'pure' cooperation with other public authorities [72] 'controlled similarly to their own departments' and with the law on aid and procurement being largely suspended [73] or

68 — See also the Opinion of Advocate General Kokott in *Parking Brixen* (cited in footnote 12 above), point 71. It is not the general application of procurement law to public-public entities that interferes with rights to self-administration (see on this, Egger, cited in footnote 2 above, p. 168, paragraph 621), but the excessive application thereof. See also 'Rekommunalisierung und Europarecht nach dem Vertrag von Lissabon', *Wettbewerb in Recht und Praxis* (WRP) 2008, p. 73 et seq., p. 85: municipal self government must be preserved in its basic structures even if it does not have carte blanche to disregard fundamental European freedoms.

69 — Cited in footnote 14 above. Article 6(1) provides that, without prejudice to more general statutory provisions, local authorities must be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management.

70 — Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ 2007, C 306, p. 1), Article 3a of the future EU Treaty, not yet in force. In the consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (OJ 2008 C115, p. 1) henceforth Article 4 of the EU Treaty, not yet in force.

71 — *Stadt Halle and RPL Lochau* (cited in footnote 15 above), paragraph 48.

72 — Second *Teckal* criterion (carrying on of the activity essentially for the public authority or authorities that hold the shares) in this respect presumably permits to a certain extent third parties to take on tasks. An example of this is (temporary) take-up of capacity but for example also as the judgment in *Asemfo* (cited in footnote 26 above) shows, systematic (regulated by law) taking on of tasks for other public authorities (in that case for all Autonomous Regions of Spain although only four of them have a small shareholding themselves).

73 — Jennert (cited in footnote 41 above), p. 626.

to tackle them by calling on private capital [74] and/or by increasing market orientation and participating in competition, the latter case entailing a loss of prerogatives. [75] Finally, they have the further alternatives of the classic award to an independent third party or privatisation which in any event do not confer any privilege in regard to competition law.

87. To tackle the many traditional [76] and new [77] tasks of municipalities — and local authorities in general — is, particularly in times of restricted budgets, not always easy, especially for smaller authorities. [78] In addition, many tasks, in particular in the areas of environment and transport are not confined to the municipality. [79] Conversely, inter-municipal cooperation without calling on private capital is owing to its synergistic effects a method used in many Member States for performing public functions in an efficient and cost-effective manner. [80]

B — *Second Teckal criterion*

88. This does not need to be gone into further here: the referring court says no question rises in this regard. [81]

74 — And where appropriate with the assistance of the requisite outside know-how.

75 — Jennert (cited in footnote 41 above), p. 626.

76 — The more or less traditional tasks of municipalities and authorities must include inter alia basic services for example provision of energy and water supplies, public transport and waste disposal, education and cultural establishments and hospitals (for examples, see inter alia, Frenz, cited in footnote 68 above, and Papier, 'Kommunale Daseinsvorsorge im Spannungsfeld zwischen nationalem Recht und Gemeinschaftsrecht', [Communal basic services in the area of tension between national law and Community law] *Deutsche Verwaltungsblätter* (DVBl) 2003, p. 686 et seq.

77 — To define public tasks which are in the general interest as 'state' tasks would be erroneously to fail to take account of the fact that the claims citizens make of their municipalities are undergoing changes particularly over the course of time. In addition the concept of tasks in the general interest in Community procurement law cannot merely be equated with tasks securing existential requirements. Thus for example in the judgement in joined in Joined Cases C-223/99 and C-260/99*Agorà and Excelsior* [2001] ECR I-3605, paragraph 33 et seq.) it was held that the holding of fairs and exhibitions was an activity in the general interest because it was not only the interests of exhibitors and dealers that were involved but also the boost to trade which flows from the information provided to consumers (in the context of the interpretation of Article 1(b) of Directive 92/50 cited in footnote 15 above. At issue was classification as a public law entity, which was not the case in *Agorà and Excelsior,* because the task was held not to be a task of a non-commercial kind).

78 — See also on this Kotschy, cited in footnote 37 above, p. 853.

79 — For many regional authorities overarching tasks with a trans-regional aspect arise for example in the sectors of local public transport, agricultural development and environmental protection; in tackling these tasks cooperation represents a natural and obvious solution. An example of such cooperation is to be found in the case of *Asemfo* (cited in footnote 26 above).

80 — In addition to the submissions of the participating governments see on that also, Söbbeke, cited in footnote 64 above, p. 999; Flömer/Tomerius, Interkommunale Zusammenarbeit unter Vergaberechtsvorbehalt? [Inter-municipal cooperation subject to reservation in respect of procurement law?], *NZBau* 2004, p. 660 et seq., p. 661.

81 — The national court responsible for assessing the case can plainly infer all that is necessary from the judgment in *Carbotermo* (cited in footnote 11 above paragraph 70): 'Where several authorities control an undertaking, the condition relating to the essential part of its activities may be met if that undertaking carries out the essential part of its activities, not necessarily with one of those authorities, but with all of those authorities together.'

V — Conclusion

89. For those reasons I propose that the Court should reply in the terms set out below to the three questions submitted by the Conseil d'État:

Neither Articles 12 EC, 43 EC and 49 EC nor the principles of equal treatment non-discrimination and transparency preclude a municipality from affiliating to a co-operative society and transferring to it the management of the municipal cable television network without a prior tendering procedure, provided that that municipality exercises over that cooperative similar control to that exercised by it over its own departments and the cooperative society carries on its activity essentially for its members. Where such a cooperative comprises solely municipalities and associations of municipalities (public authorities) — without any private-capital involvement — that indicates in principle that the criterion as to exercise of similar control as that exercised over its own departments is satisfied. In circumstances such as those in the present case, control exercised by way of majority decision over the governing bodies of the cooperative comprising representatives of the municipalities and associations of municipalities is to be deemed to be control similar to that exercised over the municipality's own departments.