



Reports of Cases

Case C-553/15

Undis Servizi Srl
v
Comune di Sulmona

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

(Request for a preliminary ruling — Public supply contracts — Award of the contract without initiating a tendering procedure — So-called ‘in-house’ award — Conditions — Similar control — Performance of the essential activity — Successful public capital tendering company owned by several local authorities — Activity also carried out for the benefit of local authorities which are not shareholders — Activity imposed by a public authority which is not a shareholder)

Summary — Judgment of the Court (Fourth Chamber), 8 December 2016

1. *Questions referred for a preliminary ruling — Admissibility — Need to provide the Court with sufficient information on the factual and legislative context — Scope of the obligation in the field of public procurement*

(Arts 49 TFEU, 56 TFEU and 267 TFEU; Rules of Procedure of the Court of Justice, Art. 94)

2. *Approximation of laws — Procedures for the award of public works contracts, public supply contracts and public service contracts — Directive 2004/18 — Scope — Public procurement subject to a so-called ‘in-house’ award — Not included — Conditions — Performance, by the contractor, of the essential part of its activities for the benefit of the contracting authority — Criteria for assessment*

(European Parliament and Council Directive 2004/18, Art. 1(2)(a))

3. *Approximation of laws — Procedures for the award of public works contracts, public supply contracts and public service contracts — Directive 2004/18 — Scope — Public procurement subject to a so-called ‘in-house’ award — Not included — Conditions — Performance, by the contractor, of the essential part of its activities for the benefit of the contracting authority — Taking into account of the activities carried out for the benefit of local authorities which are not shareholders of that contractor — Not included*

(European Parliament and Council Directive 2004/18, Art. 1(2)(a))

4. *Approximation of laws — Procedures for the award of public works contracts, public supply contracts and public service contracts — Directive 2004/18 — Scope — Public procurement subject to a so-called ‘in-house’ award — Not included — Conditions — Performance, by the contractor, of the essential part of its activities for the benefit of the contracting authority —*

Activity carried out for the benefit of local authorities which are shareholders of that contractor and which exercise a similar control over it — Taking into account of the activities carried out before the date on which that control took effect

(European Parliament and Council Directive 2004/18, Art. 1(2)(a))

1. See the text of the decision.

(see paras 24, 25)

2. Any exception to the obligation to apply the rules on the procedures for the award of public contracts laid down in the relevant directives must be interpreted strictly. As regard the exception for so-called ‘in-house’ awards, it is justified by the existence, in such a case, of a specific link between the contracting authority and the contractor, even if the latter is an entirely separate legal entity. In such cases, it may be considered that the contracting authority, in actual fact, uses its own resources and that the contractor is almost part of its internal departments.

That exception requires, in addition to the contracting authority exercising over the contractor a control similar to that which it exercises over its own departments, that that contractor performs the essential part of its activities for the benefit of the contracting authority or authorities which control it. Thus, it is essential that the contractor’s activity be principally devoted to the controlling authority or authorities; the nature of any other activity may only be marginal. In order to determine whether that is the case, the court having jurisdiction must take into account all the facts of the case, both qualitative and quantitative. In that regard, the relevant turnover is the turnover that that contractor achieves pursuant to the award decisions taken by that or those controlling authorities.

(see paras 28-32)

3. In the context of the application of the Court’s case-law on direct awards of so-called ‘in-house’ public contracts, in order to determine whether the contractor carries out the essential part of its activity for the contracting authority, including local authorities which are its controlling shareholders, an activity imposed on that contractor by a non-shareholder public authority for the benefit of local authorities which are also not shareholders of that contractor and do not exercise any control over it must not be taken into account, since that activity must be regarded as being carried out for third parties.

The requirement that the person at issue perform the essential part of its activities with the controlling authority or authorities is designed to ensure that Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts remains applicable in the event that an undertaking controlled by one or more authorities is active in the market, and therefore liable to be in competition with other undertakings. In that regard, an undertaking is not necessarily deprived of freedom of action merely because the decisions concerning it are controlled by the controlling municipal authority or authorities, if it can still carry out a large part of its economic activities with other operators. By contrast, where that undertaking’s services are mostly intended for that authority or those authorities alone, it seems justified that that undertaking should not be subject to the restrictions of Directive 2004/18, since they are in place to preserve a state of competition which, in that case, no longer has any *raison d’être*.

It follows that any activity of the contractor which is devoted to persons other than those which control it, namely persons without any relationship of control in regard to that entity, including public authorities, must be regarded as being carried out for the benefit of a third party.

(see paras 33, 34, 38, operative part 1)

4. As regards the exception to the obligation to apply the rules on procedures for the award of public contracts for so-called 'in-house' awards, for the purpose of determining whether the contractor carries out the essential part of its activity for the shareholder local authorities which jointly exercise over it control similar to that which they exercise over their own departments, account must be taken of all the circumstances of the case, which may include the activity carried out by that contractor for those local authorities before such joint control took effect.

In order to assess the condition relating to the performance of the essential part of the activity, the national court must take into account all the facts of the case, both qualitative and quantitative. In this respect, regarding the contracting authority's activities completed before the date of the award of the public contract in question, these may be indicative of the importance of the activity that that entity is planning to carry out for its shareholder local authorities after their similar control has taken effect.

(see paras 40-42, operative part 2)