



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 23 January 2014¹

Case C-15/13

**Technische Universität Hamburg-Harburg,
Hochschul-Informations-System GmbH
Datenlotsen Informationssysteme GmbH**

(Request for a preliminary ruling from the Hanseatisches Oberlandesgericht Hamburg (Germany))

(Public procurement — Directive 2004/18/EC — Conditions governing the applicability of the exemption for in-house transactions — Horizontal in-house transactions — Contracting authority and contractor which are legally distinct and are not linked by a relationship of control — Control exercised over the contracting authority and the contractor by a third party, itself a public authority — Scope of the ‘similar control’ requirement — Cooperation between public bodies)

1. The present request for a preliminary ruling, which has been submitted by the Hanseatisches Oberlandesgericht (Higher Regional Court) Hamburg, places before the Court a new type of case in the field of public procurement which will give it the opportunity to clarify the scope of the case-law according to which, subject to certain conditions, some public contracts may be exempt from the application of European Union (‘EU’) public procurement legislation.
2. More particularly, in the present case, the Court is asked to determine whether, and, if so, in what circumstances, so-called ‘horizontal in-house’ transactions may fall outside the scope of Directive 2004/18/EC² and be awarded directly, without putting into effect the public procurement procedures laid down under the directive. The term ‘horizontal in-house’ transaction signifies the conclusion of a contract between a contracting authority and a contractor which are not linked by any relationship of control, but are both subject to similar control by the same body, itself a contracting authority within the meaning of Directive 2004/18, and which carry out the essential part of their activities with that common body.
3. By its question to the Court, the national court seeks, in essence to establish whether this type of transaction may also be exempt from the applicability of public tendering procedures on the model of the exemptions established by the Court in its case-law and mentioned specifically by the national court.
4. The first of those exemptions, which originates in the judgment in *Teckal*,³ concerns so-called ‘in-house’ transactions in regard to which it has been accepted in case-law that a contracting authority is not required to issue a call for tenders for the award of a public contract, provided that it exercises over the contractor a control which is similar to that which it exercises over its own departments and,

1 — Original language: Italian.

2 — 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).

3 — Case C-107/98 [1999] ECR I-8121.

at the same time, that contractor carries out the essential part of its activities with the controlling contracting authority or authorities.⁴ Although widely discussed in legal literature, the question whether that exemption applies to ‘horizontal in-house’ transactions has yet to be considered by the Court which, in its existing and now copious case-law, has had occasion solely to consider in-house transactions in which the relationship between the contracting bodies and contractors was vertical in nature.⁵

5. The second exemption established in the Court’s case-law⁶ and referred to by the national court concerns the possibility of excluding from the scope of EU procurement law those public contracts which fall into the category of so-called cooperation between public bodies.

I – Legislative background

A – EU law

6. According to Article 1(2)(a) of Directive 2004/18, “[p]ublic 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’.

7. Article 7 of Directive 2004/18 determines the threshold amounts above which public contracts fall within the scope of the directive. At the time of the material facts in the main proceedings, that threshold stood at EUR 193 000.⁷ Under Article 20 of Directive 2004/18, ‘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 of the Directive provides that contracts are, without exception, to be awarded by applying the open procedure or the restricted procedure. Annex II A of the directive includes a Category No 7 concerning ‘[c]omputer and related services’.

B – National law

8. Article 5(3) of the German Basic Law provides that ‘[a]rts and sciences, research and teaching shall be free’.

9. Under Article 91c(1) of the German Basic Law, ‘[t]he Federation and the Länder may cooperate in planning, constructing and operating information technology systems needed to discharge their responsibilities’.

10. German national procurement legislation is contained in the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition), Article 99 of which sets out the definition of public contracts.⁸

4 — See, for example, *Teckal*, cited in footnote 3, paragraph 50; Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 49; Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 62; Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 33; Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 55; Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 27; Case C-573/07 *Sea* [2009] ECR I-8127, paragraph 40; and Joined Cases C-182/11 and C-183/11 *Econord* [2012] ECR, paragraph 25.

5 — See the cases cited in footnote 4.

6 — Case C-480/06 *Commission v Germany* [2009] ECR I-4747, paragraphs 37, 44 and 47; *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] ECR, paragraphs 34 and 35; and Case C-352/12 *Consiglio Nazionale degli Ingegneri* [2013] ECR, paragraphs 43 et seq.

7 — See Article 7(b) of Directive 2004/18, as amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64).

8 — According to Article 99 of the Law against restrictions on competition, ‘[p]ublic contracts are contracts concluded for pecuniary interest, between contracting authorities and undertakings, concerning the provision of services involving supplies, works or services, as well as works concessions and the procedures which result in the award of service contract’.

