Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

18 June 2020*

(Reference for a preliminary ruling – Public procurement – Directive 2004/18/EC – Article 1(2)(a) – Public procurement in the field of transport services – Cooperation agreement between municipalities regarding the organisation and provision of social and healthcare services based on the model of the 'responsible municipality' under Finnish law – Transfer of responsibility for the organisation of services to one of the municipalities in the area covered by the cooperation concerned – 'In-house' contract – Award of services to a company wholly owned by the responsible municipality without a call for competition)

In Case C-328/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), made by decision of 15 April 2019, received at the Court on 19 April 2019, in the proceedings brought by

Porin kaupunki

other parties to the proceedings:

Porin Linjat Oy,

Lyttylän Liikenne Oy,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, S. Rodin, D. Šváby (Rapporteur), K. Jürimäe and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Porin kaupunki, by A. Kuusniemi-Laine and J. Lähde, asianajajat,

– the Finnish Government, by J. Heliskoski and M. Pere, acting as Agents,

* Language of the case: Finnish.

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

– the European Commission, by M. Huttunen, P. Ondrůšek and L. Haasbeek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings brought by Porin kaupunki (City of Pori, Finland) concerning the award by that city of public transport services to Porin Linjat Oy.

Legal background

EU law

Directive 2004/18

3 Article 1 of Directive 2004/18, entitled 'Definitions', provides:

'1. For the purposes of this Directive, the definitions set out in paragraphs 2 to 15 shall apply.

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

…

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

…'

Regulation (EC) No 1370/2007

4 Article 2 of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1), entitled 'Definitions', provides:

'For the purposes of this Regulation:

…

(b) "competent authority" means any public authority or group of public authorities of a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or any body vested with such authority;

(c) "competent local authority" means any competent authority whose geographical area of competence is not national;

…

(j) "internal operator" means a legally distinct entity over which a competent local authority or, in the case of a group of authorities, at least one competent local authority, exercises control similar to that which it exercises over its own departments;

…'

5 Article 5 of that regulation, entitled 'Award of public service contracts', provides:

'1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC [of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)] or [2004/18] for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives [2004/17] or [2004/18], the provisions of paragraphs 2 to 6 of this Article shall not apply.

2. Unless prohibited by national law, any competent local authority, whether or not it is an individual authority or a group of authorities providing integrated public passenger transport services, may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments. Where a competent local authority takes such a decision, the following shall apply:

…

(b) the condition for applying this paragraph is that the internal operator and any entity over which this operator exerts even a minimal influence perform their public passenger transport activity within the territory of the competent local authority, notwithstanding any outgoing lines or other ancillary elements of that activity which enter the territory of neighbouring competent local authorities, and do not take part in competitive tenders concerning the provision of public passenger transport services organised outside the territory of the competent local authority;

…'

Finnish law

Law on public procurement

6 Article 10 of the Laki julkisista hankinnoista (348/2007) (Law on public procurement (348/2007)) of 30 March 2007, which transposes Directive 2004/18, provides that the Law does not apply to contracts which the contracting entity awards to an entity that is formally distinct from it but independent in its decision-making, where it exercises over that entity, alone or with other contracting entities, a control similar to that exercised over its own departments and where that distinct entity carries out the essential part of its activities with the contracting entities which control it.

Law on municipalities of 1995

7 Under Article 76(1) of the Kuntalaki (365/1995) (Law on municipalities (365/1995)) of 17 March 1995 ('Law on municipalities of 1995'), municipalities may, pursuant to an agreement, carry out their tasks jointly. Article 76(2) of that law allows municipalities to agree that one municipality is to be entrusted with a task on behalf of one or more other municipalities.

8 Under Article 77(1) of that law, where, pursuant to an agreement, a municipality is charged with a task on behalf of one or more municipalities, it may be agreed that the other municipalities concerned appoint some of the members of the institution of the first municipality that is responsible for that task.

Law on municipalities of 2015

9 The Law on municipalities of 1995 was repealed by the Kuntalaki (410/2015) (Law on municipalities (410/2015)) of 10 April 2015 ('Law on municipalities of 2015'), which entered into force on 1 May 2015.

