JUDGMENT OF THE COURT (Second Chamber)

10 November 2011 *

In Case C-348/10,

REFERENCE for a preliminary ruling under Article 267 TFUE from the Augstākās tiesas Senāts (Latvia), made by decision of 2 July 2010, received at the Court on 9 July 2010, in the proceedings

Norma-A SIA,

Dekom SIA

v

Latgales plānošanas reģions, successor to the rights of Ludzas novada dome,

THE COURT (Second Chamber),

composed of J. N. Cunha Rodrigues (Rapporteur), President of the Chamber, U. Lõhmus, A. Rosas, A. Ó Caoimh and A. Arabadjiev, Judges,

* Language of the case: Latvian.

Advocate General: P. Cruz Villalón,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 18 May 2011,

after considering the observations submitted on behalf of:

— Norma-A SIA, by L. Krastiņa and I. Azanda, advokāte,

— Latgales plānošanas reģions, successor to the rights of Ludzas novada dome, by J. Pļuta,

— the Latvian Government, by M. Borkoveca and K. Krasovska, acting as Agents,

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

— the European Commission, by C. Zadra and A. Sauka, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 July 2011

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 1(3)(b) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and Article 2d(1)(b) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31, 'Directive 92/13').

2 The reference has been made in proceedings between Norma-A SIA and Dekom SIA and Latgales plānošanas reģions [Latgale planning region (Latvia)], successor to the rights of Ludzas novada dome [Ludza Municipal Council (Latvia)] concerning the award to Ludzas autotransporta uzņēmums SIA of a 'concession' for the operation of public bus services in the city and district of Ludza.

Legal context

European Union legislation

3 Article 1(2)(a) and (d) and 3(b) of Directive 2004/17 provides:

'2. (a) "Supply, works and service contracts" are contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 2(2), and one or more contractors, suppliers, or service providers.

…

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

…

3. …

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

4 Article 2 of the abovementioned directive states:

'1. For the purposes of this Directive,

(a) "Contracting authorities' are State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law.

…

2. This Directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;

…'

5 Article 5 of Directive 2004/17 provides:

‘1. This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

…

2. This Directive shall not apply to entities providing bus transport services to the public which were excluded from the scope of Directive 93/38/EEC pursuant to Article 2(4) thereof.’

6 Article 1(2)(a) and (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) states:

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

…

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

7 In accordance with Article 1(1) of Directive 92/13:

‘This Directive applies to contracts referred to in Directive 2004/17 …, unless such contracts are excluded in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of that Directive.

…’

8 Article 2d(1) of Directive 92/13 states:

‘1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

…

(b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/17 …, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

…’

9 According to Article 2f(1)(b) of Directive 92/13:

> '1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:
>
> …
>
> (b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.'

10 Article 3(1) of Directive 2007/66, which inserted into Directive 92/13 the provisions referred to in paragraphs 7 to 9 of the present judgment, provides:

> 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 20 December 2009…'

National legislation

11 Under Article 1(7) of the Law on collaboration between the public and private sectors (Publiskās un privātās partnerības likums, *Latvijas Vēstnesis*, 2009, No 107, p. 4093), which entered into force on 1 October 2009, a service concession contract is

a contract under which, at the request of a public partner, the private partner provides the services listed in Annex 2 to the Law on public contracts (Publisko iepirkumu likums) and the consideration, or an essential component of the consideration, for the provision of those services, is that it obtains the right to operate those services whilst at the same time bearing the risks associated with the operation of the services or else a substantial proportion of those risks.

12 Under Article 1(8) of that Law, the right to operate a facility or a service includes the right to receive payment from the users of the facility or the service or to obtain payment from the public partner, the amount of which depends on user demand or the right to obtain payment both from users and from the public partner.

13 Under Article 1(9) of the abovementioned Law, there are risks associated with operating a facility or services (economic risks) where the income of the private partner depends on user demand for the facility or the services (demand risk) and/or on whether the services offered to users meet the requirements laid down in the concession contract (availability risk) or when revenue depends on both the demand risk and the availability risk.