11. The Hamburgisches Hochschulgesetz (Hamburg Law on higher education establishments: the ‘HmbHSchG’) lays down the rules applicable to the higher education establishments of the Freie und Hansestadt Hamburg (the Free and Hanseatic City of Hamburg: the ‘City of Hamburg’).

12. According to Article 2 of the HmbHSchG, ‘[t]he higher education establishments, which are bodies of the City of Hamburg, are legal entities governed by public law’ which ‘regulate the exercise of their administrative autonomy on the basis of a basic regulation and further rules’.

13. Pursuant to Article 5 of the HmbHSchG, headed ‘Administrative autonomy’, the higher education establishments independently discharge those responsibilities which are a matter of administrative autonomy, subject to a review of legality by the competent authorities. The responsibilities which are a matter of administrative autonomy are those responsibilities which are not devolved State functions.

14. Article 6 of the HmbHSchG governs the budget appropriations for the higher education establishments and, in paragraph 2, lists the delegated responsibilities discharged by these establishments, among them: management of the budget resources allocated to them, including the fees, finance and accounting systems, the real property and equipment made available to them, matters relating to staff and their recruitment, as well as teaching capacity and proposals regarding the number of admissions. Pursuant to Article 6(3), the exercise of other responsibilities may be delegated to the higher education establishments. Lastly, pursuant to Article 6(4), the competent authorities exercise, by means of directives and general instructions, ‘supervisory control’⁹ over the establishments in relation to the discharge of devolved functions.

II – Facts, national procedure and questions referred

15. The Technische Universität Hamburg-Harburg (Technical University of Hamburg: the ‘TUHH’), the applicant in the proceedings pending before the national court, is a public higher education establishment of the City of Hamburg. It is a contracting authority within the meaning of Directive 2004/18.¹⁰

16. The Hochschul-Informationssystem GmbH (‘HIS’), which, together with the TUHH, is also an applicant in the proceedings pending before the national court, is a limited company with wholly public capital, controlled one-third by the German Federal State and two-thirds by the 16 German Länder, including the City of Hamburg, which has a holding of 4.16% in the share capital of HIS. Pursuant to Article 2 of its articles of incorporation, the object of HIS is to assist public higher education establishments to achieve the rational and economic fulfilment of their mission of providing higher education by, among other things, developing procedures for rationalising the administration of higher education, as well as participating in the introduction and application of such procedures and organising exchanges of information. Pursuant to Article 3 of its articles of incorporation, HIS engages in public-interest activities exclusively and does not operate for profit.

17. Planning to introduce an IT system for higher education management, the TUHH evaluated two such systems, one developed by HIS and the other by Datenlotsen Informationssysteme GmbH (‘Datenlotsen Informationssysteme’). After comparing the two IT systems, TUHH decided, on 7 April 2011, to sign a contract with HIS for the installation of the system which HIS had developed, and awarded the contract directly without implementing the public procurement tendering procedures laid down by Directive 2004/18.

9 — According to the observations submitted to the Court, in German administrative law, ‘supervisory control’ is further-reaching than supervision limited to the legality of administrative activities (‘Rechtsaufsicht’) and extends also to the appropriateness of the act or administrative action.

10 — See Article 1(9) of the directive.

18. Datenlotsen Informationssysteme considered the direct award of the contract to HIS to be unlawful, and challenged the decision awarding the contract before the Vergabekammer (Procurement Board) of the Finanzbehörde (Finance Authority) of the City of Hamburg — the court of first instance with jurisdiction in relation to public contracts — which upheld the application. The Vergabekammer found, in particular, that the requirements laid down by the Court's case-law in relation to an in-house transaction were not satisfied, since no relationship of control existed between the TUHH and HIS.

19. HIS and the TUHH appealed against the judgment at first instance before the referring court.

20. The referring court points out that the Court of Justice has not yet had occasion to clarify whether the case-law which provides for an exception to the applicability of the rules on public procurement procedures in circumstances in which the contract is awarded in house may apply to a 'horizontal in-house' transaction, as in the case in the main proceedings. It takes the view, however, that the spirit and purpose of the exemption for in-house awards, as developed through the Court's case-law, could permit the inclusion of such transactions within the scope of that exemption, thus freeing the contracting authorities of the obligation to issue calls for tender for contracts of that nature. According to the referring court, however, in the light of the fact that, in accordance with the case-law, the system of exemptions to the applicability of such procedures must be interpreted narrowly, it is for the Court of Justice to determine whether or not horizontal in-house awards may be caught by that exemption.

21. The referring court also considers that the conditions for the applicability of the further exemption developed through the Court's case-law in regard to cooperation between public bodies are not satisfied since, on the one hand, HIS is set up in the form of a limited company under private law and, on the other, it is not directly tasked with carrying out a public- service mission.

