Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 27 April 2017 [1]

Case C-567/15

LitSpecMet UAB
v
Vilniaus lokomotyvų remonto depas UAB
intervening party:
Plienmetas UAB

(Request for a preliminary ruling from the Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania))

(Preliminary ruling — Public works contracts, public supply contracts and public service contracts — Directive 2004/18/EC — Public contracts in the water, energy, transport and telecommunications sectors — Directive 2004/17/EC — Concept of contracting authority — Company wholly owned by the State through another State-owned company — 'in-house' exemption)

1. This reference for a preliminary ruling provides the Court of Justice with the opportunity to develop its case-law in the field of public procurement procedures. In particular, it will be necessary to further clarify the concept of 'contracting authority' within the meaning of Directive 2004/17/EC [2] and Directive 2004/18/EC. [3]

2. The questions submitted by the national court have arisen in the context of proceedings to challenge a tendering procedure commenced without regard to those directives by a company [4] which is wholly owned by the Lithuanian State railway company [5] (whose status as a contracting authority is not disputed), to which the aforementioned company supplies certain goods and services. The subsidiary claims that, despite its links with the parent company, it is not a 'public body' within the meaning of the procurement directives since it was not established 'for the … purpose of meeting needs in the general interest, not having an industrial or commercial character'.

3. Initially the debate focussed on the activity in which VLRD is engaged, with a view to ascertaining whether its purpose is *directly* to meet a need in the general interest that does not have either an industrial or a commercial character. During the proceedings before the Court of Justice the debate also covered the issue of whether, by selling goods or services to a body (LG) which does meet needs of that kind, VLRD is also, in an *indirect* way, meeting those needs and might therefore be considered a contracting authority within the meaning of the directives in question.

1 Original language: Spanish.

2 Directive of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

3 Directive 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).

4 Vilniaius lokomotyvų remonto depas UAB ('VLRD').

5 Lietuvos Geležinkeliai AB ('LG').

I. Legislative framework

A. EU law

1. Directive 2004/17

4. Article 2 states:

‘1. For the purposes of this Directive,

(a) “Contracting authorities” are State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law.“A body governed by public law” means any body:

– established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character,

– having legal personality and

– 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;

…

2. This Directive shall apply to contracting entities:

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

…’.

5. Article 5 provides:

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

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

2. This Directive shall not apply to entities providing bus transport services to the public which were excluded from the scope of Directive 93/38/EEC [6] pursuant to Article 2(4) thereof.’

6 Council Directive of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

2. Directive 2004/18

6. Under Article 1(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

(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.

Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III. Member States shall periodically notify the Commission of any changes to their lists of bodies and categories of bodies.'

3. Directive 2014/24/EU[7]

7. Recital 10 states:

'The notion of "contracting authorities" and in particular that of "bodies governed by public law" have been examined repeatedly in the case-law of the Court of Justice of the European Union. To clarify that the scope of this Directive *ratione personae* should remain unaltered, it is appropriate to maintain the definitions on which the Court based itself and to incorporate a certain number of clarifications given by that case-law as a key to the understanding of the definitions themselves, without the intention of altering the understanding of the concepts as elaborated by the case-law. For that purpose, it should be clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a "body governed by public law" since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character.

Similarly, the condition relating to the origin of the funding of the body considered, has also been examined in the case-law, which has clarified inter alia that being financed for "the most part" means for more than half, and that such financing may include payments from users which are imposed, calculated and collected in accordance with rules of public law.'

8. Article 2(1)(4) contains a definition of 'bodies governed by public law' which is similar to that set out in Article 1(9) of Directive 2004/18.

7 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

9. Article 12(1) provides:

‘A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no [direct] private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.’

B. National law

10. The Lietuvos Respublikos viešųjų pirkimų įstatymas (Law of the Republic of Lithuania on Public Procurement; ‘the LPP’) transposes Directive 2004/18 into Lithuanian law.

11. Article 4 states

‘1. The following are contracting authorities:

(1) a State or local authority;

(2) a legal person governed by public or private law meeting the conditions set out in paragraph 2 of this article;

(3) an association of authorities referred to in subparagraph 1 of this paragraph and/or of the legal persons governed by public or private law referred to in subparagraph 2 of this paragraph;

(4) the contracting undertakings operating in the water, energy, transport and postal services sectors referred to in subparagraphs 2 to 4 of Article 70(1) of this law.

2. A legal person governed by public or private law (other than national or local governments) established for the purpose of specifically meeting needs in the general interest, not having an industrial or commercial character, and which satisfies at least one of the following conditions:

(1) more than 50% of its activity is financed from State or local authority budgets or from other resources of the State or local authorities or from the funds of other legal persons governed by public or private law referred to in this paragraph;

(2) it is controlled (managed) by national or local government or by other legal persons governed by public or private law referred to in this paragraph;

3) more than half of the members of its administrative, managerial or supervisory board are appointed by national or local government or by legal persons governed by public or private law referred to in this paragraph.

