



Reports of Cases

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 23 May 2012¹

Case C-15911

Azienda Sanitaria Locale di Lecce

v

**Ordine degli Ingegneri della Provincia di Lecce,
Consiglio Nazionale degli Ingegneri,
Associazione delle Organizzazioni di Ingegneri, di Architettura e di Consultazione
Tecnico-economica (OICE),
Etacons srl,
Ing. Vito Prato Engineering srl,
Barletti – Del Grosso e Associati srl,
Ordine degli Architetti della Provincia di Lecce,
Consiglio Nazionale degli Architetti, Pianificatori, Paesaggisti e Conservatori**

(Reference for a preliminary ruling from the Consiglio di Stato (Italy))

(Procurement law — Public-public partnership — Directive 2004/18/EC — Failure to conduct a public tendering procedure — Provision of a service consisting in the study and evaluation of the seismic vulnerability of certain hospitals — Contracts entered into between a contracting authority and a university constituted under public law — Contracts for pecuniary interest not exceeding the costs incurred — Capacity as an economic operator)

I – Introduction

1. In the present preliminary ruling proceedings under Article 267 TFEU, the Consiglio di Stato (Council of State; ‘the referring court’) asks the Court a question concerning the interpretation 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.²

2. The reference for a preliminary ruling has been made in a dispute between Azienda Sanitaria Locale di Lecce (‘Lecce ASL’) and a number of associations of engineers and architects, in connection with an agreement entered into by Lecce ASL and the Università del Salento (‘the University’) for the study and evaluation, for consideration, of the seismic vulnerability of hospital buildings in the Province of Lecce. Those associations of engineers and architects, which were not involved in that project, allege that

1 — Original language of the Opinion: German
Language of the case: Italian

2 — OJ 2004 L 134, p. 114.

Lecce ASL awarded the contract to the University without conducting a public tendering procedure and thus unlawfully. Lecce ASL objects that the agreement comes under cooperation and coordination between public authorities, since it was concluded in order to attain a public interest objective.

3. The present case gives the Court another opportunity to develop its case-law on procurement law. Proceeding from its judgment in *Commission v Germany*,³ the Court must decide whether it appears justified to apply the rules of procurement law in a situation such as that in the main proceedings, where a public authority awards a contract for consultancy activities to a university constituted under public law. Account must be taken of various aspects, such as the power of the University to act as an economic operator and the cost-covering character of the consideration received.

II – Legislative framework

A – EU law

4. Article 1(2), (8) and (9) of Directive 2004/18 provides:

‘(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....
- (d) “Public service contracts” are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

...

(8) The terms “contractor”, “supplier” and “service provider” mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term “economic operator” shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

...

(9) “Contracting authorities” means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A “body governed by public law” means any body

- (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (b) having legal personality; and

³ — Case C-480/06 *Commission v Germany* [2009] ECR I-4747.

- (c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

...'

5. Under Article 7, the directive applies to public contracts which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than a threshold of EUR 206 000, provided the contracts are public supply and service contracts awarded by contracting authorities other than those listed in Annex IV. Under Article 9 of the directive, the calculation of the estimated value of a public contract is based on the total amount payable, net of VAT, as estimated by the contracting authority. This calculation must take account of the estimated total amount, including any form of option and any renewals of the contract.

6. Under Article 16(f) of the directive, the directive does not apply to public service contracts for research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority.

7. Under Article 20 of the directive, contracts which have as their object services listed in Annex II A are to be awarded in accordance with Articles 23 to 55. Article 28 provides that in awarding their public contracts, contracting authorities must apply the national procedures adjusted for the purposes of the directive. Annex II A lists, inter alia, the following categories of services: 'Research and development services' (category 8) and 'Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services' (category 12).

B – *National law*

8. Article 15(1) of Law No 241 of 7 August 1990 introducing new rules governing administrative procedure and relating to the right of access to administrative documents (*nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*)⁴ provides that public administrative authorities may at any time enter into agreements among themselves with a view to laying down rules governing cooperation in activities of common interest.

9. Article 66 of Decree of the President of the Republic (*Decreto del Presidente della Repubblica*) No 382/1980 provides:

'Provided that the performance of their academic function of dissemination of knowledge is not thereby impaired, universities may carry out research and consultancy activities under contracts and agreements with public and private entities. The carrying out of those contracts and agreements shall, as a rule, be entrusted to [university] departments or, where such departments are not in place, to institutes or university clinics, or to individual full-time teachers.

The proceeds from the performance of the contracts and agreements referred to in the preceding paragraph shall be allocated in accordance with rules.

...

⁴ — GURI No 192 of 18 August 1990.

The teaching and non-teaching staff cooperating in the provision of those services may be rewarded up to an annual sum not exceeding 30% of total remuneration. In each case, the sum so paid to staff may not exceed 50% of the overall proceeds from those services.

The rules referred to in the second paragraph shall determine the amount to be allocated for general expenditure incurred by the university and the criteria for the allocation to the staff of the sum referred to in the third paragraph.

...

The proceeds derived from the activities referred to in the preceding paragraph shall constitute revenue in the budget of the university.'

10. The order for reference also states that, according to the specific legislation relating to their activity, the universities are primary centres for academic research.

III – Facts, main proceedings and question referred for a preliminary ruling

11. On the basis of the specification approved by decision of 7 October 2009 by the Director General of Lecce ASL and the subsequent agreement entitled 'Consultancy Contract', a written agreement was entered into between the abovementioned Lecce ASL and the University. That agreement concerned the study and evaluation, for consideration, of the seismic vulnerability of hospital buildings in the Province of Lecce in the light of the most recent national legislation in relation to the safety of structures and, in particular, of strategic buildings.

12. The specification indicated in the following terms the services to be provided:

- identification of the structural typology of the materials used for construction and the methods of calculation adopted; brief verification of the actual state of affairs in the light of the project documentation made available;
- verification of the soundness of the structure; brief analysis of the overall seismic resistance of the building; where appropriate, on-site analysis of structural elements or subsystems that are significant for the purposes of identifying overall seismic resistance; and
- compilation of the results referred to in the previous indent, and drafting of technical data sheets on structural diagnosis; in particular: reports on the structural typology observed, on the materials and on the state of conservation of the structure, with particular reference to the aspects having a major effect on structural reactions in relation to the seismic risk of the site of the works; drawing up of technical data sheets for the classification of the seismic vulnerability of the hospitals; technical reports on the structural elements or subsystems identified as critical in relation to the verification of seismic vulnerability; preliminary suggestions and a brief description of works which may be needed to bring the buildings up to standard, or to improve them, with regard to their seismic resistance, with particular reference to the advantages and limitations, in technical and economic terms, of the various possible technologies.

13. Under the Consultancy Contract, the work was to be carried out through close collaboration between the Lecce ASL working group and the University working group, if necessary with the help of highly qualified external staff; academic responsibility was to be assigned to two persons appointed, respectively, by the contracting authority and by the University Department; ownership of any results produced by the experimental work was to lie with Lecce ASL, together with the commitment, however, to make express mention of the Department if the results appeared in technical-academic

publications. Lecce ASL was to pay the University an amount of EUR 200 000 excluding VAT for the entire service, due in four instalments. If the contract were terminated early, the University was to be entitled to an amount equivalent to the volume of work performed up to that point and the costs incurred.