10 Under Article 8 of that law, a municipality may itself carry out the tasks entrusted to it by law or agree to entrust responsibility for carrying them out to another municipality or a group of municipalities. The municipality or group of municipalities responsible for arranging for performance of those tasks must, inter alia, ensure equal access to the services concerned, determine the need for, quality and quantity of the services, specify how those services are to be provided, oversee their provision and the exercise of the power vested in the authority

concerned. Furthermore, a municipality remains responsible for financing its tasks, even where the responsibility for performing them has been transferred to another municipality or a group of municipalities.

11 Under Article 49 of the Law on municipalities of 2015, municipalities and groups of municipalities may, pursuant to an agreement, carry out their tasks jointly. Such cooperation may take the form, among others, of a joint institution. Article 50(2) of that law provides, inter alia, that the Law on public procurement does not apply to cooperation between municipalities where the cooperation relates to an award by a municipality or group of municipalities to a linked entity, within the meaning of Article 10 of that law, or where the Law on public procurement does not apply to the cooperation for some other reason.

12 Article 50(1) of the Law on municipalities of 2015 provides that, where a municipality agrees to transfer responsibility for arranging a task for which that municipality is responsible to another municipality or a group of municipalities, the Law on public procurement does not apply to that transfer.

13 Under Article 51(1) of the Law on municipalities of 2015, a municipality, called the 'responsible municipality', may perform a task on behalf of one or more municipalities in such a manner that the municipalities have a joint institution responsible for performing that task. The municipalities may agree that the other municipalities are to appoint some of the members of the joint institution.

14 Article 52(1) of that law provides that the agreement establishing a joint institution, referred to in paragraph 11 of the present judgment, must specify that institution's tasks and, where appropriate, provide for the transfer of organisational responsibility referred to in Article 8 of that law, the composition of that institution and the right of the other municipalities to appoint members, the principles on which costs are to be calculated and allocated, and the duration and termination of the agreement.

Law on public transport

15 Under Article 12(3) of the Joukkoliikennelaki (869/2009) (Law on public transport (869/2009)) of 13 November 2009, as amended by the Laki joukkoliikennelain muuttamisesta (1219/2011) (Law on the amendment of the Law on public transport (1219/2011)) of 9 December 2011 ('Law on public transport'), the regional municipal authority may authorise the operation of scheduled services only in the territory over which it has authority.

16 Under Article 4 of the Law on public transport, the competent authorities for road transport for the purposes of Regulation No 1370/2007 are required to determine the level of service applicable to public transport in the area over which they have authority. That provision requires those authorities to cooperate, to the extent necessary, between themselves and with municipalities and groups of provinces when determining the level of service.

17 Under Article 5(2) of that law, the competent authorities for transport operated in accordance with Regulation No 1370/2007 are responsible for specifying services. However, responsibility for planning routes and timetables may lie with the transport operators or the authorities, or else may be shared between them.

18 Under Article 6 of the Law on public transport, the competent authorities are required to plan public transport services, above all, as regional or territorial systems, in order to achieve a functional public transport network. When planning public transport, those authorities are to cooperate with each other and with the municipalities.

19 Under Article 14(4) of that law, those authorities are to adopt decisions on the organisation of public transport services in the area over which they have authority or a part thereof in accordance with Regulation No 1370/2007.

Law on services and support for persons with disabilities

20 Article 3 of the Laki vammaisuuden perusteella järjestettävistä palveluista ja tukitoimista (380/1987) (Law on services and support for persons with disabilities (380/1987)) of 3 April 1987 confers responsibility on the municipalities to arrange transport services for persons with disabilities.

The main proceedings and the questions referred for a preliminary ruling

21 By a cooperation agreement which entered into force on 1 July 2012 ('public transport cooperation agreement'), the City of Pori, the Towns of Harjavalta, Kokemäki and Ulvila and the Municipality of Nakkila (Finland) decided to entrust certain transport-related tasks to the City of Pori, as the competent local authority. Those tasks are managed by the municipalities which are parties to that agreement in accordance with the arrangements laid down in Articles 76 and 77 of the Law on municipalities of 1995, and the City of Pori has set up a joint institution to that end.