…'

12. Article 10(5) states:

'The provisions of this law are not applicable where the contracting authority concludes an agreement with an entity that is legally separate, over which the contracting authority exercises an exclusive control which is similar to that which it exercises over its own departments or organs (or in respect of which the contracting authority is the only shareholder and exercises the rights and duties of the State or of a local authority) and where at least 90% of the turnover of the controlled entity in the previous accounting period (or in the period since its creation if it has been operating for less than a full accounting period) has been generated through activities intended to meet the needs of the contracting authority or to enable it to perform its functions. In the circumstances referred to in this paragraph, a request for tenders may be issued only with the prior consent of the Public Procurement Office …'

II. Facts

13. VLRD was set up in 2003, following a restructuring of the State railway company, LG, as a wholly owned subsidiary of that company.

14. The object of VLRD is the manufacture and maintenance of locomotives and railway carriages. At the material time for the purposes of the litigation, orders from LG accounted for almost 90% of VLRD's turnover.

15. In 2013, VLRD published notice of a simplified open tendering procedure for the procurement of bars of ferrous metals ('the Tendering Procedure'). The tender specifications stated that the Tendering Procedure would be carried out in accordance with VLRD's Interim Procurement Regulations.

16. LitSpecMet UAB ('LitSpecMet') submitted a tender in the Tendering Procedure and was awarded a contract for the supply of some but not all of the goods in question.

17. However, LitSpecMet sought to have the Tendering Procedure declared invalid and a new procedure started under the LPP. In support of the claim, it argued that VLRD had been established to meet the needs of LG, which was an undertaking financed by the State and which had a public service remit; furthermore, it argued that the conditions under which VLRD provided goods and services to its parent company did not reflect normal competitive conditions. According to LitSpecMet, this indicates that the activity of VLRD was intended to meet needs in the general interest, not having an industrial or commercial character, and that it was therefore a contracting authority and subject to the rules on public procurement.

18. LitSpecMet's claims were rejected by the Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania) in a judgment of 2 June 2014, which was upheld by the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) in a judgment of 25 September 2014.

19. Both courts took the view that, under Article 4(2) of the LPP, for a person governed by public or private law to be considered a contracting authority, it is not sufficient to show that it is connected with or controlled by a public-sector undertaking. It is also necessary to show that its activity is intended to meet general interests not having an industrial or commercial character, which would not be true of VLRD, since it was a company that was founded to carry out a commercial activity and to make a profit, whilst bearing the associated risks.

20. By a judgment of 27 May 2015, the civil chamber of the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) overturned the judgment given on appeal. It held that neither of the two lower courts had adequately assessed the circumstances of VLRD's establishment, the specific nature of its activities and its relationship to the parent company.

21. The case was referred back to the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania), which, by a judgment of 14 July 2015, set aside the decision of the Vilniaus apygardos teismas (Regional Court, Vilnius) of 2 June 2014 and referred the case back to that court, which is now making a reference for a preliminary ruling to the Court of Justice.

III. The question referred for a preliminary ruling

22. The question referred was lodged on 9 November 2015 and is worded as follows:

'Must Article 1(9) of Directive 2004/18/EC be interpreted as meaning that a company:

– which has been founded by a contracting authority which engages in activity in the field of rail transport, namely: management of public railway infrastructure; passenger and freight transportation;

– which independently engages in business activity, establishes a business strategy, adopts decisions concerning the conditions of the company's activity (product market, customer segment and so forth), participates in a competitive market throughout the European Union and outside the EU market, providing the services of rolling stock manufacture and rolling stock repair, and participates in procurement procedures connected with that activity, seeking to obtain orders from third parties (not the parent company);

– which provides rolling stock repair services to its founder on the basis of in-house transactions and the value of those services represents 90 per cent of the company's entire activity;

– whose services provided to its founder are intended to ensure the founder's passenger and freight transportation activity;

is not to be considered to be a contracting authority?

If the Court of Justice of the European Union determines that the company is to be considered to be a contracting authority in the circumstances set out above, must Article 1(9) of Directive 2004/18/EC be interpreted as meaning that the company loses the status of contracting authority where the value of the rolling stock repair services provided on the basis of in-house transactions to the contracting authority which is the company's founder falls and constitutes less than 90 per cent or not the main part of the total financial turnover from the company's activity?'

IV. Procedure before the Court of Justice and submissions of the parties

23. LitSpecMet, VLRD, the Lithuanian and Portuguese Governments and the Commission submitted written observations and attended the hearing held on 9 February 2017, which was also attended by the German Government.

24. LitSpecMet argues that the maintenance activity carried out by VLRD falls under general interest, in that it enables LG to ensure provision of the public service for which it is responsible, namely the management of railway infrastructure and the provision of passenger transport. In its view, this activity is not of an industrial or commercial nature, since LG is the only undertaking in Lithuania engaged in it, which means that it can easily operate according to considerations which are not purely economic. To accept that public procurement rules do not apply to VLRD would mean that a contracting authority (LG) would be able to avoid those rules simply by setting up a subsidiary (VLRD) for in-house transactions.

25. LitSpecMet therefore maintains that VLRD is a contracting authority within the meaning of Article 1(9) of Directive 2004/18, the proportion of in-house transactions conducted with the parent company being immaterial. In the alternative, it could also be considered a contracting authority within the meaning of Article 2(1)(a) of Directive 2004/17, as this is the directive that is actually applicable here, given LG's activity and in the light of the interpretation of Articles 3 to 7 of that directive in the judgment of the Court of Justice of 10 April 2008, *Ing. Aigner*.[8]

26. VLRD asserts that it was not established in order to fulfil a specific general interest remit for the benefit of citizens in general, but in order to supplement LG's commercial activities in the field of passenger transport. In its view, the fact that it enters into in-house transactions with LG, which is a contracting authority within the meaning of Article 2(1) of Directive 2004/17, does not mean that it is itself a contracting authority.