14 Article 6(3) of the Law on public transport services (Sabiedriskā transporta pakalpojumu likums, *Latvijas Vēstnesis*, 2007, No 106, p. 3682) provides, inter alia, that public transport services are to be organised according to the demand for such services, taking account of the necessary density and frequency of transport in the context of the network, the extent and quality of services, the economic viability of transport services and determining the form of organisation of passenger transport.

15 The first paragraph of Article 10 of that Law provides that the carrier will be compensated for losses and expenditure associated with the provision of the services in accordance with Articles 11 and 12 of the said Law.

16 Under Article 11(1) of the same Law:

'… the carrier is to be compensated for losses associated with the provision of public transport services:

1) for the entire amount of such losses, out of funds provided for that purpose in the State budget, as regards the interurban routes of a regional transport network.

1^{1}) out of the funds provided for that purpose in the State budget, in the case of routes which belong to a regional transport network providing local services;

1^{2}) out of local budgets, in the case of routes which belong to a regional transport network providing local services, in relation to the part of the public transport services covered by the concession which exceeds the limit of the funds provided for in the State budget in order to secure the provision of those services'

…'

17 Under Article 12 of the Law on public transport services:

'(1) If the State lays down minimum quality requirements which a profit-making carrier would not have to comply with, and where compliance gives rise to additional costs, the carrier shall be entitled to apply for compensation from the State for all such additional costs.

(2) Compensation shall be provided, by means of the payment referred to in the first paragraph, to carriers who provide public transport services under a public transport concession if the minimum quality requirements were laid down after the commencement of the provision of public transport services.

(3) The rules governing the definition of, calculation of and compensation for the costs mentioned in the first paragraph, the allocation to local authorities of the appropriation from the national budget intended to cover those costs, as well as review of the legality and conformity of the appropriation shall be determined by the Council of Ministers.'

18 Decree No 672 of the Council of Ministers of 2 October 2007 concerning compensation for expenditure and losses incurred in providing public transport services and concerning the establishment of public transport service tariffs (Sabiedriskā transporta pakalpojumu sniegšanā radušos zaudējumu un izdevumu kompensēšanas un sabiedriskā transporta pakalpojuma tarifa noteikšanas kārtība, *Latvijas Vēstnesis*, 2007, No 175, p. 3751), of 2 October 2007, which was in force until 20 November 2009, and Decree No 1226 of the Council of Ministers of 26 October 2009 (*Latvijas*

Vēstnesis, 2009, No 183, p. 4169, 'Decree No 2009/1226'), which replaced it from 21 November 2009, are both based on the Law on public transport services.

19 Article 2 of Decree No 2009/1226 provides that:

'… the carrier will be compensated for the following losses, associated with performance of the public transport service contract:

2.1 the part of essential costs associated with performance of the public transport service contract which exceeds the income obtained;

2.2 costs incurred through application of the tariffs laid down by the mandating authority;

2.3 loss of income due to the fact that the mandating authority applies a reduction of the transport price for certain categories of passenger.'

20 Article 3 of that decree provides that the carrier is entitled to request compensation for costs incurred in fulfilling the minimum quality requirements laid down by the mandating authority or by the legislation after the public transport services began to be provided, if compliance therewith involves additional costs.

21 Article 38 of Decree 2009/1226 requires the mandating authority to determine the extent of the losses for which the carrier is to be compensated on the basis of the report referred to in point 32.2 of the abovementioned decree and the information referred to in points 32.3 and 32.4 thereof, taking account also of whether it had or had not fixed the fares (tickets).

22 Under Article 39 of the abovementioned decree, the mandating authority is to determine the actual losses having regard to the total income obtained through performance of the public transport service contract, excluding justified costs that are attributable to the provision of public transport services. Within the meaning of the same decree, 'income' means income from the sale of tickets, including season tickets and similar income obtained through performance of the public transport service contract.

23 Article 40 of Decree No 2009/1226 provides that the mandating authority is to determine the amount of compensation which is to be paid by aggregating the volume of losses set in accordance with Article 39 thereof with the total profits obtained. The latter figure is to be determined by multiplying the income by a profit percentage, calculated by adding 2.5 % to the average Euro Interbank Offered Rate (EURIBOR) for the 12 months of the reference year.