22. The referring court further notes that, under the relevant legislation, the higher education establishments have extensive autonomy in the areas of research and teaching, and that the exercise of those autonomous responsibilities is subject only to supervision of legality. However, the subject-matter of the dispute pending before the referring court falls within the sector of procurement, in which the competent authorities enjoy a power of control which includes the power to cancel or correct the decisions taken by the universities. The referring court therefore raises the question whether or not the requirement of 'similar control', set out in the case-law in *Teckal*, which it finds to be satisfied in relation to the area of procurement, must encompass all of the contractor's fields of activity.

23. In the light of those considerations, by order of 6 November 2012, the referring court deemed it necessary to stay the proceedings pending before it and refer to the Court the following questions for a preliminary ruling:

'(1) Must a "public contract" within the meaning of Article 1(2)(a) of Directive 2004/18 ... be interpreted as including a contract in the case of which, although the contracting authority does not exercise over the contractor a control similar to that which it exercises over its own departments, both the contracting authority and the contractor are controlled by the same body, which is itself a public contracting authority within the meaning of Directive 2004/18 and the contracting authority and the contractor carry out the essential part of their activities with that common body (horizontal in-house transaction)?

If the first question is answered in the affirmative:

(2) Must the control similar to that which the contracting authority exercises over its own departments extend to all aspects of the contractor's activity or is it sufficient for it to be confined to the area of procurement?'

III – Procedure before the Court

24. The order for reference was received at the Court Registry on 10 January 2013. Written observations were submitted by the TUHH, HIS, Datenlotsen Informationssysteme, the Czech, Italian, Spanish and Hungarian Governments and the European Commission. The TUHH, HIS, Datenlotsen Informationssysteme, the Spanish Government and the European Commission made oral submissions at the hearing on 21 November 2013.

IV – Legal analysis

A – *The first question referred*

25. By its first question, the referring court asks, in essence, whether a horizontal in-house transaction — that is to say the conclusion of a contract between a contracting authority and a contractor which are not linked by a relationship of control, but which are both controlled by the same body, itself a contracting authority within the meaning of Directive 2004/18, and with which both carry out the essential part of their activities — constitutes a public contract within the meaning of Directive 2004/18 and must therefore be subject to the procedures for the award of public contracts laid down by the directive.

26. As a preliminary point, it should be noted that the application of Directive 2004/18 to public contracts is subject to the condition that the estimated value of the contract reaches the threshold laid down in Article 7(b) of the directive, taking into consideration the usual value on the market of the works, supplies or services to which the public contract relates. If it does not reach the threshold, the fundamental rules and general principles of the FEU Treaty apply.¹¹ It is evident from the order for reference that the value of the contract at issue has been estimated at EUR 840 000 at least, clearly exceeding that threshold,¹² and the contract at issue therefore falls within the scope of Directive 2004/18.

27. In accordance with Article 1(2)(a) of Directive 2004/18, a contract for pecuniary interest concluded in writing between an economic operator and a contracting authority and having as its object the provision of services referred to in Annex II A to the directive, is a public contract.¹³

28. It is apparent from the documents before the Court that, on the one hand, the contract at issue in the main proceedings, which was directly awarded, was concluded between a contracting authority, the TUHH, and an economic operator, HIS, and, on the other, that the services forming the object of the contract at issue in the main proceedings fall within the concept of '[c]omputer and related services' as set out in Annex II A of Directive 2004/18.

29. It must be pointed out here that, according to the case-law, as far as the concept of public contract is concerned, it is immaterial that, as applies to HIS pursuant to Article 3 of its articles of incorporation,¹⁴ the contractor is not primarily profit-making.¹⁵ Furthermore, as regards the nature of the contract at issue as a contract for pecuniary interest, I must point out that, according to the

11 — However, the fact that the contract at issue in the main proceedings is capable of falling, as the case may be, under either Directive 2004/18 or the fundamental rules and general principles of the FEU Treaty does not affect the answer to be given to the question raised. The criteria laid down in the case-law of the Court in order to determine whether an invitation to tender is mandatory or not are relevant both with regard to the interpretation of the directive and with regard to the interpretation of those rules and principles of the FEU Treaty. See, to that effect, *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraphs 23 and 24.

12 — See point 7 above.

13 — See, in that connection, *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraph 25.

14 — See point 16 above.

15 — See, to that effect, Case C-305/08 *CoNISMa* [2009] ECR I-12129, paragraphs 30 and 45, and *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraph 26.

case-law, a contract cannot fall outside the concept of public contract merely because the remuneration is limited to reimbursement of the expenditure incurred to provide the agreed service.¹⁶ Therefore, even were the contract at issue in the main proceedings not to provide for the payment of a market price for the IT services provided by HIS to the TUHH, which it is a matter for the national court to establish, this would not be a determining factor as far as its classification as a contract is concerned.¹⁷

30. In the light of the foregoing considerations, and subject to the necessary checks which it is for the national court to make, I therefore consider that the contract at issue in the main proceedings exhibits the characteristics of a public contract and is therefore, in principle, subject to the tendering procedures under Directive 2004/18.