27. The Lithuanian Government makes reference to the judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others*,[9] in which the Court of Justice relied on the 'infection theory', holding that a body which performs an activity only a part of which meets needs in the general interest, not having an industrial or commercial character, can also be considered a contracting authority. However, the Lithuanian Government is of the view that the 'infection theory' does not apply vertically and that the nature of the activity carried out by a company is not dependent on whether it was established by a contracting authority with which it engages in in-house transactions.

28. The German Government advocates a functional approach to interpretation and believes that, in the circumstances, this offers sufficient indicators that VLRD is carrying on an activity in the general interest, since, while not being directly involved in the transport activity performed by LG, it is engaged in an activity which is closely linked to it: the manufacture of locomotives. On the commercial nature of VLRD's activities the German Government believes that the decisive factor is whether it meets its objectives in a competitive market, which it does not, since 90% of its business is with LG, such that it does not assume a genuine commercial risk. In short, the German Government posits that the subsidiary of a contracting authority is also a contracting authority where the purpose of its activities is to meet the needs in the general interest served by its parent company. Furthermore, in the light of Directive 2014/24 (which, although not applicable *ratione temporis* can be used as guidance), a subsidiary cannot be a contracting authority if its business with the parent company does not exceed 80%.

8 C-393/06, EU:C:2008:213.

9 C-44/96, EU:C:1998:4.

29. The Portuguese Government observes that, although VLRD appears to have been set up for general interest purposes, its activity is industrial and commercial in character, since VLRD fully assumes the risks of its activities. Under the case-law established in the judgment of 16 October 2003, *Commission* v *Spain*,[10] and referred to in recital 10 of Directive 2014/24, VLRD should not be considered a contracting authority.

30. The Commission submits that only Directive 2004/18 should be taken into consideration in this case, as VLRD supplies goods and services to the Lithuanian State railway company and it is immaterial that the activities of the latter company (LG) fall within the scope of Directive 2004/17.

31. According to the Commission, VLRD is not subject to Directive 2004/18, inasmuch as it is not a 'body governed by public law' within the meaning of Article 1(9), since it was established to serve the specific interests of LG — making it an internal supplier of that company — rather than the general interest. It argues that the fact that LG's object is to meet a need in the general interest and that it has had recourse to VLRD for this purpose, is irrelevant because the conclusive factor is that the sole object of VLRD's activities is to look after the specific interests of the parent company.

32. The Commission therefore questions whether VLRD was established specifically to meet needs in the general interest, although it makes the point that only the national court is in a position to evaluate all the circumstances of the case and to confirm that the pre-eminent non profit-making goal at the time of its establishment does not have precedence over the commercial environment in which it operates.

V. Assessment

A. Introductory remarks

33. The referring court and most of the parties participating in the preliminary ruling proceedings assume that Directive 2004/18 governs this case. LitSpecMet, however, suggests, albeit only in the alternative, that it is Directive 2004/17 (known as the 'Sectoral Directive' in relation to public procurement) that is in fact applicable.

34. In practice, since Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18 contain identical definitions of 'bodies governed by public law',[11] the questions raised by the Vilniaus apygardos teismas (Regional Court, Vilnius) can be answered without making a prior determination on the applicability of either directive.

35. The second point to be noted is that, although the case file does not state the sum involved in the tendering procedure, VLRD's legal representative asserted at the hearing that it was EUR 600 000 or 700 000 and, as such, it exceeds the threshold for application of the relevant European Union provisions. It is for the referring court to investigate this point.[12]

10 C-283/00, EU:C:2000:544.

11 Judgment of 10 April 2008, *Ing. Aigner* (C-393/06, EU:C:2008:213), paragraph 35.

12 Judgment of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440), paragraph 43.

36. Thirdly and finally, the Court must necessarily give its answer on the basis of the factual information pertaining to VLRD provided by the referring court. It is, however, possible that this information has not been reviewed by the court of first instance, after the case was referred back to it, in quite the manner indicated by the judgment of the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) of 27 May 2015. [13]

B. The first question referred for a preliminary ruling

1. Directly (or indirectly) meeting needs in the general interest, not having an industrial or commercial character

37. It is common ground between the parties that VLRD meets two of the three conditions necessary to be considered a 'body governed by public law' (and therefore a 'contracting authority') under Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18.

38. Of the three conditions, which must be met cumulatively, [14] VLRD satisfies the second and third: it has legal personality and it cannot be disputed that another body governed by public law (LG) has a role in its financing, the supervision of its management or the composition of its administrative, managerial or supervisory board.

39. There is, however, no agreement with respect to the requirement that VLRD should have been 'established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character'.

40. The written observations of the parties are dedicated to analysing whether the activity of VLRD itself addresses needs in the general interest that do not have an industrial or commercial character, the majority arguing that it does not. At the hearing, the debate was extended, at the request of the Court, to the issue of whether VLRD indirectly meets needs of this kind, in that it provides goods or services to a body governed by public law, LG, which does so. The positions of the parties on this point were substantially aligned with those taken in relation to the question of whether the activity carried out by VLRD is in the general interest.