24 The national court points out that, under Article 49 of the said decree, the amount of the compensation for losses may not exceed the volume of actual losses that has been calculated, if the carrier has applied the tariffs laid down by the mandating authority (transport price).

25 According to Article 50 of the same decree, if the right to provide public transport services is awarded in accordance with the Law on public contracts, the amount of the compensation is to be determined on the basis of the difference between the price of the public transport service laid down in the contract and the income actually obtained.

26 According to Article 57 of Decree No 2009/1226:

'… if the public transport service contract is terminated:

(1) the carrier shall repay the mandating authority the funds paid in excess if, during the provision of the public transport service, the volume of compensation for losses exceeds the real amount calculated for the compensation and the mandating authority shall use those funds to compensate for losses of other carriers;

(2) the mandating authority shall pay compensation for losses if during the provision of public transport services the amount of the compensation for losses has fallen short of the amount calculated as the real amount of compensation due.'

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

27 On 17 July 2009, the Ludzas rajona padome (Ludza District Council) published an invitation to tender for public bus services in the city and district of Ludza. The applicants in the main proceedings submitted their offer on 6 August 2009.

28 On 31 August 2009, the award was made to Ludzas autotransporta uzņēmums SIA and, consequently, on 2 September 2009, the Ludzas novada dome decided to conclude a concession contract for public transport services with that undertaking.

29 On 16 September 2009, the applicants in the main proceedings brought an action before the Administratīvā rajona tiesa (Administrative Court of First Instance) for annulment of the decision of the Ludzas novada dome of 2 September 2009 and applied for operation of the decision to be suspended. That application was granted by the court on 16 October 2009 and confirmed on 14 December 2009 by the Administratīvā apgabaltiesa (Regional Administrative Court).

30 The national court observes that the national legislation in force gives the applicants in the main proceedings the right to challenge the decision of Ludzas novada dome of 2 September 2009 before the Contract Supervision Office and that such a challenge would have prevented the mandating authority from awarding the contract until after the Office had ruled.

31 On 9 October 2009, the Ludzas rajona padome and Ludzas autotransporta uzņēmums SIA entered into a concession contract for the provision of the public transport services concerned.

32 The applicants in the main proceedings thereupon brought an action before the Administratīvā rajona tiesa for annulment of that contract. On 3 December 2009, that action was dismissed on the ground that the contract was governed by private law and that, therefore, the administrative courts did not have jurisdiction to hear the action.

33 On 11 May 2010, the Administratīva apgabaltiesa set aside the judgment at first instance, while dismissing the action for annulment as inadmissible on the ground that, since the contract had been concluded before the expiry of the time-limit for the transposition of Directive 2007/66, the applicants in the main proceedings did not have a right to bring such an action before the courts.

34 On 21 May 2010, the said applicants brought an appeal against the decision of the Administratīva apgabaltiesa before the court making the reference. They argue, inter alia, that Directive 2007/66 grants them a right to apply for annulment of the contract at issue and that that right flows from the purpose of the directive, which is to grant third parties the right to apply to have contracts concluded by State bodies or local authorities declared ineffective.

35 In those circumstances the Augstākās tiesas Senāta decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 1(3)(b) of Directive 2004/17 … be interpreted as meaning that it is necessary to treat as a public service concession a contract under which the successful tenderer is granted the right to provide public bus services, in cases where part of the consideration consists in the right to operate the public transport services but where, at the same time, the contracting authority compensates the service provider for losses arising as a result of the provision of services, and in addition the public law provisions governing the provision of the service and the contractual provisions limit the risk associated with operation of the service?

(2) If the first question is answered in the negative, has Article 2d(1)(b) of Directive 92/13 … been directly applicable in Latvia since 21 December 2009?

(3) If the second question is answered in the affirmative, must Article 2d(1)(b) of Directive 92/13 … be interpreted as being applicable to public contracts entered into before the end of the period prescribed for domestic law to be brought into conformity with Directive 2007/66 …?'