31. As set out in points 4 and 5 above, it is, however, clear from the Court's case-law that there are two kinds of public contract which fall outside the scope of EU procurement law¹⁸ and in regard to which the contracting authority is not therefore required to issue a public call for tenders, as provided for by Directive 2004/18.

32. The two kinds of contract in question are, on the one hand, contracts falling under the exemption for so-called 'in-house' contracts and, on the other, contracts falling under the exemption provided for in the case of contracts establishing cooperation between public bodies. Given that, in its order for reference, the national court mentions both the exemptions developed in the Court's case-law, and that both were also discussed at the hearing, I consider it necessary to analyse each of them.

1. Applicability of the 'in-house' exemption to horizontal internal transactions

33. As I mentioned earlier, according to settled case-law originating in the judgment in *Teckal*,¹⁹ a contracting authority is not required to issue a public call for tenders if two cumulative conditions are satisfied: first, the contracting authority must exercise over the contractor a control which is similar to that which it exercises over its own departments and, second, the contractor must carry out the essential part of its activities with the controlling contracting authority or authorities.²⁰

34. As far as the first of those conditions is concerned, it must be pointed out that, according to settled case-law, there is similar control where the contractor in question is subject to control enabling the contracting authority to influence that entity's decisions. It must be a power of decisive influence over both strategic objectives and significant decisions of that entity. In other words, the contracting authority must be able to exercise structural and functional control over the entity. The Court also requires that the control be effective.²¹

35. According to the case-law, where use is made of an entity jointly owned by a number of public authorities, the 'similar control' may be exercised jointly by those authorities, without it being essential for such control to be exercised individually by each of them.²²

16 — See, to that effect, *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraph 29.

17 — See, in that connection, the considerations set out by Advocate-General Trstenjak at points 30 to 34 of her Opinion in *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6.

18 — See *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraph 31, and the order in *Consiglio Nazionale degli Ingegneri*, cited in footnote 6, paragraph 40.

19 — Cited in footnote 3.

20 — See the case-law cited in footnote 4.

21 — See *Econord*, cited in footnote 4, paragraph 27 and the case-law cited.

22 — See *Econord*, cited in footnote 4, paragraph 28 and the case-law cited.

36. Since one of the cumulative conditions governing the application of the exemption developed in case-law for in-house contracts is that there should be a relationship of control between the contracting authority and the contractor, that exemption clearly cannot, as such, apply in cases of horizontal in-house transactions in which by definition there can be no direct relationship of control between the bodies concerned.²³ It therefore follows that, as the law stands, such transactions must, in principle, be subject to the tendering procedures laid down by Directive 2004/18.

37. However, the national court takes the view that the spirit and purpose of the ‘in-house exemption’, as developed through the Court’s case-law in relation to vertical internal transactions, could make it possible also to include horizontal internal transactions within the scope of that exemption. However, this would be feasible only if the scope of the exemption were extended to cover also transactions in which, although both the contracting authority and the contractor are subject to the similar control exercised by another public authority, the first condition laid down in case-law is not satisfied, as there is no relationship of direct control between the two parties to the contract. That, in my view, prompts a number of considerations.

38. First, it is necessary to draw attention to the fact that the Court has reiterated, on several occasions, that the primary objective of EU rules on public procurement is the free movement of services and the widest possible opening-up to competition in all of the Member States.²⁴ That entails an obligation on all contracting authorities to apply EU procurement law where the conditions for its application are satisfied, with the result that any derogation from the application of that obligation must be interpreted *strictly*.²⁵ It follows that any extension of the scope of an exemption to the applicability of EU procurement law must be very carefully scrutinised.

39. Second, it is necessary, however, to draw attention to the fact that the Court has recognised that a public authority, which is a contracting 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.²⁶

40. Based specifically on that premiss, the Court has recognised the derogation for in-house transactions from public tendering procedures. In fact, where an administrative authority performs tasks conferred on it in the public interest by using an entity which constitutes its own resource, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority, and there is therefore no need to apply the EU rules in the field of public procurement.²⁷

41. Moreover, it is apparent from a careful reading of the case-law²⁸ that the basis for the exemption for in-house transactions resides specifically in the fact that, since the contractor does not enjoy a degree of independence such as to preclude the contracting authority from exercising over it control similar to that which it exercises over its own departments, there can be no contractual relationship in the strict sense, as there is no ‘concordance of two autonomous wills representing separate legal interests’.²⁹

23 — See points 2 and 25 above.

24 — See, to that effect, *CoNISMa*, cited in footnote 15, and the case-law cited.

25 — See, among others, *Stadt Halle and RPL Lochau*, paragraphs 44 and 46, and *Parking Brixen*, paragraph 63, both cited in footnote 4, and Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 26.