22 The public transport committee for the Pori Region ('public transport committee'), made up of five members appointed by the City of Pori and a member appointed by each of the other municipalities which are parties to the public transport cooperation agreement, acts as the competent authority for local transport in the City of Pori and exclusively for transport operated in the area formed by the parties to that agreement. The operation of the public transport committee is governed by regulations approved by the City of Pori municipal assembly and management rules approved by that committee.

23 Transport-related costs are allocated in compliance with Regulation No 1370/2007 and divided among the municipalities which are parties to that agreement in accordance with specific arrangements determined by the public transport committee. When the budget and the financial plan are drawn up, the municipalities which are parties to the public transport cooperation agreement must be given the opportunity to put forward proposals concerning the objectives and financing of the cooperation.

24 The regulations of the public transport committee provide that, as a joint competent regional authority for transport for the area consisting of the territories of the parties to that agreement, it acts under the authority of the municipal assembly and municipal executive council of the City of Pori. The committee is responsible for the tasks which Regulation No 1370/2007 and the Law on public transport confer on the competent authority in the field of public transport, in the entire area covered by the cooperation agreement. On that basis, it specifies, inter alia, detailed arrangements for the organisation and award of public transport, as referred to in that regulation, which is operated solely in the area over which it has authority. It also approves contracts to be concluded and sets fares and charges.

25 At the same time, the City of Pori, the Town of Ulvila and the Municipality of Merikarvia (Finland) agreed, by a cooperation agreement on the organisation and provision of social and healthcare services concluded on 18 December 2012 ('healthcare services cooperation agreement'), pursuant to Articles 76 and 77 of the Laki kunta- ja palvelurakenneuudistuksesta (169/2007) (Law on the restructuring of municipalities and services (169/2007)) of 9 February 2007, to transfer responsibility for organising social and healthcare services for their entire territory to the City of Pori.

26 That agreement is based on the 'responsible municipality' model provided for under the Law on municipalities of 1995 and the Law on municipalities of 2015. In that model, a task entrusted to various municipalities is performed by one among them, called the 'responsible municipality', on their behalf under an agreement which those municipalities have entered into.

27 The healthcare services cooperation agreement designates the City of Pori as the 'responsible city [or municipality]' or the 'host city', while the Town of Ulvila and the Municipality of Merikarvia are called the 'contracting municipalities'.

28 That agreement provides that the system of social and healthcare services is to form a coherent whole, developed jointly by the responsible municipality and the contracting authorities under that agreement. The responsible municipality is to assess and determine the needs of residents for healthcare and social services, decide on the scope and level of quality of those services offered to residents, ensure that the residents have access to the necessary services and also decide how those services are to be delivered. It is also responsible for the availability, accessibility and quality of social and healthcare services and for overseeing and monitoring them.

29 In practice, responsibility for organising social and healthcare services in the area covered by the cooperation lies with the Committee for the Guarantee of Fundamental Social Rights of the City of Pori, which is a joint committee consisting of 18 members, 3 of whom are appointed by the Town of Ulvila, 2 by the Municipality of Merikarvia and the 13 others by the City of Pori. In addition, the healthcare services cooperation agreement provides that the municipal assembly of the City of Pori is to approve the Committee's regulations and determine its field of activity and tasks. That committee is fully responsible for social and healthcare services, the system of services and the necessary budget. The Committee approves contracts to be concluded within its field of activity and sets charges for the services and other benefits concerned in line with general criteria specified by the municipal assembly of the City of Pori. In addition, each year, the City of Pori's Committee for the Guarantee of Fundamental Social Rights draws up a service plan that specifically determines the content of services, the draft plan having previously been submitted to the contracting municipalities under the healthcare services cooperation agreement for their opinion. Finally, that agreement provides that the financial management of healthcare and social services is to be based on a jointly established budget, financial plan and plan for those services, and also on the monitoring of expenditure and use of those services. Costs are allocated according to use of social and healthcare services, so that each municipality pays for the actual cost of the services used by its own population and the residents for whom it is responsible.