14. On three administrative appeals brought, respectively, by the Ordine degli Ingegneri della Provincia di Lecce, the Associazione delle Organizzazioni di Ingegneri, di Architettura e di Consultazione Tecnico-economica (OICE) – together with Etacons Srl, Vito Prato Engineering Srl, Barletti-del Grosso & Associati Srl – and the Ordine degli Architetti della Provincia di Lecce, the Puglia Regional Administrative Court declared the direct award to the University of the above contract unlawful for failure to apply public tendering procedures.

15. Lecce ASL and the University appealed to the referring court against the respective judgments. In its order for reference, that court expresses reservations that Directive 2004/18 could preclude the conclusion of a contract like the one at issue. Accordingly, it asks whether the contested agreement satisfies the legal requirements governing a public-public partnership, as developed in the Court's case-law. Whilst there are some grounds in support of this conclusion, it cannot be stated with any certainty, especially since other aspects suggest the contrary. Because, in its view, it is not possible to infer any guidance as to interpretation from the Court's case-law, the Consiglio di Stato stayed the proceedings and made reference to the Court for a preliminary ruling on the following question:

'Does Directive 2004/18, and, in particular, Article 1(2)(a) and (d), Article 2 and Article 28 of that directive and Categories 8 and 12 in Annex II [A] thereto, preclude national legislation which permits written agreements to be entered into between two contracting authorities for the study of the seismic vulnerability of hospital structures and its evaluation in the light of national regulations on the safety of structures and of strategic buildings in particular, for a consideration not exceeding the costs incurred in the performance of the service, where the authority responsible for performance may act as an economic operator?'

IV – Procedure before the Court

16. The order for reference dated 9 November 2010 was lodged at the Registry of the Court on 1 April 2011.

17. Written observations were submitted by Lecce ASL, the University, the Consiglio Nazionale degli Ingegneri (CNI), the Associazione delle Organizzazioni di Ingegneri, di Architettura e di Consultazione Tecnico-economica (OICE), the Consiglio Nazionale degli Architetti, Pianificatori, Paesaggisti e Conservatori (CNAPPC), the Italian, Czech, Polish and Swedish Governments and the European Commission within the period laid down in Article 23 of the Statute of the Court of Justice.

18. At the hearing on 27 March 2012, oral argument was presented by the agents of Lecce ASL, the University, CNI, OICE, CNAPPC, the Italian, Polish and Swedish Governments, and the Commission.

V – Main arguments of the parties

19. The arguments of the parties will, in so far as they are relevant, be reproduced in my statements.

VI – Legal assessment

A – *General remarks*

20. According to the wording of the question, the referring court is essentially seeking to ascertain whether the applicable national legislation may be regarded as compatible with Directive 2004/18 in so far as it permits agreements such as that described in the question. If, however, we consider the legal problems raised in the present case in their overall context, it must be stated that the central question which the Court must address as a matter of priority concerns the compatibility of the agreement in question with Directive 2004/18. In order to give the national court an answer to its questions which is helpful with a view to the resolution of the main proceedings, it would appear reasonable to shift the focus of the analysis to this aspect. In my analysis I will therefore deal with the question whether there has been an infringement of Directive 2004/18 in the main proceedings. I do not consider it absolutely necessary to reformulate the question to that end, especially since the finding of a possible infringement will indirectly provide clarification whether the applicable national law is consistent with EU law. Should the analysis reveal that the agreement in question does not comply with Directive 2004/18, the legal position which exists in Italy likewise cannot be regarded as consistent with EU law.

21. Directive 2004/18 would preclude an agreement such as that entered into between Lecce ASL and the University if under European Union law the contract for the study and evaluation of the seismic vulnerability of certain hospitals required a tendering procedure, since no call for tenders was made in the main proceedings. According to the order for reference, the contract in question was instead awarded directly to the University. Should the requirement of a tendering procedure be confirmed, it would also have to be examined whether an exception might apply which allows no public tendering procedure to be conducted, in which connection consideration must be given in the main proceedings to both the exceptions codified in Directive 2004/18 itself and the legal concept, developed in the Court's case-law, of a partnership between public authorities for the performance of a public interest task.

B – *Applicability of Directive 2004/18*

22. However, that presupposes that the agreement in question actually falls within the scope of Directive 2004/18. This is the first point to be examined, to which I will turn immediately below.

(1) Existence of a public contract

(a) Provision of services

23. For the situation to fall within the material scope of the directive, a 'public contract' must exist. The agreement in question may possibly be classifiable as one of the types of public contract listed in Article 1(2) of the directive. In my view, in the light of the available factual information, classification as a 'public service contract' within the meaning of the legal definition contained in Article 1(2)(d) is a possibility. In that provision, public service contracts are defined as 'public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II'. According to its object, the work to be performed by the University under the agreement corresponds to the type of services listed under category 12 in Annex II A ('Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services;

related scientific and technical consulting services; technical testing and analysis services’). This is complex technical work consisting in analysis of both compliance with building regulations and the seismic exposure of buildings. It has an obvious link to architecture and envisages extensive consultancy activities in this field carried out by suitably qualified staff from the University.

(b) Contract between a contracting authority and an economic operator

24. In addition, the definition of ‘public service contract’ requires, in so far as it is based on the notion of public contract in Article 1(2)(a) of the directive, a written contract between a contracting authority and an economic operator.

25. The legal requirement of written form is satisfied because the ‘Consultancy Contract’ concluded on 29 October 2009 was laid down in writing.

26. Under Article 1(9) of the directive, ‘contracting authority’ means ‘the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law’. In its capacity as part of the public administration, Lecce ASL satisfies the conditions for classification as a contracting authority within the meaning of the directive.

27. As far as the potential classification of the University as an ‘economic operator’ is concerned, under Article 1(9) of the directive that term also covers ‘service provider’. This means ‘any natural or legal person or public entity or group of such persons and/or bodies which offers on the market ... services’. The Università del Salento itself is constituted under public law, as is clear from its written observations.⁵ A relevant provision in this connection is Article 66 of Decree of the President of the Republic No 382/1980, because it authorises universities to enter into contracts and agreements with public and private bodies to carry out research and consultancy activities. Accordingly, under national law, universities are permitted not only to function as education and research centres, but also as economic operators within the meaning of the abovementioned definition.

28. Reference should be made here to *CoNISMa*,⁶ in which the Court confirmed that universities may also take part in tendering procedures as economic operators. In that judgment, the Court stated that capacity as an economic operator is not necessarily reserved for service providers which are structured as a business.⁷ Rather, any person or entity which is capable of carrying out the contract is eligible to put itself forward as a candidate, regardless of whether it is governed by public law or private law, whether it is active as a matter of course on the market or only on an occasional basis and whether or not it is subsidised by public funds.⁸ The Court also found that the effect of a restrictive interpretation of the concept of economic operator would be that contracts concluded between contracting authorities and bodies which are primarily non-profit-making would not be regarded as ‘public contracts’, could be awarded by mutual agreement and would thus not be covered by EU rules on equal treatment and transparency, which would be inconsistent with the aim of those rules.

29. Consequently, the agreement entered into between Lecce ASL and the University must be regarded as a written contract between a contracting authority and an economic operator.

5 — P. 2 of the written observations submitted by the University.