26 — See, among others, *Stadt Halle and RPL Lochau*, cited in footnote 4, paragraph 48, *Coditel Brabant*, cited in footnote 4, paragraph 48, *Commission v Germany*, cited in footnote 6, paragraph 45, and *Sea*, cited in footnote 4, paragraph 57.

27 — See, to that effect, *Stadt Halle and RPL Lochau*, cited in footnote 4, paragraph 48.

28 — See, in that connection, the analysis of case-law by Advocate-General Cruz Villalón at point 38 et seq of his Opinion in *Econord*, cited in footnote 4.

29 — See the Opinion of Advocate-General Cosmas in *Teckal*, cited in footnote 3, point 64, and the Opinion of Advocate-General Cruz Villalón in *Econord*, cited in footnote 28, point 43. See also paragraph 49 in conjunction with paragraph 50 of *Teckal*, cited in footnote 3.

42. It is my view that where a horizontal internal transaction takes place in the context of the fulfilment of public-interest tasks incumbent on a contracting authority, which carries out those tasks using two entities over which it exercises control similar to the control which it exercises over its own departments, the rationale behind the in-house exemption, as developed in case-law, may in principle apply. In point of fact, in accordance with the case-law cited at point 39 above, if the authority uses its own resources to perform the tasks conferred on it in the public interest, it is not compelled to call on outside entities not forming part of its own departments. I consider that this applies also in circumstances in which the authority's own resources consist of two entities over which it exercises control and, in order to perform those public-interest tasks, it is necessary to conclude a contract between those entities. Therefore, in a situation of that nature also, in certain conditions, the requirements for the application of EU procurement law might not be present.

43. It must, however, be pointed out that, as set out in points 40 and 41 above, the justification for the application of the in-house exemption lies in the fact that the conclusion of the contract at issue is not the result of the expression of the autonomous will of the parties to the contract, but the expression of a single will. It must be noted here that, in a horizontal internal transaction, the relationship existing between the contracting authority and the contractor is far more tenuous than the relationship that exists in a vertical in-house transaction. It is not in fact a relationship of direct control but merely an indirect link, the scope of which is contingent on the relationship that exists between each of the bodies and their common controlling authority.

44. From that perspective, the condition that the contract must be the expression of a single will seems to me to be capable of being satisfied if the two entities which enter into the contract are subject to the *exclusive* control of the same authority. Only then is it, in my view, possible to conclude that the contract is the expression of a single act of will on the part of a public authority, which seeks thereby to perform the tasks conferred on it in the public interest by using its own resources. Indeed, where a contract is concluded between an entity over which several authorities exercise joint control and another entity which is controlled (exclusively or jointly with other authorities) by one of the authorities which exercise control over the first entity, it seems to me that the transaction can hardly be regarded as the expression of a single act of will.

45. From that point of view, I therefore consider that the exemption from the application of EU rules for horizontal internal transactions may be admissible only if the body which exercises over the two entities, that is to say the contracting authority and the contractor, control similar to the control which it exercises over its own departments is not just the same body but it exercises that similar control over both entities on an exclusive basis. I therefore consider it necessary to preclude the possibility of extending the in-house exemption to instances of horizontal transactions concluded between entities over which an authority exercises similar control, as defined in case-law, jointly with other contracting authorities.

46. A restrictive approach of that nature to the type of similar control which the controlling authority must necessarily exercise over the two entities entering into the procurement contract, if the derogation from EU procurement law for horizontal internal transactions is to be permissible, seems to me not only to be consistent with the rationale behind the in-house exemption and with the need set out by the Court, and referred to in point 38 above, to interpret that derogation strictly, but also to meet the need, referred to by a number of the parties which submitted observations, to avoid extending the derogations from the rules on public procurement beyond the limits of reasonableness, and thereby run the risk of abstracting significant economic sectors from the rules on public

procurement and the objectives of opening up to competition³⁰ which, as I mentioned in point 38, those rules pursue.³¹

47. As far as the main proceedings are concerned, it is clear from the information set out in the documents before the Court that the City of Hamburg is possibly able to exercise over HIS only joint similar control together with the other Länder and the Federal Government, although this is disputed, among other things, by some of the interveners.³² Consequently, even accepting that the City of Hamburg exercises over the TUHH similar control, and does so on an exclusive basis — which it will, in any event, be for the national court to determine, including on the basis of the second question which it has referred to the Court — the exemption as described in the points above in relation to horizontal internal transactions would not in any case apply.