30 By decision of 4 May 2015, the Committee for the Guarantee of Fundamental Social Rights of the City of Pori decided that, in the entire area covered by the healthcare services cooperation agreement, persons with disabilities would be transported to their work and day activity facilities by low-floor buses operated by the City of Porin as its own service through Porin Linjat, a limited company which the City owned entirely. Consequently, the City of Pori did not organise a call for

competitive tenders for the contract to transport persons with disabilities but awarded it directly to Porin Linjat under the rules governing in-house contracts, known in Finnish law as 'awards to linked entities'.

31 However, the City of Pori states it had previously entered into two other contracts with Porin Linjat under the public transport cooperation agreement: first, the contract concluded on 5 September 2013 for transport services from 1 January 2013 to 31 May 2016, which governed the management of public transport in the City of Pori and the award of services to operators and applied to transport routes linking the City of Pori, the Municipality of Nakkiki and the Towns of Harjavalta and Kokemäki and, second, the contract concluded on 11 June 2014, which covered transport between the City of Pori and the Town of Ulvila from 1 July 2014 to 31 May 2016.

32 Lyttylän Liikenne Oy challenged the decision of the Committee for the Guarantee of Fundamental Social Rights of the City of Pori of 4 May 2015 before the Markkinaoikeus (Market Court, Finland), which annulled it on the grounds, first, that Porin Linjat could not be classified as a 'linked entity' or 'internal operator' of the City of Pori within the meaning of Article 10 of Law (348/2007) and, second, that the Law did not specify any other reasons to exclude the contract from the obligation to call for competitive tendering. That court considers that, unlike the City of Pori, which has five representatives on the public transport committee, the other municipalities which are parties to the healthcare services cooperation agreement have only one representative on that committee and so are not able to exercise control over Porin Linjat. As a result, the profit made by that company from operating public transport in those municipalities cannot be taken into account when assessing whether that company performs the essential part of its activities for the benefit of the contracting authority which controls it, in this case the City of Pori. Although the transport is partly operated pursuant to instruments adopted by the City of Pori, Porin Linjat's turnover from operating that city's transport is not enough to establish a relationship between the City of Pori and a linked entity since Porin Linjat does not perform the essential part of its activities for the benefit of its sole shareholder.

33 The City of Pori, supported by Porin Linjat, appealed to the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), claiming that Porin Linjat is an entity linked to it. Porin Linjat is a company owned and controlled by the City of Pori and, since 2009, has not taken part, as a tenderer, in calls for tenders for transport services. In addition, it does not compete on the market. Under the public transport cooperation agreement, the Towns of Harjavalta, Kokemäki and Ulvila and the Municipality of Nakkila entrusted the City of Pori with responsibility for managing, as the responsible municipality, the operation of the public transport services of the municipalities participating in the cooperation. Consequently, the turnover generated by Porin Linjat's operation of that transport in the territory of those municipalities must be attributed to the City of Pori. More than 90% of Porin Linjat's turnover is thus generated by operating the transport of the City of Pori.

34 The referring court is uncertain whether the healthcare services cooperation agreement may, by its nature, be excluded from the scope of Directive 2004/18 because it gives tangible form to a transfer of powers or cooperation between public-sector entities, or for another reason.

35 In that regard, the referring court points out that cooperation between the municipalities in the Pori Region is based, as regards the provision of both social and healthcare services and transport services, on the 'responsible municipality' model. That court is unsure whether the contracts awarded by the responsible municipality are exempt from the obligation to call for competitive

tendering where that municipality or its linked entity procure services on behalf of the municipalities in the area covered by the cooperation which are intended for the inhabitants of those municipalities. The referring court considers that the 'responsible municipality' model may be understood as a transfer of powers, as interpreted in the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985). However, that judgment did not expressly address the question of whether the obligation to call for competitive tendering laid down in EU public procurement legislation must apply to decisions taken after a transfer of powers.