Consideration of the questions referred

The first question

36 As a preliminary point, it must be observed that, according to Article 2(2)(a) of Directive 2004/17, that directive applies to contracting entities which are 'contracting authorities' within the meaning of Article 2(1)(a) of the directive, among which are 'regional or local authorities' which 'pursue one of the activities referred to in Articles 3 to 7' of the directive.

37 According to the national court, the main proceedings are subject to Directive 2004/17 inasmuch as the contracting entity pursues an activity in the field of transport by bus within the meaning of Article 5(1) of the directive.

38 On the other hand, according to the Latvian Government, since that entity does not itself provide public transport services to the population, Directive 2004/18 is applicable to the main proceedings.

39 In that regard, it is sufficient to note that Articles 1(2)(a) and 4 of Directive 2004/18 contain definitions of 'public contracts' and 'service concession' which are substantially similar to the corresponding definitions in Article 1(2)(a) and (3)(b) of Directive 2004/17. The fact that the definitions are substantially similar means that the same considerations are applicable to an interpretation of the concepts of service contract and service concession within the respective spheres of application of those two directives (Case C-206/08 *Eurawasser* [2009] ECR I-8377, paragraphs 42 and 43). Thus, the interpretation of Article 1(2)(a) and (3)(b) of Directive 2004/17 is directly

transposable to the corresponding provisions of Directive 2004/18 as, indeed, the Latvian Government admits.

40 The question whether an operation is to be classified as a 'service concession' or a 'public service contract'must be considered exclusively in the light of European Union law (see, inter alia, Case C-274/09 *Privater Rettungsdienst und Krankentransport Stadler* [2011] ECR I-1335, paragraph 23 and the case-law cited).

41 It is clear from the definitions of service contract and service concession, contained in Article 1(2)(a) and (d) and Article 1(3) of Directive 2004/17 respectively, that the difference between a service contract and a service concession lies in the consideration for the provision of services. A service contract involves consideration which is paid directly by the contracting authority to the service provider while, for a service concession, the consideration for the provision of services consists in the right to exploit the service, either alone, or together with payment (see, to that effect, *Eurawasser*, cited above in paragraph 39, paragraph 51).

42 In the case of a contract for the supply of services, the fact that the supplier is not remunerated directly by the contracting authority, but is entitled to collect payment from third parties, meets the requirement of consideration laid down in Article 1(3)(b) of Directive 2004/17 (see, inter alia, *Eurawasser*, cited above in paragraph 39, paragraph 57).

43 That is the case where, as in the main proceedings, the provider of public bus services is given the right to operate such services and is paid by the users of those services in accordance with a fixed fare scale.

44 While the method of remuneration is one of the determining factors for the classification of a service concession, it also follows from the case-law that the service concession implies that the service supplier takes the risk of operating the services in question. The absence of a transfer to the service provider of the risk connected with operating the service shows that the transaction concerned is a public service contract and not a service concession (see, inter alia, *Privater Rettungsdienst und Krankentransport Stadler*, cited above in paragraph 40, paragraph 26).

45 It is thus necessary to establish whether the service provider takes the risk of operating the service. While that risk may, at the outset, be very limited, it is necessary for classification as a service concession that the contracting authority transfer to the concession holder all or, at least, a significant share of the risk which it faces (see, to that effect, *Privater Rettungsdienst und Krankentransport Stadler*, cited above in paragraph 40, paragraph 29).

46 It is not unusual that certain sectors of activity, in particular sectors involving public service utilities, such as those at issue in the main proceedings, are subject to rules which may have the effect of limiting the financial risks entailed. First, the detailed rules of public law, to which the economic and financial operation of the service is subject, facilitate the supervision of how that service is operated, and scale down the factors which may threaten transparency and distort competition. Second, it must remain open to the contracting authorities, acting in all good faith, to ensure the supply of services by way of a concession, if they consider that to be the best method of ensuring the public service in question, even if the risk linked to such an operation is limited (*Eurawasser*, paragraphs 72 to 74).

47 In such circumstances, as the contracting authority has no influence on the detailed rules of public law governing the service, it is impossible for it to introduce and, therefore, to transfer risk factors which are excluded by those rules. Moreover, it would not

be reasonable to expect a public authority granting a concession to create conditions which were more competitive and involved greater financial risk than those which, on account of the rules governing the sector in question, exist in that sector (*Eurawasser*, paragraphs 75 and 76).