41. According to the information provided by the referring court, LG is a public company which operates a rail transport network. As I have already mentioned, there is no doubt that it is a contracting authority within the meaning of Directive 2004/17. [15] VLRD, on the other hand, is engaged in the manufacture and maintenance of locomotives and rolling stock. In other words, its role, although closely linked to rail transport, does not consist of 'the provision or operation of networks providing a service to the public in the field of transport by railway', which is the activity to which Article 5(1) of Directive 2004/17 is restricted.

13 This point is made by the Lithuanian Government at the end of paragraph 7 of its written observations when it states that it is not clear from the case file submitted by the referring court whether the latter had taken into consideration the 'relevant circumstances' indicated by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) when it referred the case back to the lower courts for fresh consideration.

14 See, inter alia, judgment of 12 September 2013, *IVD* (C-526/11, EU:C:2013:543), paragraph 19.

15 LG is listed as a contracting authority in Annex IV (Contracting entities in the field of rail services) to Commission Decision 2008/963/EC of 9 December 2008 amending the Annexes to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards their lists of contracting entities and contracting authorities (OJ 2008, L 349, p. 1). Also included in that Annex, without naming them, are 'other entities in compliance with the requirements of Article 70(1) and (2) of the Law on Public Procurement of the Republic of Lithuania (*Official Gazette*, No 84-2000, 1996; No 4-102, 2006) and operating in the field of railway services in accordance with the Code of Railway Transport of the Republic of Lithuania (*Official Gazette*, No 72-2489, 2004)'.

42. LitSpecMet maintains that, in any event, VLRD performs an essential task in relation to 'the provision or operation' of the Lithuanian rail network such that it also meets the general interest needs served by LG. Not to be overlooked, it argues, is the fact that under Article 5(1) of Directive 2001/14/EC,[16] railway undertakings are entitled to what is called 'the minimum access package and track access to service facilities' that are described in Annex II to the directive, point 2(h) of which refers to 'maintenance and other technical facilities'. It therefore concludes that 'in the absence of realistic alternatives in the market', VLRD is 'obliged to provide rolling stock maintenance services to … LG, disregarding all commercial considerations'.[17]

43. I do not agree with LitSpecMet on that point, since it is the facilities in which maintenance services are provided that Directive 2001/14 makes part of the 'access package' rather than the maintenance services themselves. So, if VLRD does serve a need in the general interest in an immediate and direct way, it is not the need addressed by the activity specifically referred to in Article 5 of that directive.

44. The analysis must therefore focus on the interpretation of Directive 2004/18, with a view to clarifying whether VLRD meets the needs in the general interest (other than those of an industrial or commercial nature) that are inherent to public works contracts, public supply contracts and public service contracts.

45. By the use of logical reasoning, we must, first of all, determine whether needs in the general interest are being met in this case; the second step, assuming that the answer is in the affirmative, is to determine whether their commercial or industrial character predominates over any other.

46. From that standpoint, it does not seem to me that simply manufacturing and repairing rolling stock in the rail transport sector has, in itself, the purpose of meeting needs that are closely linked to the institutional operation of the State,[18] the promotion and development of the conditions of social welfare which it is the duty of the State to provide,[19] or other similar purposes.

47. It can, of course, be argued, as the German Government does, that in providing its parent company with goods and services which enable that company to meet its own needs — which are in the general interest — VLRD is also, indirectly, meeting the need served by LG.

48. This approach to the problem, however, encounters certain difficulties, at least from a general point of view.

49. If it is in general hard to ascertain whether the purpose of an economic activity is to meet needs in the general interest (a term with various meanings to start off with), then it is harder still to determine the extent to which an activity which is in principle private and commercial in nature might, by virtue of its connection to activities which are inherently in the general interest, take on the nature of the latter. The consequences of this assimilation are not insignificant: as the Lithuanian Government observed at the hearing, a private operator could, possibly without realising it, become a provider of services in the general interest by virtue of its necessary association with a contracting authority.

16 Directive of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ 2001 L 75, p. 29);

17 Written observations of LitSpecMet, paragraph 33.

18 Judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1998:4), paragraph 24.

19 The list of such needs in the case-law of the Court of Justice is very long. It covers, for example, matters ranging from the provision of heating by means of an environmentally friendly process (judgment of 10 April 2008, *Ing. Aigner*, C-393/06, EU:C:2008:213, paragraph 39) to promoting the location of private undertakings on a particular territory (judgment of 22 May 2003, *Korhonen and Others*, C-18/01, EU:C:2003:300, paragraph 48).

50. The level of interconnection and interdependence of all public and private economic activities is so great in the market economy of today that it would be difficult to prevent 'meeting needs in the general interest' from growing uncontrollably if it were to be accepted that this concept also covers private activities which are, *to some extent*, necessary in order to meet those needs. Furthermore, this would give rise to the very problematic issue of the *extent* to which this relationship of necessity would be relevant in each case.