36 The referring court states that the 'responsible municipality' model could also possibly be classified as 'cooperation between public-sector entities'. In that case, however, it must be clarified whether the responsible municipality may, when organising services for the other contracting entities involved in the cooperation, use an entity linked to it without a call for competitive tendering.

37 The question also arises as to, first, whether, in calculating the share of Porin Linjat's turnover derived from operating the public transport of the City of Pori, account should be taken of the turnover generated by the regional transport services which the City of Pori, as the competent authority, organises on behalf of the Towns of Harjavalta, Kokemäki and Ulvila and the Municipality of Nakkila under the public transport cooperation agreement and, second, whether the share of Porin Linjat's turnover generated by operating the public transport of the City of Pori is such that it may be classified as an entity over which that city has control.

38 In so far as, first, the City of Pori awards contracts for regional transport services, on its own behalf but also on behalf of the other municipalities which are parties to the public transport cooperation agreement, and, second, those municipalities bear part of the costs of the services awarded, the question arises as to whether the City of Pori can be regarded as a contracting authority for all regional transport and whether, therefore, all of those contracts must be taken into account in calculating Porin Linjat's turnover from operating that city's public transport.

39 Against that background, the Korkein hallinto-oikeus (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 1(2)(a) of Directive [2004/18] be interpreted as meaning that the model of the "responsible municipality" in accordance with the cooperation agreement between municipalities in question [in the main proceedings] meets the conditions for a transfer of responsibilities which is not covered by the scope of the Directive (judgment of 21 December 2016, *Remondis*, C-51/15, EU:C:2016:985) or a horizontal cooperation which is not covered by an obligation to issue a call for tenders (judgment of 13 June 2013, *Piepenbrock*, C-386/11, EU:C:2013:385 and the case-law cited), or does this constitute another case altogether?

(2) If the model of the "responsible municipality" in accordance with the cooperation agreement meets the conditions for a transfer of responsibilities: in the event that contracts are awarded after responsibilities have been transferred, is the public entity to which the responsibilities have been transferred the contracting authority and is this public entity entitled, on the basis of the responsibilities transferred to it by the other municipalities, to award contracts for services to one of its related entities without a call for tenders in circumstances where the

award of these contracts for services would – without the principle of the "responsible municipality" – have been the responsibility of the municipalities which transferred the responsibility?

(3) If, on the other hand, the model of the "responsible municipality" in accordance with the cooperation agreement fulfils the conditions of a horizontal cooperation: can the municipalities taking part in the cooperation award contracts for services without issuing calls for tenders to a municipality taking part in the cooperation, which awarded these service contracts to one of its related entities without a call for competitive tenders?

(4) As part of the assessment whether a company carries out the essential part of its activities for the municipality by which it is controlled, does the calculation of the turnover related to the municipality take into account the turnover of a company owned by the municipality which operates transport services within the meaning of [Regulation No 1370/2007] to the extent that the company derives this turnover from transport services organised by the municipality as the competent authority within the meaning of that regulation?'

Consideration of the questions referred

Preliminary observations

40 First, although, unlike the healthcare services cooperation agreement, the legal nature of the public transport cooperation agreement is not expressly indicated by the referring court, it is apparent from the order for reference that, under the latter agreement, the Towns of Harjavalta, Kokemäki and Ulvila and the Municipality of Nakkila transferred to the City of Pori, as the responsible municipality, responsibility for managing the operation of the public transport of the municipalities participating in the cooperation.

41 It therefore appears to follow from the order for reference that, like the healthcare services cooperation agreement, the public transport cooperation agreement is based on the 'responsible municipality' model.

42 The Court will therefore examine the questions referred by the national court based on that premiss.

43 Second, it appears that the public transport cooperation agreement and healthcare services cooperation agreement were not concluded by the same parties. The public transport cooperation agreement involves the City of Pori, the Towns of Harjavalta, Kokemäki and Ulvila and the Municipality of Nakkila. The healthcare services cooperation agreement was concluded by the City of Pori, the Town of Ulvila and the Municipality of Merikarvia.