6 — Case C-305/08 *CoNISMa* [2009] ECR I-12129.

7 — *Ibid.*, paragraph 35.

8 — *Ibid.*, paragraph 42.

(c) Pecuniary interest of the service

30. A further condition for classification of an agreement as a ‘public contract’ within the meaning of Article 1(2)(a) of the directive is that it is for pecuniary interest. The notion of ‘pecuniary interest’ requires that the service provided by the tenderer is subject to a remuneration obligation on the part of the contractor. This means, in addition to participation by two persons, reciprocity in the form of the material exchange of consideration. Such reciprocity of the contractual relationship is necessary for the requirement of a tendering procedure to apply.

31. In the main proceedings, under the agreement in question Lecce ASL entered into a remuneration obligation vis-à-vis the University. However, in this particular case, the consideration promised was assessed in such a way that it did not exceed the costs incurred. Against that background, the question arises whether cost-covering remuneration also satisfies the definition of ‘pecuniary interest’. In my view, certain arguments support a broad interpretation of this notion, to the effect that it covers any kind of remuneration which has monetary value.

32. As the referring court correctly explains in its order for reference,⁹ the absence of profit alone does not render the contractual agreement gratuitous. It continues to be a contract for valuable consideration from an economic point of view, especially since the recipient is in any case given a non-cash benefit,¹⁰ and could thus, in principle, come within the scope of Directive 2004/18. Notwithstanding the above, the view can be taken that only a broad understanding of the notion of ‘pecuniary interest’ is consistent with the purpose of the procurement directives, which is to open up the markets to genuine competition.¹¹ Only in this way is it possible to guarantee the effectiveness of the procurement directives and to prevent the circumvention of procurement law by agreeing other forms of remuneration which are not readily recognisable as profit-making, for example through swaps or the waiver of reciprocal claims existing between the contracting parties.¹²

33. Such an understanding of pecuniary interest is also in line with the broad definition adopted by the Court for freedom to provide services under Article 56 TFEU.¹³ In view of the fact that, according to its legal basis in Article 95 EC (now Article 114 TFEU), Directive 2004/18 is intended to serve to attain the fundamental freedoms in the internal market, as expressed in recital 2 in the preamble, a broad understanding of the notion ‘pecuniary interest’ would seem logical. In accordance with that broad interpretation, the service provider may not be absolutely required to be profit-making. Rather, it should also be sufficient, for the pecuniary interest requirement to be satisfied, if the service provider merely receives cost-covering remuneration in the form of reimbursement of costs. The notion of pecuniary interest is thus also intended to cover simple reimbursement.¹⁴

34. Consequently, the agreement in question is for pecuniary interest and a ‘public service contract’ within the meaning of the definition contained in Article 1(2)(d) of the directive exists in the main proceedings.

9 — See p. 22, paragraph 34 of the order for reference.

10 — See Hailbronner, K., *Das Recht der Europäischen Union* (Eberhard Grabitz/Meinhard Hilf (eds.), part B5, paragraph 24, p. 4, in whose view the criterion of pecuniary interest is considered to be satisfied in principle in the case of any non-cash benefit. See also Eisner, C., ‘Interkommunale Kooperationen und Dienstleistungskonzessionen (Teil 1)’, *Zeitschrift für Vergaberecht und Beschaffungspraxis*, 2011, p. 190, according to whom, as soon as remuneration for the provision of a service is actually agreed, the operation in question must be assessed on the basis of the procurement rules.

11 — See Frenz, W., *Handbuch Europarecht*, Vol. 3 (Beihilfe- und Vergaberecht), Heidelberg 2007, p. 617, paragraph 2012.

12 — Ibid.

13 — See Case 263/86 *Humbel & Edel* [1988] ECR 5365, paragraph 18. Budischowsky, J., *Kommentar zu EU- und EG-Vertrag* (Heinz Mayer (ed.)), Vienna 2003, Article 49 EC, paragraph 8, p. 5, considers the criterion of pecuniary interest to be satisfied on account of the cost-covering character of a consideration.

14 — See Frenz, W., loc. cit. (footnote 11), p. 618, paragraph 2013.

(2) Attainment of the respective threshold

(a) Falling below the relevant threshold?

35. The procurement directives, with their strict procedural requirements, do not apply to every small contract. Rather, the monetary consideration of the contract in question must reach a certain threshold in order to come under the procurement rules. Considering only proportionality grounds, the sometimes very expensive procurement procedures do not have to be used for every small-scale contract. In addition, a low contract value does not suggest a serious cross-border commercial interest.

36. Thus, as a result of the thresholds, procurement law is divided into two classes. Above the thresholds it is necessary to comply with detailed stipulations under the directives. Below the thresholds, only EU primary procurement law, together with the unwritten principles stemming from the Court's case-law, is relevant. This division proves to be relevant in the present case because the contract in the main proceedings possibly falls below the threshold, which will have to be examined in detail.

37. Under Article 9(1) of Directive 2004/18, the calculation of the estimated value of a public contract is to be based on the total amount payable, net of VAT, as estimated by the contracting authority. This calculation must take account of the estimated total amount, including any form of option and any renewals of the contract. It is clear from the documents before the Court that Lecce ASL undertook to pay a consideration of EUR 200 000 net of VAT. If that amount is taken as the estimated value of the contractually agreed services, it is clear that it falls below the threshold of EUR 206 000 defined in Article 7(1)(b) of Directive 2004/18 in the version applicable on 29 October 2009, i.e. at the time the agreement in question was concluded. Consequently, the compatibility of the agreement in question with EU procurement law should also not be assessed on the basis of Directive 2004/18. The sole basis for assessment should be primary law, and above all the provisions relating to the fundamental freedoms.

38. On the other hand, as the Commission points out in its written observations,¹⁵ it should not be disregarded that a short time later the threshold was reduced to EUR 193 000, under Commission Regulation (EC) No 1177/2009 of 30 November 2009, with effect from 1 January 2010.¹⁶ The estimated value of the services would thus be above the new threshold. The question therefore arises which threshold must be used in the main proceedings. This is in turn linked to the question which version of Directive 2004/18 is applicable in the main proceedings. In order to be able to answer this question, the relevant moment from which a procurement directive is applicable must be determined.

39. Directive 2004/18 contains a number of rules which are intended to help those applying the law to determine the relevant moment for the calculation of the contract value. For example, Article 9(2) of the directive provides that the relevant moment for the calculation is the moment at which the contract notice is sent or, where such notice is not required, the moment at which the procedure is commenced. It would therefore be conceivable, in principle, to have regard to those rules in order to determine the temporal applicability of the relevant version of Directive 2004/18. It must be stated, however, that those rules assume a situation where a tendering procedure has actually taken place.

15 — See footnote 22 of the written observations submitted by the Commission.

16 — Commission Regulation (EC) No 1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2009 L 314, p. 64).

They do not state what action should be taken where – as in the main proceedings – no call for tenders has been made, for whatever reason. In the absence of express provisions governing this latter situation, it is necessary to make some fundamental observations in order to find a solution for this situation which takes sufficient account of it.