51. However, even working on the assumption that the activity carried out by VLRD does have the purpose of meeting needs in the general interest, this would not be a sufficient basis on which to conclude that VLRD is a 'body governed by public law' within the meaning of Directive 2004/18. The reason for this is that meeting needs in the public interest is not enough: those needs must also not be industrial or commercial in character. The case-law of the Court of Justice has stated that for this to be the case, those needs must be met under conditions which are not subject to market forces.

52. As the Court of Justice affirmed in its judgment of 22 May 2003, *Korhonen and Others*, the point is to 'avert both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by other than economic considerations'. [20]

53. Working from those assumptions, a body which aims to meet needs of this kind (which should not be mistaken for needs which cannot be met by private undertakings) [21] might easily fall victim to that risk if it operates outside market conditions, in the sense of not being subject to free competition. On the other hand, if it operates under competitive pressure from its rivals, [22] it is less likely to run this risk, since any behaviour motivated by considerations other than economic ones would eventually cause it to be expelled from the market.

54. In other words, the key factor in answering the question is not so much the public nature of the need to be met but the conditions in which this is done. When interpreting the expression 'needs in the general interest, not having an industrial or commercial character' it is essential to ascertain on what terms these are to be met.

55. It is worth repeating that this is so because, according to the spirit of the procurement directives, what is important is to safeguard competition in the market and to prevent it being altered or distorted by participants who do not operate according to free trade principles. Consequently, the determining factor is not whether, by supplying goods and services to LG, VLRD is itself meeting a need in the general interest, or whether it does so indirectly, but whether, in either case, it is operating under the same conditions as any private competitors, that is to say, without incentives to offer unfair advantages to national producers.

56. As noted by the referring court, for these purposes it is necessary to take into account multiple legal and factual circumstances, amongst which the Court of Justice has mentioned, by way of example, the circumstances prevailing when the body concerned was formed [23] and matters such as 'the fact that it does not aim primarily at making a profit, the fact that it does not bear the risks associated with [its] activity, and any public financing of the activity in question'. [24]

20 C-18/01, EU:C:2003:300, paragraph 52, citing, in particular, the judgments of 3 October 2000, *University of Cambridge* (C-380/98, EU:C:2000:529), paragraph 17; of 12 December 2002, *Universale-Bau and Others* (C-470/99, EU:C:2002:746), paragraph 52; and of 27 February 2003, *Adolf Truley* (C-373/00, EU:C:2003:110), paragraph 4. To the same effect, see judgment of 13 December 2007, *Bayerischer Rundfunk and Others* (C-337/06, EU:C:2007:786), paragraph 36.

21 Judgment of 10 April 2008, *Ing. Aigner* (C-393/06, EU:C:2008:213), paragraph 40.

22 According to the judgment of 22 May 2003, *Korhonen and Others* (C-18/01 EU:C:2003:300), paragraph 49, 'the existence of such competition may… be an indication that a need in the general interest has an industrial or commercial character'.

23 See, for example, judgment of 16 October 2003, *Commission* v *Spain* (C-283/00, EU:C:2000:544), paragraph 81.

24 See, once again, judgment of 22 May 2003, *Korhonen and Others* (C-18/01 EU:C:2003:300), paragraph 59.

57. It is my view that only the referring court is in a position to determine whether, in the light of all the relevant legal and factual circumstances, VLRD meets a need in the general interest, not having an industrial or commercial character. Although it may be inferred from the wording of the question [25] that the Vilniaus apygardos teismas (Regional Court, Vilnius) is inclined towards its original conclusion, which was upheld by the appeal court but not by the Lithuanian Supreme Court, the fact is that the order for reference really goes no further than setting out the dispute between the parties and the reasoning behind the three judgments given to date in the case, and does not include any analysis of its own of the 'relevant circumstances' [26] in the dispute which might enable a definitive answer to be provided.

58. This being the case, the Court of Justice should perhaps confine itself to informing the referring court that it should pay particular attention to the question of whether VLRD operates under market conditions, [27] and, beyond that, to factors such as whether or not it is largely publicly financed, whether it aims to make a profit and whether it bears the risks (and the losses) associated with its activity, these being matters on which the referring court has shed little light but which cannot be sidestepped when ruling on the nature of this company's activities.

59. It seems, however, from the information on the case file and that produced at the hearing that the essential part of VLRD's activity (90% of it at the relevant time) is carried out against an economic backdrop characterised by the monopoly in supplying LG with railway equipment, that is, in conditions which are not those of the free market. LG is supplied with railway equipment by its subsidiary, without going through the public procurement procedures which would increase competitive pressure on VLRD. VLRD is thus able to operate according to considerations other than those of the market, safe in the knowledge (or without incurring any risk in that respect) that it will be able to meet its orders, which will always be forthcoming from LG.

2. Meeting needs in the general interest, not having an industrial or commercial character, in the context of in-house transactions

60. The foregoing would suggest that VLRD can be considered a contracting authority, within the meaning given. It is possible, however, to see the question that has been referred from another point of view. Leaving to one side for the moment the nature of the activities carried out by VLRD and LG, the relationship between these two companies should be examined in order to determine whether the former is a proxy entity of the latter (or its own resource) which can use the 'in-house exemption'. I therefore propose analysing the substantive issue from an *organic perspective* as opposed to the *perspective of the activity*.