48 The risk linked to such an operation must be understood as the risk of exposure to the vagaries of the market (see, to that effect, *Eurawasser*, paragraphs 66 and 67), which may, in particular, consist in the risk of competition from other operators, the risk that supply of the services will not match demand, the risk that those liable will be unable to pay for the services provided, the risk that the costs of operating the services will not be met by revenue or also the risk of liability for harm or damage resulting from an inadequacy of the service (see, to that effect, *Privater Rettungsdienst und Krankentransport Stadler*, paragraph 37).

49 By contrast, risks such as those linked to bad management or errors of judgment by the economic operator are not decisive for the purposes of classification as a public service contract or a service concession, since those risks are inherent in every contract, whether it be a public service contract or a service concession (*Privater Rettungsdienst und Krankentransport Stadler*, paragraph 38).

50 Although, as was stated in paragraph 45 of the present judgment, the risk of operating the service may, at the outset, be very limited by reason of the public law arrangements governing the organisation of the service, it is necessary for classification as a service concession that the contracting authority transfer to the concession holder all or, at least, a significant share of the operating risk which it faces.

51 The information provided by the national court shows that the legislation applicable in the main proceedings provides that the adjudicating authority is to reimburse the service provider for operating losses and, in addition, by reason of the rules of public law and the contractual terms governing the provision of those services, the provider does not bear 'a significant share of the operating risk'.

52 The national court notes, in particular, that, pursuant to the terms of the contract, the mandating authority is to compensate, within the limit of the funds allocated to the State budget, for the losses related to the provision of transport services, engendered by such provision and for related costs once the operating receipts from the transport services have been deducted.

53 Furthermore, pursuant to Articles 2 and 3 of Decree No 2009/1226, the service provider is compensated for losses associated with performance of the contract as regards essential costs associated with performance of the public transport service contract which exceed the income obtained, costs incurred through application of the tariffs laid down by the mandating authority, lost revenue because the mandating authority has applied a reduction of the transport price for certain categories of passenger, and costs incurred in fulfilling the minimum quality requirements laid down after the public transport services began to be provided, if compliance therewith involves additional costs compared to the quality requirements previously laid down.

54 Moreover, Article 40 of Decree No 2009/1226 provides that the successful tenderer is to be paid an amount by way of profit determined by multiplying the income by a profit percentage, calculated by adding 2.5 % to the average Euro Interbank Offered Rate (EURIBOR) for the 12 months of the reference year.

55 Having regard to those terms and national law provisions, it cannot be concluded that a significant part of the exposure to the vagaries of the market is borne by the successful tenderer. Therefore, such an operation should be regarded as a 'service contract' within the meaning of Article 1(2)(d) of Directive 2004/17 and not a 'service concession' within the meaning of Article 1(3)(b) thereof.

56 It is true that, at the hearing before the Court, the parties disagreed as to the extent of the risk actually borne by the successful tenderer. Thus, unlike the applicants in the main proceedings and the European Commission, the Latvian Government and the defendant in the main proceedings argue that various factors, such as the reduction of public resources available to cover possible losses, the lack of cover for certain kinds of expenses and losses, linked in particular to route and journey changes or uncertainty in regard to user demand, increase the risk to such an extent that a significant part thereof is in fact born by the successful tenderer, all the more so as the contract is for a period of eight years. Consequently, they state, the transaction is undoubtedly a service concession.

57 It is not for the Court to classify specifically the transaction at issue in the main proceedings. That is within the jurisdiction of the national court alone. The Court's role is confined to providing the national court with an interpretation of European Union law which will be useful for the decision which it has to take in the dispute before it (see, inter alia, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 32).

58 Only the national court is in a position, on the one hand, to interpret the provisions of its national law and, on the other hand, to assess the part of the risk which is actually borne by the contractor in the light of national law and the contractual terms at issue. Nonetheless, consideration of the transaction at issue in the light of the legislative provisions and contractual terms as set out in the order for reference leads, at

first sight, to the conclusion that that transaction has the characteristics of a service contract.