40. In my Opinion in *Commission v Germany*,¹⁷ I had drawn attention to the fact that the thresholds defined in the procurement directives are regularly revised. Accordingly, clear rules are needed to determine the relevant thresholds. For that reason, I also suggested in that Opinion that, where there is no call for tenders, regard is to be had to the time of the contractual negotiations as the material time for determining the relevant threshold and, indirectly, also for the temporal applicability of a procurement directive.¹⁸ This seems to be reasonable, especially since regard must be had to a time when there is sufficient certainty as to the overall contract volume and the estimated contract value. The abovementioned provisions in Article 9(2) of Directive 2004/18 are based on the same idea. Since it must be assumed that at the time the contract was concluded at the latest there was final certainty as to the estimated contract value, that must be the relevant moment in the main proceedings. This means that in the main proceedings the older version of Directive 2004/18 is applicable. Because the value of the contractually agreed service falls below the threshold laid down therein, the compatibility of the agreement in question with EU procurement law would, as has already been explained, have to be assessed, in principle, solely on the basis of primary law.

41. There are no explicit rules on procurement law in the treaties.¹⁹ The Court has nevertheless inferred principles of procurement law from the fundamental freedoms, the prohibition on discrimination on grounds of nationality and the principle of equal treatment and, according to the individual case to be assessed, has laid down conditions of procurement law with which contracting authorities must comply. Thus, the principle of equal treatment under primary law in the field of public procurement is intended to afford equality of opportunity to all tenderers when formulating their tenders, regardless of their nationality.²⁰ The principles of equal treatment and non-discrimination on grounds of nationality imply a duty of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the award of the contract to be opened up to competition and a review of the impartiality of the procurement procedures.²¹

42. However, the referring court has not provided the necessary descriptions of the facts and explanations for a detailed analysis of compliance with the principles governing procurement under primary law. This is not least due to the fact that the referring court has restricted its request for the interpretation of EU law to Directive 2004/18. The statements made by the referring court therefore relate solely to aspects which are relevant to an interpretation of that secondary legislation.

43. It should be borne in mind in this connection that, with regard to the admissibility of references, the Court has pointed to the requirement that the national court's decision should contain a sufficient description of the facts and law involved in the case. The purpose of that requirement is to enable the Court, first, to provide an interpretation of EU law which will be of use to the national court,²² and, second, to give the governments of the Member States and other interested parties the opportunity to

17 — Opinion in Case C-271/08 *Commission v Germany* [2010] ECR I-6817, point 143.

18 — *Ibid.*

19 — See Frenz, W., *loc. cit.* (footnote 11), p. 533, paragraph 1721.

20 — Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 48.

21 — Case C-196/08 *Acoset* [2009] ECR I-9913, paragraph 49, and Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 21. With regard to the relationship between the prohibition on discrimination and the transparency requirement, see Case C-507/03 *Commission v Ireland* [2007] ECR I-9777, paragraph 30 et seq.; Case C-412/04 *Commission v Italy* [2008] ECR I-619, paragraph 66; Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 17 et seq.; and Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60 et seq.

22 — See Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6.

submit observations pursuant to Article 23 of the Statute of the Court of Justice.²³ However, account can be taken of both purposes, at least as far as the main proceedings are concerned, only if the referring court makes a suitable request for an interpretation of primary law to the Court and supplements its description of the facts and law involved in the case with relevant statements. The referring court should therefore be advised of the possibility of making a fresh reference.

44. However, a fresh reference would appear to be possible only if it is definitively confirmed that the contract actually falls below the relevant threshold. It is for the national court to make the necessary factual findings in order to rule out entirely that other amounts also do not have to be taken into consideration as part of the agreed consideration. Particular attention must be given to the method by which the contract value for Lecce ASL was calculated. The national court will have to review a number of aspects, including whether items might be underestimated, whether the contractual agreement provided for the subsequent adjustment of such items to the actual costs, and whether the contracting parties agreed to split up the contracts, including a separate calculation of items.²⁴ Since the contract falls only slightly below the threshold in the main proceedings, it appears that these aspects require particular clarification.

(b) Presumption that the question is relevant

45. Should the contract value actually fall below the threshold of EUR 206 000 which is relevant in the main proceedings, this fact would raise doubts whether the question referred is relevant to the decision, especially since it expressly seeks the interpretation of Directive 2004/18, rather than of the applicable primary law. The question referred could possibly prove to be irrelevant to the decision in so far as it is not entirely clear that it bears any relation to the actual facts of the main proceedings or to their purpose.

46. It should nevertheless be remembered that it is settled case-law that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.²⁵ Where the questions submitted by the national court concern the interpretation of EU law, the Court of Justice is, in principle, bound to give a ruling.²⁶

47. It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of EU law referred to in the questions bears no relation to the actual facts of the main action or to its purpose.²⁷ This is not the case in the main

23 — See Joined Cases C-480/00 to C-482/00, C-484/00, C-489/00 to C-491/00, C-497/00 to C-499/00 *Azienda Agricola Ettore Ribaldi and Others* [2004] ECR I-2943, paragraph 73, and Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 40.

24 — Connected with the calculation method are the prohibitions on circumvention expressly laid down in all the procurement directives. First, it is prohibited to split up contracts with the intention of circumventing the application of the relevant directive. Second, the directives prohibit circumvention through the choice of calculation method. Furthermore, it is possible to infer from the prohibitions of circumvention a general prohibition of deliberate or negligent under-calculation (see Frenz, W., loc. cit. (footnote 11), p. 209, paragraph 822; Trepte, P., *Public Procurement in the EU*, 2nd edition, Oxford 2007, p. 262 et seq.).

25 — Under that case-law, it is assumed that the national court alone has direct knowledge of the facts of the case and of the arguments put forward by the parties and is therefore in the best position to determine, with full knowledge of the matter before it, the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment (see Case C-425/98 *Marca Mode* [2000] ECR I-4861, paragraph 21).

26 — See, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 19; Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 30; and Case C-103/08 *Gottwald* [2009] ECR I-9117, paragraph 16.

27 — See, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraph 29; and Case C-103/08 *Gottwald*, cited above in footnote 26, paragraph 17.

proceedings, however, especially since it cannot be ruled out that, after assessing all the circumstances of the main proceedings, in particular the method by which the contract value for Lecce ASL was calculated,²⁸ the referring court will conclude that Directive 2004/18 should ultimately be applied in the main proceedings, because the relevant threshold has been exceeded.

48. Consequently, the Court is bound to comply with the request from the referring court and to interpret Directive 2004/18.

(3) Irrelevance of an exception

49. Whilst the thresholds narrow the limits of procurement law initially on a purely financial basis, the directives also contain explicit exceptions for specific areas. These must be distinguished from the unwritten exceptions which the Court has developed in its case-law and which mainly concern situations in which regional or local public authorities perform public interest tasks together. The purpose of the rules laying down the exceptions is to fine tune the procurement directives. In particular, the intention is to exclude from the scope of procurement law areas in which there is no specific procurement-related danger to competition, there is no cross-border commercial interest or an application of procurement law would not be consistent with the characteristics and the particular needs of the areas covered by the exceptions.²⁹

50. Irrespective of the kind of exception that is relevant in a certain case, it should be borne in mind that, because of the aim of the procurement directives, which is to make the award of public contracts in all Member States subject to common rules and to open up public procurement to competition in general, the rules laying down exceptions in the directives must be given a definitive and, in principle, a narrow interpretation.³⁰

51. In the main proceedings, consideration must be given to both codified and unwritten exceptions, the applicability of which will be examined below in that schematic order.