48. In conclusion, it follows from the considerations set out above that, subject to the checks which are for the national court to make, a contract such as the contract at issue in the main proceedings constitutes a public contract within the meaning of Directive 2004/18, since it is a contract concluded in writing between a contracting authority and an economic operator having as its object the provision of services within the meaning of the directive. As such, it is in principle subject to the tendering procedures laid down under the directive. Regardless of the question whether a relationship of ‘control similar to the control exercised over its own departments’ exists between the City of Hamburg, on the one hand, and the TUHH and HIS, on the other, that contract cannot be caught by the exemption from those procedures under the *Teckal* case-law, as there is no relationship of control between the contracting authority, that is to say the TUHH, and the economic operator which is the contractor, namely HIS. Nor, in my view, does such a contract fall into the category of a horizontal internal transaction which may be eligible for exemption from the application of the public tendering procedures because it is a transaction designed to enable the authority which controls the two entities concluding the contract to perform the tasks conferred on it in the public interest, since, as I set out in points 44 to 46 above, that possibility must, in my view, be confined to cases in which the controlling authority exercises similar control over the two parties to the contract on an exclusive basis, which is certainly not true in the dispute pending before the national court.

2. Cooperation between public bodies

49. The referring court also considers the possibility that the contract at issue in the main proceedings may be caught by the second derogation, which has emerged in case-law, from the application of public tendering procedures, namely the exemption referred to in point 5 above which is provided for in relation to cooperation between public bodies.

50. The case-law makes that exemption contingent on the fulfilment of five cumulative requirements, all of which must be satisfied for the contract at issue to be excluded from the scope of EU procurement law.³³ The Court has thus stipulated that contracts which, first, establish cooperation between public bodies and, second, establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out, may fall outside the scope of the public tendering procedures. Third, the contracts must be concluded exclusively by public bodies,

30 — See in that regard also *Carbotermo and Consorzio Alisei*, cited in footnote 4, paragraphs 58 and 59.

31 — It is necessary, in passing, to point out that a similar solution appears to have been adopted in the final version of the Proposal for a Directive of the European Parliament and of the Council on public procurement currently under discussion within the Council (Council document No 11745/13; see, more specifically, Article 11(2) of that proposal).

32 — In particular, the Commission disputes the existence of a relationship of control between the City of Hamburg and HIS, as the City does not have a permanent representation on the HIS supervisory board. In the light of the answer given to the question referred, it is not, however, necessary, to take a view on that.

33 — *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraph 36 and the case-law cited, and order in *Consiglio Nazionale degli Ingegneri*, cited in footnote 6, paragraph 45.

without the participation of a private party. Fourth, no private operator must be placed in a position of advantage vis-à-vis competitors, and, fifth and last, the cooperation established must be governed solely by considerations and requirements relating to the pursuit of objectives in the public interest.³⁴

51. It is, however, for the national court to make the checks necessary to determine whether all of those criteria are satisfied in the specific case. The Court may none the less provide the national court with all guidance on the interpretation of EU law that could be useful for its decision.³⁵

52. More specifically, the national court is uncertain on two counts as to the applicability to the present case of the derogation for cooperation between public bodies.

53. First, the national court rules out the possibility that that derogation may apply because HIS takes the form of a limited liability company organised under private law. That observation by the referring court raises the question of the personal scope of the derogation at issue.

54. In that connection, it must be pointed out that, in its abovementioned judgment in *Commission v Germany*, the Court employed the term ‘public authorities’³⁶ to describe the entities which could take part in the cooperation, the cooperation at issue being entered into between the City of Hamburg and four neighbouring Landkreise.³⁷ The Court’s use of that term signalled that the derogation was not exclusively confined to cooperation between local authorities.³⁸ Subsequently, in its judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others*, the Court employed the concept of cooperation between ‘public entities’.³⁹

55. Setting aside the terminological issue, it seems to me, however, that a functional rather than a formal approach is required here.⁴⁰ From that perspective, I consider that the private-law nature of one of the entities participating in the cooperation is not of itself a bar to the application of the derogation in question, always provided that it is established that, despite its private-law nature, the entity is in reality a public body,⁴¹ which seems to me clearly to be the case when it comes to a company such as HIS with wholly public capital.

56. In my view, the third of the conditions set out in case-law, and mentioned in point 50 above, does not require that the entities establishing the cooperation should possess the formal nature of public-law bodies, but in fact requires that no private interests should participate in such entities. It may be added, in that regard, that the participation of private interests must be excluded for the

34 — *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraphs 34 and 35 and case-law cited, and order in *Consiglio Nazionale degli Ingegneri*, cited in footnote 6, paragraphs 43 and 44.

35 — See Case C-418/11 *Texdata Software* [2013] ECR, paragraph 55 and the case-law cited.

36 — See paragraphs 34, 44, 45 and 47 of the judgment.

37 — The Landkreise, or rural districts, are administrative units in Germany which cover various municipalities located in the same geographical region.

38 — See point 69 of the Opinion of Advocate-General Trstenjak in *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6.

39 — See paragraphs 34 and 35 of the judgment.