61. From that point of view, the order for reference of the Vilniaus apygardos teismas (Regional Court, Vilnius) contains two paragraphs that are of interest. The first is paragraph 23, which states that 'around 90 per cent of the subsidiary's [VLRD's] revenue comes from the parent company [LG] under transactions between the two legal persons', leading to the conclusion that 'the activities of the defendant [VLRD] and of the company controlling it [LG] are closely connected'.

25 The referring court notes in the second indent of its question that VLRD 'independently engages in business activity, establishes a business strategy, adopts decisions *concerning* the conditions of the company's activity …, participates in a competitive market throughout the European Union and outside the EU market, … and participates in procurement procedures connected with that activity, seeking to obtain orders from third parties (not the parent company)' (emphasis added).

26 See, to that effect, the observations of the Lithuanian Government referred to in footnote 13.

27 It is stated in paragraph 24 of the description of the '[facts and procedure in the main proceedings]' set out in the order for reference that 'the in-house relationships between LG and VLRD demonstrate not only the … close economic ties between those undertakings but *perhaps* also the fact that VLRD essentially does not operate under free market conditions' (emphasis added).

62. This point was fundamental in the decision of the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) to overturn the decision of the appeal court. According to the same paragraph of the order for reference, that fact was basis enough not to 'reject as unfounded the applicant's [LipSpecMet's] claim that the founding of VLRD, which followed [LG's] reorganisation, did not actually create qualitatively new legal and economic relations between separate economic operators but was more of *a change in the form of organisation of the latter company's activity*'. [28]

63. The second paragraph of the order for reference to note is paragraph 25, which states that VLRD 'entered into an average of 15 in-house transactions per year with [LG] in the period from 2011 to 2014'; transactions which, the order continues, 'under the case-law of the Court of Justice are not to be classified as public procurement contracts'. [29]

64. The national court's references to the in-house contracting system did not go unnoticed by the parties to the preliminary ruling proceedings. In particular, the Commission has argued [30] that VLRD is an internal supplier to LG and that, consequently, transactions concluded between them are not subject to procurement procedures but are covered by the 'in-house exemption'. [31]

65. The Lithuanian Government likewise referred to the in-house system in its written observations, [32] specifically mentioning Article 12(1) of Directive 2014/24. [33] The German Government also made reference to these rules in its oral submissions.

66. At the hearing, the legal representative of VLRD was asked about the intended use of the goods involved in the tendering procedure in question and replied that they were intended for use in the manufacture of equipment ordered by LG under their in-house arrangements.

67. As the Court of Justice has repeatedly stated, the in-house exemption 'is justified by the consideration that a public authority which is a contracting authority has the possibility of performing its public-interest tasks by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments, and that that exception may be extended to situations in which the other contracting party is an entity legally distinct from the contracting authority, where the latter exercises control over the contractor similar to that which it exercises over its own departments and that contractor carries out the essential part of its activities with the contracting authority or authorities which own it', as it is possible in such a situation to regard 'the contracting authority … as employing its own resources'. [34]

68. It must therefore be concluded that the establishment of VLRD as an instrument of LG, although resulting in the creation of a separate entity, in a formal sense, (they are actually two legally distinct companies), seems, from a functional point of view, to have perpetuated the previous position. Ultimately, it was done in order to reorganise the activities of the Lithuanian State railway company. [35]

28 Emphasis added.

29 The order for reference then goes on to cite several judgments of the Court of Justice in which the in-house exception has been applied: judgments of 18 November 1999, *Teckal* (C-107/98, ECLI:EU:C:1999:562), and of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, ECLI:EU:C:2005:5).

30 Paragraphs 21 and 22 of its written observations.

31 This would be confirmed by the data provided by Kanapinskas, V., Plytnikas, Z., and Tvaronavičienė, A., 'In-house procurement exception: Threat for sustainable procedure of public procurement?', *Journal of Security and Sustainability Issues* (http://dx.doi.org/10.9770/jssi.2014.4.2(4), which for 2011 gives VLRD 39.2% of all contracts awarded by LG under the in-house system; in 2013 this rose to 74%.

32 Paragraphs 31 to 36.

33 Directive 2014/24, and Article 12(1) in particular, which is based on the case-law of the Court of Justice in this area (although it deviates from this in certain important respects), does not apply *ratione temporis* to the main proceedings.

34 Judgment of 8 May 2014, *Datenlotsen Informationssysteme* (C-15/13, EU:C:2014:303), paragraph 25 and the case law cited. More recent is the judgment of 8 December 2016, *Undis Servizi* (C-553/15, EU:C:2016:935), paragraph 30.

35 The referring court itself takes the view that the establishment of VLRD was an attempt to *reorganise* the activities of LG (paragraph 26 of the order for reference).

69. If the two bodies are analysed functionally, they ultimately belong under the 'in-house exemption'.[36] This, which automatically entails exemption from the procurement directives, reflects the fact that a public authority has the right to organise itself in such a way that certain tasks are entrusted to the proxy entities through which it operates (where it exercises the same control over them as it does over its own departments), without having to go to the market for the relevant works, services or supplies.

70. Under the in-house system, the contracting authority does not, from a functional point of view, contract with a separate body but, in effect, contracts with itself, given the nature of its connection with the formally separate body. Strictly speaking, there is no award of a contract, but simply an order or task, which the other 'party' cannot refuse to undertake, whatever the name given to it.