(a) Codified exceptions

(i) Service contract on the basis of an 'exclusive right'

52. Consideration should first be given to the exception laid down in Article 18 of Directive 2004/18. Under that provision, the directive 'shall not apply to public service contracts awarded by a contracting authority to another contracting authority ... on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty'. This exception would thus be relevant only if it can be shown that the University has an exclusive right to provide services of the agreed kind.

53. It is sufficient to note that even though Italian law states in Article 6(4) of Law No 168/1989 that the universities are the 'primary centres for academic research' and, in Article 15(1) of Law No 241/1990, it authorises them to 'enter into agreements among themselves with a view to laying down rules governing cooperation in activities of common interest', it is not possible to infer from this any exclusive right in the abovementioned sense. A legally enshrined exclusive right for the universities to carry out the study and evaluation of the seismic vulnerability of hospital buildings on behalf of the public administration cannot be found in either the Italian legal order or in EU law. The

28 — See point 44 of the present Opinion.

29 — See Frenz, W., loc. cit. (footnote 11), p. 670, paragraph 2197.

30 — See Case 199/85 *Commission v Italy* [1987] ECR 1039, paragraph 14; Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 43; Case C-71/92 *Commission v Spain* [1993] ECR I-5923, paragraph 10; and Case C-84/03 *Commission v Spain* [2005] ECR I-139, paragraphs 48 and 58.

Czech Government³¹ is correct in its view that these activities should, by their nature, be regarded as ancillary research activities carried out by the University and do not serve to fulfil its fundamental function as a centre of academic learning, in respect of which the University enjoys an exclusive right in the context of the education system of each Member State.

54. The exception laid down in Article 18 of Directive 2004/18 is not therefore relevant in the main proceedings.

(ii) Special exception for research and development services

55. It must also be examined whether the special exception laid down in Article 16(f) of Directive 2004/18 is relevant in the main proceedings. Under that provision, the directive does not apply to service contracts for ‘research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority’.

56. This criterion is satisfied in so far as Lecce ASL has undertaken, by contract, to pay a consideration. However, it is unclear whether the other requirements are fulfilled. Even though under the consultancy contract ownership of any results produced by the experimental work was to lie with Lecce ASL, it was under a commitment to make express mention of the Department if the results appeared in academic publications. That raises the question of the extent to which the benefits of the research accrue exclusively to Lecce ASL. It cannot be ruled out entirely that that was the case. In the absence of more precise factual information on the content of the agreement and the associated legal consequences under national law, it is not possible to determine with any certainty whether that requirement of the exception in Article 16(f) of Directive 2004/18 is satisfied. To that end it would be necessary to ascertain and assess facts, which the Court however has no power to do in proceedings under Article 267 TFEU.³² Instead, this falls within the jurisdiction of the national court. It must therefore examine whether the exception laid down in Article 16(f) of Directive 2004/18 is relevant in the light of the overall circumstances in the main proceedings.

(b) Unwritten exceptions

57. As has already been intimated above, in its case-law the Court has developed two further exceptions, which relate to ‘in-house operations’ and various forms of inter-municipal cooperation.³³ A description should be given, with a view to an examination of whether they are applicable in the main proceedings, of their main characteristics.

(ii) In-house operations

58. In-house operations presuppose, by definition, an exchange of consideration which – from a legal point of view – takes place within a single legal entity. In-house operations are not therefore relevant for the purposes of the procurement rules because a contracting authority provides the services with its own resources. This is permissible under procurement law, as the Court found in *Stadt Halle and RPL Lochau*.³⁴ In that judgment, the Court stated that ‘a public authority which is a contracting

31 — See paragraphs 17 and 18 of the written observations submitted by the Czech Government.

32 — See Case 13/61 *Bosch* [1962] ECR 45 and Case 26/62 *Van Gend en Loos* [1963] ECR 1.

33 — See the *Commission Green Paper of 27 January 2011 on the modernisation of EU public procurement policy, Towards a more efficient European Procurement Market*, COM(2011) 15 final, p. 24, which mentions both situations developed in the Court’s case-law. The Commission advocates, in connection with formulating legislative proposals, defining those forms of cooperation that are outside of the scope of application of the EU public procurement directives. Consideration should also be given in this regard to the findings made in the Court’s case-law.

34 — Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1.

authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments'. In the view of the Court, 'in such a case, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority'. There is therefore no need to apply the EU rules in the field of public procurement to such a situation.³⁵

59. The situation where a public corporation awards a contract to a legally autonomous person, but that person has special relations with it is also dealt with in connection with the same set of issues.³⁶ In this case too, the question is ultimately whether there is a contract which requires a tendering procedure to be conducted. The key question is whether the operation involves two different persons who may operate respectively as a contracting authority and as a tenderer. Whilst it can be ruled out that they are the same person in view of their legal autonomy, the question whether they each have the capacity of contracting authority and tenderer for a specific operation often causes difficulties. Both persons may possibly be linked to one another, in relation to a specific contract, in such a way that in the absence of a contract the tender requirement ceases to apply.

60. In the view of the Court, it is sufficient, for a tender requirement to apply, if the contract was concluded between, on the one hand, a contracting authority and, on the other, a person legally distinct from that contracting authority. Since the leading judgment in *Teckal*,³⁷ however, the Court considers that there is no need for a call for tenders and that, in the final analysis, there is a quasi in-house operation 'where a public authority which is a contracting authority exercises over the separate entity concerned control similar to that which it exercises over its own departments, provided that that entity carries out the essential part of its activity with the public authority or with other controlling local or regional authorities'.³⁸

61. It should be stated, however, that neither of these two situations exists in the main proceedings. First, the contract at issue was concluded between two distinct legal entities. Second, according to the referring court,³⁹ the University is exempt from any kind of control by Lecce ASL. As a result, there can be no question of an in-house operation.

(ii) Inter-municipal cooperation

62. A further unwritten exception can be seen in *Commission v Germany*⁴⁰ in which the Court sets out certain principles.⁴¹ That judgment shows under what circumstances and in what forms inter-municipal cooperation is to be excluded from the scope of procurement law.⁴² For this reason in particular, the facts in that case and the broad lines of the Court's arguments should be summarised.

35 — Ibid., paragraph 48.

36 — See Holoubek, M., *EU-Kommentar* (Jürgen Schwarze (ed.)), 2nd edition., Article 49/50 EC, paragraph 151, p. 753, who points out that the Court's case-law has excluded from the scope of the procurement directives, and also from the scope of the fundamental freedoms, not only quasi-contractual internal relations within a legal person, but also contractual relationships between the public sector and spun-off bodies.

37 — Case C-107/98 *Teckal*, cited above in footnote 30.

38 — See Case C-107/98 *Teckal*, cited above in footnote 30, paragraph 50; Case C-26/03 *Stadt Halle and RPL Lochau*, cited above in footnote 34, paragraph 49; and Case C-480/06 *Commission v Germany*, cited above in footnote 3, paragraph 34.

39 — See paragraph 35 of the order for reference.

40 — Cited above in footnote 3.