40 — Corresponding, moreover, to the approach taken by the Court in defining the concept of contracting authority and body governed by public law pursuant to the second subparagraph of Article 1(9) of Directive 2004/18. See, in that connection, Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173, paragraph 37, and Case C-393/06 *Ing. Aigner* [2008] ECR I-2339, paragraph 37.

41 — In that regard, I would point out in passing that, according to the case-law, an entity’s private law status does not constitute a criterion for precluding its classification as a body governed by public law and thus a contracting authority (see Case C-214/00 *Commission v Spain* [2003] ECR I-4667, paragraph 55, and Case C-283/00 *Commission v Spain* [2003] ECR I-11697, paragraph 74, relating to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), Article 1(b) of which contains a definition of ‘body governed by public law’ identical to that contained in Directive 2004/18). It is merely necessary to ascertain, and this is a matter for the national court, whether, in the light of the relevant case-law, that entity fulfils the three cumulative conditions set out in the second subparagraph of Article 1(9) of Directive 2004/18, considering that the method in which the entity concerned has been set up is irrelevant in that regard. See the judgment in Case C-214/00, cited above, paragraph 54.

duration of the contract at issue in the main proceedings. If, in fact, the capital of the contractor, which is of a private-law nature, were opened to private shareholders, the effect would be to award a public contract to a semi-public company without any call for competition, and that would interfere with the objective pursued by EU law.⁴²

57. Second, the national court considers that the second condition laid down in case-law, namely that the cooperation must be designed to ensure the carrying out of a common public task, is not satisfied in the present case because, even though Articles 2 and 3 of the articles of incorporation of HIS provide that its business purpose is to assist higher education establishments and, consequently, it is pursuing objectives in the general interest, its task cannot be equated with a genuine public service mission which has been conferred on it.

58. I do not share the approach which the referring court appears to take, according to which it is absolutely necessary for each of the public entities taking part in the cooperation to *perform* the public task before it can be regarded as a task which is common to both of them.

59. Even if it is necessary that the cooperation serves to perform a *common* public task, and 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,⁴³ I still consider that there may also be cooperation designed to ensure that a common public task is carried out, if the public tasks performed by the public entities in question *specifically complement* each other and the cooperation itself concerns precisely those specifically complementary tasks. The notion of complementarity cannot, however, constitute the passport to the system of exemptions for cooperation involving activities which are in some way connected. In my opinion, it is not in fact sufficient for the public tasks to be complementary. They must complement each other in a specific way, in the sense that, with reference to all of the public entities concerned, the element of complementarity must relate specifically to the task which forms the object of the cooperation, as, for instance, seems to me to be the case for the teaching and research in the main proceedings.

60. In that regard, the information in the documents before the Court indicates that the specific task performed by HIS, a company with wholly public capital, is to assist higher education establishments to achieve the rational and economic fulfilment of their mission of providing higher education. That task seems to me specifically to complement the task of teaching and research performed by the universities, and thus may constitute, provided that all of the other conditions are satisfied, cooperation which is caught by the derogation in case-law for cooperation between public entities. I would add, in that connection, that, as far as I am concerned, it is far from unimportant in terms of the analysis, that the performance of that task is the expression of the will of the German constitutional legislature which provided, in Article 91c(1) of the German Basic Law, for forms of cooperation between the Federation and the Länder in constructing and operating the IT systems needed to discharge their responsibilities.

61. Having analysed the uncertainties expressed by the national court, a question raised by the Commission remains to be considered. At the hearing, the Commission maintained that the exemption at issue could not be applied to the present case, since cooperation between public entities concerning activities falling into the category of a public-service mission could not occur under a contract in which services are provided for remuneration.

42 — See, by analogy, *ANAV*, cited in footnote 25, paragraph 30.

43 — See, to that effect, point 75 the Opinion of Advocate-General Trstenjak in the judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6.

62. In that regard, I would first point out that, in its abovementioned judgment in *Commission v Germany*, the Court established that EU law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks.⁴⁴ In that case, moreover, the cooperation between the City of Hamburg and the Landkreise took specifically contractual form.

63. However, it must also be borne in mind that, in that judgment, the Court noted that the provision of the services in question, namely the supply of waste disposal services, gave rise to payment only to the operator of the facility, the other contracting party of the City of Hamburg, while the actual cooperation set in place by the contract between the authorities concerned, that is to say the City of Hamburg Cleansing Department and the Landkreise, did not give rise to any financial transfers between those entities.⁴⁵

64. I therefore wonder whether it is necessary, in order for the exemption at issue to be applicable to the agreement establishing the cooperation, that the agreement should not give rise to any financial transfers between the public entities concerned.

65. I would, however, point out in that connection that, in its judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others*, in which the Court took up again in a more detailed and systematic manner, based on its earlier judgment in *Commission v Germany*, the five cumulative conditions which must be satisfied in order for the contract at issue to be eligible for exemption from EU procurement law, it made no mention of any criterion of that nature. I infer from the absence of any such reference that the Court did not intend to stipulate that there should be no financial transfers between the entities involved in the cooperation as a prerequisite for the application of the exemption.