44 Third, it should be noted that, in its capacity as the 'responsible municipality', the City of Pori must provide the services covered by those two agreements. For that purpose, it relies on a linked entity, that is to say an internal operator, which it owns wholly and controls, namely Porin Linjat.

The first question

45 By its first question, the referring court asks, in essence, whether Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that an agreement under which the municipalities which are parties to that agreement entrust to one among them responsibility for organising services for their benefit is excluded from the scope of Directive 2004/18 on the ground that it constitutes a transfer of powers, for the purposes of Article 4(2) TEU as interpreted in the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985), or cooperation between contracting authorities subject to an obligation to call for competitive tendering as referred to in the judgment of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385).

46 As the Court noted in the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985, paragraphs 40 and 41), the division of competences within a Member State benefits from the protection conferred by Article 4(2) TEU, according to which the Union must respect national identities, inherent in their fundamental structures, political and constitutional, including local and regional self-government. Moreover, as that division of competences is not fixed, the protection conferred by that provision also concerns internal reorganisations of powers within a Member State. Such reorganisations, which, in particular, may take the form of voluntary transfers of competences between public authorities, have the consequence that a previously competent authority relinquishes the obligation or power to perform a given public task, whereas another authority is henceforth entrusted with that obligation or power.

47 Paragraphs 42 to 44 of the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985), also make clear that such a transfer of powers does not fulfil all the conditions required to come within the definition of 'public contract'. Only a contract concluded for pecuniary interest may constitute a public contract coming within the scope of Directive 2004/18. The pecuniary nature of the contract means that the contracting authority concluding a public contract receives a service which must be of direct economic benefit to that contracting authority. The synallagmatic nature of the contract is thus an essential element of a public contract. The very fact that a public authority is released from a competence with which it was previously entrusted by that self-same fact eliminates any economic interest in the accomplishment of the tasks associated with that competence.

48 That said, in order to be regarded as an internal organisation measure covered by Article 4(2) TEU, a transfer of powers between public authorities requires that the public authority on which competence has been conferred has the power to organise the performance of the tasks coming within that competence and to draw up the regulatory framework relating to those tasks and, lastly, that it has the financial autonomy allowing it to ensure the financing of those tasks. The authority initially competent cannot, therefore, retain primary responsibility over those tasks nor retain financial control over them or give prior approval for decisions envisaged by the entity on which it has conferred powers. A transfer of competence hence implies that the newly competent public authority acts autonomously and under its own responsibility in the performance of its tasks (see, to that effect, judgment of 21 December 2016, *Remondis*, C-51/15, EU:C:2016:985, paragraphs 49 and 51).

49 However, the autonomy of action of the public authority to which a competence is conferred does not mean that the newly competent entity must be shielded from any influence whatsoever by another public entity. An entity that transfers competence may retain a certain degree of influence over the tasks associated with the public service thus transferred. That influence, which may be brought to bear through a body, such as the general meeting, made up of representatives of

the previously competent local and regional authorities, does, however, in principle, preclude any involvement in the actual performance of the tasks coming within the transferred competence (see, to that effect, judgment of 21 December 2016, *Remondis*, C-51/15, EU:C:2016:985, paragraph 52).

50 In this case, first, the order for reference makes plain that the healthcare services cooperation agreement transfers responsibility for organising the social and healthcare services of the municipalities which are parties to that agreement from those municipalities to the City of Pori. That voluntary transfer of powers is based on Law (169/2007).

51 Second, the management of the area covered by the cooperation thus established is organised in accordance with the rules laid down in Articles 76 and 77 of the Law on municipalities of 1995. It follows that the healthcare services cooperation agreement thus confers on the responsible municipality responsibility for assessing and determining the needs of the residents of the municipalities concerned for social and healthcare services, deciding the scope and quality of those services offered to those residents and ensuring that they have access to the necessary services. The responsible municipality is also to determine how those services are to be delivered and decide on their availability, accessibility and quality and their oversight and monitoring.

52 Third, responsibility for organising social and healthcare services in the area covered by the cooperation is entrusted, in practice, to a joint institution, in this case the Committee for the Guarantee of Fundamental Social Rights of the City of Pori, the composition and tasks of which are described in paragraph 29 of this judgment.