41 — See Chaminade, A., 'Des possibilités de coopération accrues pour les collectivités territoriales', *La Semaine Juridique – édition générale*, 2010, No 363, p. 662, who discusses a further development in the Court's case-law since the judgments in relation to in-house operations. See Ferk, P./Ferk, B., 'Osebe javnega prava kot ponudniki', *Podjetje in delo*, 2011, No 4, p. 481 et seq., who state, in connection with *Commission v Germany*, that the previous legal theory on in-house operations was supplemented in so far as the judgment referred to a contractual and not an institutional relationship between the participants.

42 — See Pirker, B., 'La jurisprudence de la Cour de justice et du Tribunal de première instance. Chronique des arrêts. Arrêt Commission c/Allemagne', *Revue du droit de l'Union européenne*, 2009 No 3, p. 574; Broussy, E./Donnat, F./Lambert, C., *Chronique de jurisprudence communautaire, Droit administratif*, 2009, p. 1542, who take the view that *Commission v Germany* establishes a new exception in respect of procurement law.

– The Court's arguments in *Commission v Germany*

63. Those treaty infringement proceedings concerned the assignment by four *Landkreise* in Lower Saxony, namely Rotenburg (Wümme), Harburg, Soltau-Fallingb. and Stade, of the contract for the disposal of their waste to Stadtreinigung Hamburg, a public undertaking operating in the form of a public-law institution (*Anstalt des öffentlichen Rechts*), without conducting a tendering procedure at European level. Provision was made for an annual fee with a price adjustment mechanism based on the volume of waste as remuneration. The contract was to run for 20 years. The parties had agreed to open negotiations five years at the latest before the end of that contract in order to make a decision as to whether a subsequent contract should be concluded.

64. The Court dismissed the action brought by the Commission, since it did not consider the conclusion of the contract on waste disposal services, without issuing a call for tenders or conducting a tendering procedure at European level, to be an infringement of Directive 92/50. The Court essentially rejected any requirement for a call for tender on the ground that the contract at issue established cooperation between local authorities with the aim of ensuring that a public task that they all have to perform, namely waste disposal, was carried out.⁴³ In order to ascertain this, it subjected the contract to a detailed analysis in which it highlighted the aspects which, in its view, typically characterised inter-municipal cooperation. As will be shown below, those aspects also constitute the criteria by which it can be determined whether a certain agreement between public authorities is covered by the unwritten exception of inter-municipal cooperation. In other words, they constitute the criteria for the exception.

65. It is striking that, in the view of the Court, inter-municipal cooperation is characterised by the efforts of all the participating local authorities to ensure jointly the effective performance of a public interest task. The legitimation for excluding that area from the scope of procurement law is the finding – as was held in *Coditel Brabant*⁴⁴ – that a public authority may perform the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities not forming part of its own departments. The Court considers, however, that this autonomy also requires a contracting authority to have the freedom to cooperate with other contracting authorities and thereby to pool their respective resources.⁴⁵ On the basis of these arguments, the Court acknowledged that the public authorities also have the freedom to choose the legal form for their cooperation in order to carry out jointly their public service tasks, whether, as in the present case, by means of a simple contract or institutionalised⁴⁶ by means of a specifically created public body. It based this view, first, on the formal argument that EU law does not require any particular legal form.⁴⁷ Second, from a teleological point of view, it also saw no need for any such requirement that cooperation take a certain form, provided competition in the internal market for procurement is not distorted because a private undertaking is given preferential treatment and others are thus discriminated against.⁴⁸

– The criteria defined by the Court

66. Unlike the case-law on in-house operations, where, in *Teckal*, the Court summarised the two relevant criteria in a succinct mnemonic, there is no comparable succinct formula in that leading decision as to the conditions under which, going beyond the case to be decided, inter-municipal cooperation to which the procurement rules are not applied may be regarded as lawful. Nevertheless,

43 — See Case C-480/06 *Commission v Germany*, cited above in footnote 3, paragraph 37.

44 — See Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 48.

45 — See Case C-480/06 *Commission v Germany*, cited above in footnote 3, paragraph 45.

46 — See Steiner, M., 'Ausschreibungsfreier Abfallentsorgungsvertrag: Ist das der Anfang vom Ende der sogenannten Teckal-Kriterien?', *European Law Reporter*, 2009, p. 283, who, with regard to the situation in *Commission v Germany*, talks about de facto 'institutionalised cooperation'.

47 — See Case C-480/06 *Commission v Germany*, cited above in footnote 3, paragraph 47.

48 — *Ibid.*

as has already been mentioned, it is possible to identify, from the line of argument pursued by the Court, a number of relevant criteria which must be satisfied cumulatively. Accordingly, the Court exempts inter-municipal cooperation from the scope of procurement law on the basis of the following criteria:

- performance of a common public interest task or tasks relating to the pursuit of objectives in the public interest;
- solely by public authorities, without the participation of any private party;
- on a contractual basis or in an institutionalised legal form, such as an association;
- no private undertaking is placed in a position of advantage vis-à-vis competitors in relation to the conclusion of the contract;
- the contract does not seek to circumvent procurement law.

67. It could, in principle, be argued, against the direct applicability of this case-law to the main proceedings, that the present case – unlike the situation in *Commission v Germany* – does not concern cooperation between local authorities. In fact, the present case relates to a contractual agreement between a local authority and a public-law institution. Against this background, it is necessary to consider the extent to which it is possible, on the basis of this case-law, to assume the existence of an exception which covers forms of cooperation like the one at issue here.

(iii) Legal form of the ‘public-public partnership’

- Extension of the exception to various forms of cooperation between public authorities

68. A careful reading of the judgment in *Commission v Germany* nevertheless makes it clear that the exception developed by the Court does not, in principle, preclude such forms of cooperation.

69. An argument in support of this view is, first, that that case concerned a contract between Stadtreinigung Hamburg and four neighbouring Landkreise, where Stadtreinigung Hamburg was a public-law institution and not a local authority.⁴⁹ Second, it should be borne in mind that in the judgment the Court often uses the neutral term ‘public authority’,⁵⁰ by which it intimates that cooperation, as a condition for the application of the unwritten exception, is open not only to municipalities.⁵¹ To restrict the exceptions solely to cooperation by local authorities would also be excessively formalistic and difficult to comprehend in view of the different forms of administrative organisation in each of the Member States. Accordingly, it is more logical to give a broad understanding to the scope of that unwritten exception and talk about ‘cooperation between public authorities’.

70. This unwritten exception must therefore be considered, in principle, also to cover a situation in which a health authority and a university are parties to a contract.

49 — See Wagner, S., ‘Öffentliche Aufträge: Eine förmliche europaweite Ausschreibung ist nicht erforderlich, wenn öffentliche Stellen i.R. interkommunaler Zusammenarbeit einen Vertrag zur Erfüllung einer ihnen allen obliegenden öffentlichen Aufgabe (Abfallentsorgung) schließen’, *Europäisches Wirtschafts- & Steuerrecht*, 2009, p. 328.

50 — See Case C-480/06 *Commission v Germany*, cited above in footnote 3, paragraphs 34, 44, 45 and 47.

51 — See Öhler, M./Gruber, C., “‘Zusammenarbeit’ iSd EuGH-Urteils Rs Stadtreinigung Hamburg nicht auf Kooperationen zwischen Gebietskörperschaften beschränkt”, *Zeitschrift für Vergaberecht und Beschaffungspraxis*, 2011, p. 288.