66. However, I consider it essential in relation to an exemption of that nature that the remuneration provided by one entity to another entity for the performance of a specific service, in the context of their cooperation, cannot be equivalent to the market price, but must reflect the costs and financial expenditure actually incurred in providing the service, and that leads me to harbour doubts as to the compatibility with that requirement of any provisions providing for the costs of supplying the service to be paid on a flat-rate basis.

67. It will, in any event, be for the national court to make the necessary checks in that regard, and in relation to the fulfilment of all of the other conditions laid down in case-law for the application of the derogation for cooperation between public bodies.

B – *The second question referred*

68. By its second question, submitted to the Court in the event that the first question is answered in the affirmative, the referring court asks, in essence, whether the similar control required by the case-law in *Teckal* must extend to all aspects of the contractor's activity or it is sufficient if such control is confined to the area of procurement.

69. I would first point out that, in the light of the considerations set out in my analysis of the first question referred, if the Court were to adopt the approach which I have suggested, it would not be necessary to answer that question, since applicability of the in-house exemption would in any event be precluded in the case pending before the national court. I shall therefore set out the following considerations on the second question merely for the sake of completeness.

⁴⁴ — See paragraph 47 of the judgment, cited in footnote 6.

⁴⁵ — See paragraph 43 of *Commission v Germany*, cited in footnote 6.

70. I have already drawn attention at point 34 to the essential features of similar control as defined in case-law. At points 39 to 41, I have, however, described the rationale underlying recognition of the in-house exemption, and that rationale also sheds light on the significance of the requirement concerning similar control.

71. In my view, it follows from those considerations, and particularly from the need for the control to be structural and functional, that, in principle, such control should extend to all aspects of the contractor's activity and not be confined to the procurement sector alone. The in-house entity must, in fact, in essence, act as an organ of the authority and the latter must exercise a power of decisive influence over both the strategic objectives and the significant decisions of the entity which it controls.⁴⁶

72. It is, however, necessary to bear in mind that the Court has already had occasion to clarify that, while case-law requires that the control exercised over a contractor by a contracting authority must be similar to that which the authority exercises over its own departments, it need not be identical in every respect.⁴⁷

73. It must be noted in that regard that the autonomy which the universities enjoy in relation to teaching and research is the expression of the freedom of teaching and research, a principle that is set out not only at constitutional level in Article 5(3) of the German Basic Law, but also in the Charter of Fundamental Rights of the European Union, Article 13 of which provides that arts and scientific research are to be free of constraint and that academic freedom must be respected. From that perspective, I therefore consider that in order for entities such as the universities to be eligible for the in-house exemption, it cannot be required that control should be exercised over their teaching and research activities also, since the autonomy of the universities in relation to those activities is an expression of values of a constitutional nature common to the legal systems of the Member States and enshrined in the Charter.

74. Moreover, it may also be noted in that regard that the Court has already had occasion to deal in its case-law with the special characteristics of university establishments in terms of procurement law.⁴⁸

75. It follows from the foregoing considerations that should the Court consider it necessary to answer the second question referred by the national court also, the answer should, in my view, be that the similar control exercised must extend to all of the contractor's activities, except for the special rights and powers which the universities enjoy in the areas of teaching and research.

V – Conclusions

76. In the light of the foregoing, I propose that the Court reply as follows to the first question referred by the Hanseatisches Oberlandesgericht Hamburg:

A contract for the provision of services in relation to which the recipient of the services, which constitutes a contracting authority within the meaning of Directive 2004/18, does not exercise over the entity providing the services control similar to the control which it exercises over its own departments, but both are subject to the control of the same body, which may be classified as a contracting authority under the directive, and in which both the recipient of the services and the entity providing the services carry out the essential part of their activities with the body which controls them, constitutes a public contract if it is a contract concluded in writing between the recipient

46 — See the case-law cited in footnote 21 and *Sea*, cited in footnote 4, paragraph 65.

47 — See, to that effect, *Coditel Brabant*, cited in footnote 4, paragraph 46.

48 — See *CoNISMa*, cited in footnote 15, paragraphs 48, 49 and 51, and *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraph 27.

contracting authority and the economic operator providing the services, provided that the object of the contract is the provision of services which may be defined as the provision of services within the meaning of the directive.

A contract of that nature may be caught by the exemption from the application of the public tendering procedures required by EU procurement law only in circumstances in which the controlling authority exercises, on an exclusive basis, over both the recipient of the services and over the entity providing the services, similar control to the control which it exercises over its own departments, and both entities carry out the essential part of their activities for that controlling authority, or in circumstances in which the contract satisfies all of the prerequisites for the application of the derogation for cooperation between public bodies.