71. The absence of a real relationship between two distinct parties explains why a contracting authority is not required to comply with public procurement procedures where it is using its own resources to perform its tasks, in other words, where it makes use of undertakings that, over and above their separate legal personality, merge with it *in a material sense*. Procurement procedures make sense only between two separate and autonomous bodies, since what those procedures seek to do is precisely to create between them the kind of bilateral legal relationship that is essential for concluding a contract for consideration[37] on equal terms rather than those of dependence or subordination in a hierarchy.

72. It is therefore logical that — within the strict limits set by the case-law of the Court of Justice — economic relationships between a contracting authority and a body that is subordinated to it, acting simply as its proxy and controlled by it in the same way as the authority controls its (other) departments, should be exempted from the formal procurement procedures of the directives. Neither would it be sensible to turn the procurement procedure into a procedure for the internal regulation of the workings of the authority in question by applying it in cases where it has chosen to use only its own resources.

73. Consequently, working from the single effective identity principle at the root of the in-house exemption, it is my view that, if the exemption was applicable to the transactions concluded between LG and VLRD, in the manner set out in the order for reference, this is because the two companies meet the conditions already mentioned which have been established in the case-law (and which have now been *crystallised* in Article 12(1) of Directive 2014/24). This is ultimately a matter for the referring court to determine.

74. The Commission submits that the fact that VLRD is an internal supplier to LG does not of itself make it a contracting authority, although it offers very few reasons in support of this assertion.[38] It could, in fact, be said that, in general, subordinated in-house bodies qualify as 'bodies governed by public law' within the meaning of Directives 2004/18 and 2004/17 only where they themselves meet the three cumulative conditions mentioned.

36 See, in general, Sánchez Graells, A., *Public procurement and the competition rules*, 2nd edition, Hart, Oxford, 2015, pp. 265 to 272.

37 The Court of Justice referred to consideration as a feature which distinguishes contracts governed by Directive 2004/18 in its judgment of 8 September 2016, *Politanò* (C-225/15 EU:C:2016:645), paragraphs 29 to 31.

38 Paragraph 23 of the written observation of the Commission.

75. This assertion, however, should be immediately qualified by making a distinction between 'marginal' activities and the 'essential' activities of proxy entities which justify the application of the in-house exemption. With respect to the former,[39] I do not think that there can be any difficulty in accepting the Commission's position, since in relation to these activities the undertaking is operating within the market and can compete on an equal footing with rival economic operators.

76. In my opinion, the same is not true of the 'essential' tasks which have been entrusted or assigned to the subordinate undertaking by the contracting authority under the in-house system. Where in order to carry out those tasks the undertaking (VLRD in this case) needs to obtain goods, services or supplies from third parties to a value which exceeds the level for harmonised procurement, then the public procurement directives apply.

77. Any other interpretation would give rise not only to inconsistency but to a potential circumvention of the law; the former because it would be inconsistent with the *single* effective identity of the two bodies, which was acknowledged for the purposes of exempting them from procurement procedures when dealing with each other, and the latter because it would make it easy to escape the application of the EU public procurement rules.

78. The relationship between LG and VLRD already gives rise to an exception concerning the application of Union rules to *in-house* transactions between them, which are deemed not to be contractual. If, in addition, VLRD were exempted from the obligation to comply with those rules in respect of transactions which are formally *external*, which are concluded with third parties but are actually part of the turnover of the LG/VLRD unit, then the in-house exemption might take on unforeseen proportions.

79. In other words, the contracting authority can make use of proxy entities, within the limits already mentioned, by entrusting them with particular tasks which should, in principle, be subject to public procurement procedures but which are exempted. This exception is not, of itself, open to question, legally speaking, in the light of the case-law of the Court of Justice (and, now, Article 12(1) of Directive 2014/24). However, where such proxy entities do not have the resources needed to themselves carry out the tasks assigned by the contracting authority and are obliged to have recourse to third parties in order to do so, the reasons for relying on the in-house exemption disappear and what emerges is actually a hidden public (sub-)procurement where the contracting authority, through an intermediary (the proxy entity) obtains goods and services from third parties without being subject to the directives which should govern the award.

80. This is what would happen in this case. Transactions of LG which would necessarily have had to comply with public procurement legislation if VLRD had not existed (and the State body had carried them out directly) would escape those rules by virtue of the argument that they are attributable to a different company, which is, however, so closely connected to the former that both companies can use the in-house exception when dealing with each other.[40]

39 In the judgment of 11 May 2006, *Carbotermo and Consorzio Alisei* (C-340/04, ECLI:EU:C:2006:308), the Court of Justice reiterated what it had already stated in the judgment of 18 November 1999, *Teckal* (C-107/98, ECLI:EU:C:1999:562), namely that the subordinate body must carry out 'the essential part of its activities with the controlling authority or authorities' (paragraph 59), stating that the activity must be 'devoted principally to that authority and any other activities are only of *marginal* significance' (paragraph 63, without emphasis in the original version). Article 12(1) of Directive 2014/24 has (controversially) set the limits of what is 'essential' and what is 'marginal' at 80% and 20% respectively.