– Satisfaction of the criteria in the main proceedings

71. In order for Lecce ASL and the University to be able to rely on this unwritten exception, the abovementioned criteria which distinguish cooperation between public authorities must be satisfied in the main proceedings. It is common ground that there is a contractual agreement solely between public authorities, without the participation of any private party in any form, and several criteria are therefore satisfied. Other criteria raise difficulties, on the other hand, and require closer examination.

Performance of a public interest task

72. One of the most contentious questions raised in the present case is whether the contract in question was concluded by both parties with the aim of performing a *public interest* task.

73. As has already been explained, the University was awarded a contract for the study and evaluation of the seismic vulnerability of hospital buildings in the Province of Lecce. That work had to be carried in accordance with the national regulations on the safety of structures and of strategic buildings in particular. As Lecce ASL⁵² stated in its written observations, the results of that study were intended to serve as the basis for its own future projects to improve the resistance of the structures concerned. It follows that, by the contract to carry out the study, Lecce ASL actually intended to comply with an obligation imposed on it by national law with a view to guaranteeing the safety of hospitals. This is a public interest task which falls within the competence of the State.

74. Consequently, the contract in question was concluded by both parties with the aim of performing a public interest task.

Cooperation to perform a common public task

75. It must also be required that the cooperation serves to perform a *common* public task.⁵³ It is not therefore sufficient that the statutory duty to perform the public task in question concerns only one of the public authorities involved, whilst the other's role is limited to that of a vicarious agent, which takes on the performance of this external task under a contract. This seems understandable if we consider the etymological meaning of the word 'cooperation'; the essence of such cooperation consists precisely in a common strategy between partners which is based on the exchange and the coordination of their respective interests. The unilateral pursuit of one participant's own interests cannot really be described as 'cooperation' in the above sense.⁵⁴

76. Specific indications of such a requirement of genuine cooperation between public authorities are given by the Court's statements in *Commission v Germany*,⁵⁵ which relate to a particular form of cooperation between four local authorities and a public institution which enabled them jointly to perform a public task incumbent on them all, namely waste disposal. The Court made express reference to this aspect in its statements. As has already been mentioned, the relationship between the parties to the contract is distinguished by the recognition of reciprocal rights and duties. In addition, the parties to the contract were committed to mutual assistance and mutual consideration. This judgment is thus based on a relationship of exchange which goes beyond the provision of services for consideration.⁵⁶

52 — See p. 3 of the written observations submitted by ASL Lecce.

53 — See Struve, T., 'Durchbruch für interkommunale Zusammenarbeit', *Europäische Zeitschrift für Wirtschaftsrecht*, 2009, p. 807; Veldboer, W., 'Zur Entscheidung für interkommunale Zusammenarbeit durch das EuGH-Urteil "Hamburger Stadtreinigung"', *Die öffentliche Verwaltung*, 2009, p. 360.

54 — See Öhler, M./Gruber, C., loc. cit. (footnote 51), p. 289, who require the agreement between the public authorities to have 'cooperative character'.

55 — See Case C-480/06 *Commission v Germany*, cited above in footnote 3, paragraph 37.

56 — See Struve, T., loc. cit. (footnote 53).

77. As the Polish Government,⁵⁷ CNI⁵⁸ and the Commission⁵⁹ rightly recognise, however, the main proceedings are fundamentally different from the situation described above, in so far as the specific aims of the public authorities are not the same. Whilst Lecce ASL alone is subject to a statutory duty to study and evaluate the seismic vulnerability of hospital buildings, the University's role, by law, consists in scientific research. This role is supplemented by the traditional function as a centre of academic learning, as has already been pointed out.⁶⁰ Against this background, it is clear that the study and evaluation of the seismic vulnerability of hospital buildings cannot be considered to fall within the primary competence of a university. If we consider the specific aspects of the main proceedings, it must be stated that the University does not have any such statutory duty. This has already been established in the context of the analysis of Article 18 of Directive 2004/18.⁶¹ Nor are there any indications that the University would take on this task of its own motion. Nevertheless, it has both the necessary expertise and the staff and facilities to perform that task. Lecce ASL calls on those resources in order to carry out its public task. It is, to some extent, the beneficiary of the University's resources. Ultimately, however, only the interests of Lecce ASL are pursued.

78. Importance must be attached in this connection to the nature of the relationship between the two parties. Cooperation between public authorities may take different forms, as can be seen from *Commission v Germany*: either on an institutional basis by establishing a structure tailored to the needs of the participants, to which powers are transferred or through which powers are exercised jointly, or on a contractual basis by concluding a cooperation agreement or an agreement on the performance of a joint public task.⁶² In the main proceedings there is nothing of the sort. The consultancy contract concluded between Lecce ASL and the University does not lay down either the basis or the legal framework for cooperation in the service of a common public task. Instead, it merely provides for a service in the form of specialist consultancy for a consideration. In the final analysis, Lecce ASL 'buys' a study from the University, especially since it acquires the sole right of ownership and may use it as it wishes. The University receives financial remuneration in return, in connection with which it must be pointed out that the cost-covering character of the consideration does not affect the pecuniary interest of the service.⁶³

79. In addition, the consultancy contract at issue here, unlike the contractual agreement in *Commission v Germany*, does not provide for any reciprocal assistance obligations. This is notwithstanding the fact that the work was to be carried out through close collaboration between the Lecce ASL working group and the University working group, since external staff could also be used under the contract. The reciprocal assistance obligations were therefore limited and were clearly not intended to go beyond what was necessary to allow the University working group to carry out the study.

80. Irrespective of this, the written observations submitted by Lecce ASL⁶⁴ suggest that no genuine exchange took place between the two working groups appointed by it and the University to perform the supposedly common public task. Rather, on the basis of the findings, i.e. after the completion of the study by the University, the Lecce ASL working group was to formulate plans to improve the safety of the investigated structures. This fact confirms the view already expressed that in reality Lecce ASL commissioned and paid for a report.

57 — See paragraph 22 of the written observations submitted by the Polish Government.

58 — See p. 6 of the written observations submitted by the CNI, in which it even denies that the study and evaluation of the seismic vulnerability of hospital buildings is actually a statutory task of ASL Lecce.

59 — See paragraph 86 of the written observations submitted by the Commission.

60 — See point 53 of this Opinion.

61 — See point 53 of this Opinion.

62 — See Dreyfus, J.-D., Rodrigues, S., 'La coopération intercommunale confortée par la CJCE?', *L'actualité juridique; droit administratif*, 2009, p. 1720.

63 — See point 34 of this Opinion.

64 — See p. 3 of the written observations submitted by ASL Lecce.

81. In the light of the foregoing, it must be stated that the consultancy contract in question does not, in accordance with case-law, establish any genuine cooperation between the public authorities involved which performs a common public task. It is in fact a contract for services which are provided for a consideration.

A private undertaking is not placed in a position of advantage vis-à-vis competitors

82. Furthermore, according to the criteria set out by the Court, a private undertaking should not be placed in a position of advantage vis-à-vis competitors with regard to the award of the contract to carry out the study.