59 In the light of the foregoing considerations, the answer to the first question is that Directive 2004/17 must be interpreted as meaning that a contract by which a contracting party, pursuant to the rules of public law and the terms of the contract which govern the provision of the services in question, does not bear a significant share of the risk run by the contracting authority is to be regarded as a 'service contract' within the meaning of Article 1(2)(d) of that directive. It is for the national court to assess whether the transaction at issue in the main proceedings must be regarded as a service concession or a public service contract by taking account of all the characteristics of that transaction.

Second and third questions

60 By its questions, which it is appropriate to examine together, the national court is asking whether, if the contract at issue in the main proceedings is regarded as a 'public service contract' within the meaning of Directive 2004/17, Article 2d(1)(b) of Directive 92/13 which, pursuant to Article 1 thereof, applies to the contracts referred to in Directive 2004/17, is applicable to the above contract even though it was concluded before the expiry of the time-limit for the transposition of Directive 2007/66, which inserted Article 2d(1)(b) into Directive 92/13, and if the answer to that question is in the affirmative, whether that provision is directly applicable.

61 If, as the Latvian Government argues, Directive 2004/18 is applicable, which it is for the national court to ascertain, it must be pointed out that Article 1 of Directive 2007/66 inserted into Council Directive 89/665/EEC of 21 December 1989 on

the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1), provisions identical to Article 2d and 2f of Directive 92/13, with the result that the interpretation of the latter provisions is directly transposable to the corresponding provisions of Directive 89/665, as amended.

62 According to Article 2d(1)(b) of Directive 92/13, Member States are to ensure that a contract is considered ineffective by a review body independent of the contracting entity or that its ineffectiveness is the result of a decision of such a review body, inter alia, where the contract has been concluded even though, pursuant to Article 2(3) of that directive, a body of first instance, which is independent of the contracting authority, is reviewing a contract award decision or if it was concluded before the expiry of the standstill period referred to in Article 2a(2) of that directive.

63 Without there being any need to consider whether, after the expiry of the time-limit for transposing Directive 2007/66, an individual can rely on Article 2d(1)(b) of Directive 92/13 before the national courts against a contracting authority such as the defendant in the main proceedings, it is sufficient to point out that that provision does not apply in any event to contracts which, as in the main proceedings, were concluded before the expiry on 20 December 2009 of the time-limit for transposition of Directive 2007/66, since such transposition did not take place before the expiry of that time-limit.

64 It is common ground that the decision to award the contract at issue was made on 2 September 2009 and that the contract was concluded on 9 October 2009.

65 The fact that, in accordance with Article 2f(1)(b) of Directive 92/13, Member States may provide that the application for review in accordance with Article 2d(1) of that directive must be made in any case before the expiry of 'a period of at least six months with effect from the day following the date of the conclusion of the contract' does not lead to the conclusion that contracts which, like the one in the main proceedings, were concluded in the six months preceding the expiry of the time-limit for transposition of Directive 2007/66 could come within the scope of Article 2d(1)(b).

66 In the absence of any indication in Directive 2007/66 as to the retroactive effect of the provision at issue, it would be contrary to the principle of legal certainty to consider that that provision is applicable to contracts which were concluded before the expiry of the time-limit for transposition of that directive.

67 In the light of the foregoing considerations, the answer to the second and third questions is that Article 2f(1)(b) of Directive 92/13 does not apply to public contracts concluded before the expiry of the time-limit for transposition of Directive 2007/66.

Costs

68 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 (Second Chamber) hereby rules:

1. **Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors must be interpreted as meaning that a contract by which a contracting party, pursuant to the rules of public law and the terms of the contract which govern the provision of the services in question, does not bear a significant share of the risk run by the contracting authority is to be regarded as a 'service contract' within the meaning of Article 1(2)(d) of that directive. It is for the national court to assess whether the transaction at issue in the main proceedings must be regarded as a service concession or a public service contract by taking account of all the characteristics of that transaction.**

2. **Article 2d(1)(b) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, does not apply to public contracts concluded before the expiry of the time-limit for transposition of Directive 2007/66.**

[Signatures]