40 On the risk that subcontracting may be used under the in-house system as a means of avoiding the rules on free competition, see the report of the Comisión Nacional de la Competencia (National Competition Commission, Spain) entitled *Los medios propios y las encomiendas de gestión: implicaciones de su uso desde la óptica de la promoción de la competencia*, pp. 30 to 57. (https://www.cnmc.es/Portals/0/Ficheros/Promocion/Informes_y_Estudios_Sectoriales/2013/2014_MediosPropios_Inf_sectorial.PDF).

81. It seems to me that if the connection between LG and VLRD is such as to justify the application of the in-house exemption to transactions between them, then the external transactions that are essential to the performance of the tasks entrusted to VLRD by LG cannot avoid being caught by the procurement directives (provided they are in excess of the relevant value threshold). Otherwise, simply by *reorganising* the activities of LG through the establishment of VLRD, LG would be able to avoid the consequences that flow from its status as a contracting authority.

82. I therefore do not think that it is essential to determine whether VLRD is a body governed by public law due to the fact that it, itself, meets needs that are inherently in the general, non-industrial or commercial interest, since it must be concluded that VLRD does this in so far as it is functionally part of a company (LG) which meets this type of need and on behalf of which it acts under the in-house system.

83. As for the question of precisely which directive governs the contracts entered into by VLRD, it should be noted that 'contracts awarded in the sphere of one of the activities expressly listed in Articles 3 to 7 of Directive 2004/17 and contracts which, although different in nature and thus capable normally, as such, of falling within the scope of Directive 2004/18, are used in the exercise of activities defined in Directive 2004/17 fall within the scope of the latter directive'.[41] It is therefore for the referring court, which did not raise this issue with the Court of Justice, to determine which directive would be applicable, depending on the subject matter of the contract at issue in the main proceedings.

84. In conclusion, I propose that the answer to the first question raised by the Vilniaus apygardos teismas (Regional Court, Vilnius) should be that Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18 must be interpreted as meaning that a company that is connected in terms of substance and function to a contracting authority such that the in-house exemption is justified in respect of their mutual transactions, is subject to those directives when concluding works, supply and service contracts with third parties for the purpose of performing the task entrusted to it by the contracting authority.

C. The second question referred for a preliminary ruling

85. In the event that the Court of Justice decides to answer the previous question in the affirmative, as I am proposing, the Vilniaus apygardos teismas (Regional Court, Vilnius) would like to know whether a company such as VLRD would lose the status of contracting authority if the value of the services which it provides on the basis of in-house transactions to LG were to fall to the point of constituting less than 90% or not the main part of the total financial turnover from its activity.

86. The question is a purely hypothetical one (and, to that extent, inadmissible), since what the main proceedings are attempting to resolve is not some future situation but the situation which existed at the time when VLRD published the invitation to tender for the supply of bars of ferrous metals (2013). The original proceedings are concerned only with the annulment of that specific tendering procedure, which has been challenged by LitSpecMet.

41 Judgment of 10 April 2008, *Ing. Aigner* (C-393/06, EU:C:2008:213), paragraph 57.

87. The relevant time to be considered for the purposes of resolving the dispute is right at the beginning, as may be inferred from the case-law of the Court of Justice. This states that the principle of legal certainty requires Community rules to be clear and their application foreseeable by all those affected by them,[42] and as a result of that requirement, and of the requirements on the protection of the interests of tenderers, it is necessary for a body which is a contracting authority on the date of the commencement of a procurement procedure to remain subject to the requirements of the public procurement directives until the relevant procedure has been completed.[43]

88. As I have explained, in determining whether the public procurement directives applied to VLRD, the relevant consideration is whether the 2013 invitation procedure concerned goods supplied by third parties and used in performing the task that LG had entrusted to it in the context of their in-house relationship.

89. Obviously, if at a later date, some years into the future, that were no longer to be the case and, whether due to the circumstances mentioned by the referring court (namely if the 'essential' part of the activity of VLRD were no longer to be serving the purposes of LG),[44] or for some other reason of that kind, VLRD were to lose its status as a proxy entity of LG and start to operate in the free market, then it would be necessary to evaluate the new circumstances and decide accordingly.

90. The legislation applicable in this hypothetical future scenario would be Directive 2014/24, and it would be necessary to determine in accordance with the criteria and requirements of that directive whether VLRD should still, at that time, be considered a contracting authority.

VI. Conclusion

91. In the light of the foregoing, I propose that the Court of Justice reply to the Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania) as follows:

Article 2(1)(a) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and the second subparagraph of Article 1(9) 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 must be interpreted as meaning that:

(a) a company that is connected to a contracting authority in terms of substance and function such that the in-house exemption is justified in respect of their mutual transactions, is subject to those directives when concluding works, supply and service contracts with third parties for the purpose of performing the task entrusted to it by that contracting authority; and

(b) in any event, that company should be considered a body governed by public law where it has legal personality, is controlled by a contracting authority and the essential part of its activity is to supply the contracting authority, free of any pressure from competitors and not in free market conditions, with railway equipment to enable the authority to provide its designated service of transporting passengers and freight.

42 See, for example, judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1998:4), paragraph 34.

43 Judgment of 3 October 2000, *University of Cambridge* (C-380/98, EU:C:2000:529), paragraph 43.

44 However, according to the information made available at the hearing, in fact, 85% of the supplies effected by VLRD in 2016 were still to LG and, of these, two thirds were under in-house arrangements.