83. As was stated earlier, the University acted as an ‘economic operator’ within the meaning of Article 1(9) of Directive 2004/18.⁶⁵ It therefore had the same legal status, from the point of view of procurement law, as a private undertaking. Because the University was awarded that contract without a public tendering procedure having taken place, it was placed in a position of advantage vis-à-vis the associations of engineers and architects which could possibly also have produced the study in question.

84. This criterion logically presupposes that potential competitors actually existed. It must be stated in this regard that in its written observations Lecce ASL did not expressly deny that other economic operators could also have carried out the study in question. The University’s cost-effectiveness, material resources and competence are indeed praised,⁶⁶ but the basic capacity of other economic operators such as engineering or architect’s firms to perform the task certainly cannot be denied. In view of the statements made by CNI⁶⁷ in support of the view that this kind of activity tends to fall within the primary competence of engineers and architects, such a claim is difficult to maintain. In so far as at the hearing Lecce ASL amended its position, to the effect that the complex terms of reference would have overstretched engineering or architect’s firms, it could not deny, in response to a question asked by the Court, that other universities and private research institutes at home and abroad would possibly also have met the requirements of the terms of reference.

85. However, it is for the national court having jurisdiction to make the factual findings to give definitive clarification on this question. It must assess whether the necessary procedures for the study and evaluation of seismic vulnerability were actually so complex that, in the final analysis, only that University – and no other – could have carried out the study. For the purposes of the present preliminary ruling proceedings, it is sufficient to state that Lecce ASL would most probably have had a choice between various potential competitors if it had invited tenders for a public contract to carry out the study.

86. Consequently, the University was placed in a position of advantage vis-à-vis potential competitors with regard to the conclusion of the contract and a further condition for the application of the unwritten exception is not satisfied.

No circumvention of procurement law

87. As a further condition for the applicability of the unwritten exception in the main proceedings it must be required that the rules of procurement law were not circumvented through the conclusion of the contract.

65 — See points 27 and 28 of this Opinion.

66 — See p. 23 et seq. of the written observations submitted by ASL Lecce.

67 — See p. 2 of the written observations submitted by the CNI.

88. As far as this condition is concerned, the Polish Government⁶⁸ is correct in its view that a distortion of competition stems from the fact that no call for tenders was made, even though the study in question could, in all likelihood, also have been carried out by associations of engineers and architects competing with the University. Mention should be made in this connection of the fact that it would have been in the specific interest of Lecce ASL as the contracting authority to open out the contract to the largest possible number of competitors. As the Court held in *CoNISMa*,⁶⁹ one of the primary objectives of EU rules on public procurement is to attain the widest possible opening-up to competition. Such opening-up is contemplated not only from the point of view of the EU interest in the free movement of goods and services,⁷⁰ but also the interest of the public authority concerned itself, which will thus have greater choice as to the most advantageous tender which is most suitable for the needs of the public authority in question. Lecce ASL prevented itself from utilising that option because it did not give potential tenderers an opportunity to submit tenders.

89. Against this background, the argument put forward by Lecce ASL⁷¹ that the award of the contract to the University brought it considerable cost savings is not convincing, especially since, in the absence of a public tendering procedure, it did not have the opportunity to assess tenders from other potential competitors. Not only has Lecce ASL failed to provide evidence in support of this claim, it has not even been able to demonstrate conclusively how it arrived at an estimated amount of EUR 800 000 which, in its view, other competitors would have charged if they had been in a position to carry out the study. The assumption, which is not substantiated by facts, that only the University could have carried out the study in question at such a favourable price highlights a misunderstanding of the purpose of procurement law.

90. If contracting authorities were permitted – going beyond the scope of the public-public partnership – to have recourse to other public authorities in order to obtain services, without making them subject to the rules of procurement law, there would be grounds to fear that those rules could be circumvented in the long term, which would ultimately frustrate the Union's aim of guaranteeing freedom of establishment, freedom to provide services and unrestricted competition within the internal market. In order to prevent this, there is a need for strict monitoring of compliance with the criteria set out by the Court in *Commission v Germany*.

91. It can therefore be concluded that the contract concluded between Lecce ASL and the University sought to circumvent procurement law. That fact too militates against the application of the unwritten exception.

– Arguments against classification as a ‘public-public partnership’

92. The above analysis has shown that a number of criteria for classification of the collaboration between public authorities as a ‘public-public partnership’ are not satisfied in the main proceedings. This holds, above all, for the requirement of cooperation to perform a joint public service task.⁷² It is neither possible to identify genuine ‘cooperation’ in the conventional sense, nor do the participants pursue a common aim imposed on them by law. Rather, a public authority is using the resources of another public authority to limit costs. From a legal point of view, there is a contract for services which are provided for a consideration. Other arguments against excluding the operation at issue

68 — See paragraph 23 of the written observations submitted by the Polish Government.

69 — Case C-305/08 *CoNISMa*, cited above in footnote 6, paragraph 37.

70 — Procurement law places limits on private autonomous action by public authorities, specifically as regards the choice of contractual partners, in the interest of competition. See, with regard to the influence of internal-market objectives on private law, Wendehorst, C., ‘Methodenlehre und Privatrecht in Europa’, *Vom praktischen Wert der Methode – Festschrift für Heinz Mayer zum 65. Geburtstag*, Vienna 2011, p. 829.

71 — See p. 15 of the written observations submitted by ASL Lecce.

72 — See point 81 of this Opinion.

from the scope of procurement law are the fact that the University was placed in a position of advantage vis-à-vis potential competitors with regard to the conclusion of the contract⁷³ and the fact that the contract in question sought to circumvent procurement law.⁷⁴ In the light of this finding, there can be no question of a ‘public-public partnership’.

(c) Interim conclusion

93. Consequently, there is no relevant exception which would preclude the applicability of Directive 2004/18.

2. Summary of conclusions

94. In summary, it must be stated that the contract at issue concerning the study and evaluation of the seismic vulnerability of certain hospitals requires a tendering procedure and Directive 2004/18 is applicable. Since no call for tenders was made in the main proceedings, there is an infringement of the directive. In view of the fact that national law permits agreements such as that between Lecce ASL and the University, national law is also not consistent with the directive.

95. Consequently, Directive 2004/18, and, in particular, Article 1(2)(a) and (d), Article 2 and Article 28 of that directive and Categories 8 and 12 in Annex II thereto, are to be interpreted as precluding national legislation which permits written agreements to be entered into between a contracting authority and a university constituted under public law for the study of the seismic vulnerability of hospital structures and its evaluation in the light of national regulations on the safety of structures and of strategic buildings in particular, for a consideration not exceeding the costs incurred in the performance of the service, where the university responsible for performance may act as an economic operator.

VII – Conclusion

96. In the light of the above considerations, I suggest that the Court answer the question asked by the Consiglio di Stato as follows:

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, and, in particular, Article 1(2)(a) and (d), Article 2 and Article 28 of that directive and Categories 8 and 12 in Annex II thereto, are to be interpreted as precluding national legislation which permits written agreements to be entered into between a contracting authority and a university constituted under public law for the study of the seismic vulnerability of hospital structures and its evaluation in the light of national regulations on the safety of structures and of strategic buildings in particular, for a consideration not exceeding the costs incurred in the performance of the service, where the university responsible for performance may act as an economic operator.

73 — See point 86 of this Opinion.

74 — See point 91 of this Opinion.