53 Fourth, the healthcare services cooperation agreement provides that the municipal assembly of the City of Pori is to approve the Committee's regulations and determine its field of activity and tasks.

54 Fifth, that cooperation agreement provides that the financial management of healthcare and social services is to be based on a budget, financial plan and plan for those services drawn up jointly by the municipalities which are parties to that agreement, and also on the monitoring of expenditure and use of those services.

55 Sixth, the costs of social and healthcare services are allocated according to the use thereof, so that each municipality pays for the actual cost of the services used by its own population and the residents for whom it is responsible.

56 Thus, subject to the verifications which it will be for the referring court to carry out, the conditions for a transfer of powers, for the purposes of Article 4(2) TEU, appear to be met, with the result that the healthcare services cooperation agreement does not appear to constitute a 'public contract' within the meaning of Article 1(2)(a) of Directive 2004/18. Accordingly, that cooperation agreement should be excluded from the scope of Directive 2004/18.

57 In those circumstances, it does not appear necessary to examine whether the healthcare services cooperation agreement may also constitute cooperation between contracting authorities which is excluded from the obligation to call for competitive tendering in accordance with the judgments of 9 June 2009, *Commission* v *Germany* (C-480/06, EU:C:2009:357), and of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385).

58 The answer to the first question is therefore that Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that an agreement under which the municipalities which are parties to that agreement entrust to one among them responsibility for organising services for the benefit of those municipalities is excluded from the scope of Directive 2004/18 on the ground that it constitutes a transfer of powers, for the purposes of Article 4(2) TEU as interpreted in the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985).

The second and fourth questions

59 By its second and fourth questions, which the Court will consider together, the referring court asks, in essence, whether Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that a cooperation agreement under which the parties to that agreement transfer to one among them responsibility for organising services for their benefit allows that municipality, in awards made after that transfer, to be regarded as a contracting authority and authorises it to entrust to an in-house entity, without a prior call for competitive tendering, services meeting not only its own needs but also those of the other municipalities which are parties to that agreement whereas, without that transfer of powers, those municipalities would have had to fulfil their own needs themselves.

60 The answer to the first question makes clear that, subject to verification by the referring court, an arrangement such as the 'responsible municipality' model involves a transfer of powers for the purposes of Article 4(2) TEU as interpreted in the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985).

61 By its very nature, such a transfer of powers implies that the other municipalities which are parties to the cooperation agreement relinquish those powers to the responsible municipality. As noted in paragraph 26 of this judgment, in the 'responsible municipality' model, such a municipality assumes, on behalf of the other municipalities, a task which each municipality hitherto performed itself.

62 Thus, as a result of that transfer, the responsible municipality is, as it were, assigned the rights and duties of its contractual partners as regards the delivery of services which are the subject matter of a cooperation agreement based on the 'responsible municipality' model.

63 It follows that, in this case, it is for the beneficiary of the transfer of powers, in other words the responsible municipality, to meet the needs of the other municipalities which are parties to the healthcare services cooperation agreement and therefore to provide the social and healthcare services at issue in the main proceedings throughout the territory covered by that agreement, although each municipality remains liable for the actual cost of the services used by its own population and the residents for which it is responsible.

64 Consequently, if a transfer of powers, for the purposes of Article 4(2) TEU as interpreted in the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985), is not to be deprived of its practical effect, the authority to which the task has been transferred must necessarily be regarded, as regards the award of a service, as the contracting authority for that task, in respect of all the territory of the municipalities which are parties to the agreement that transfers powers.

65 It is necessary, however, to ascertain whether that contracting authority may use an in-house entity to meet not only its own needs but also those of the municipalities which have transferred a power to it.

66 In an in-house award, the contracting authority is deemed to use its own resources. Even if the contractor is legally distinct from the contracting authority, it is almost part of the contracting authority's internal departments, where two conditions are satisfied: first, the contracting authority must exercise over the contractor a control similar to that which it exercises over its own departments; secondly, the entity must carry out the essential part of its activities for the benefit of the contracting authority or authorities which control it (see, to that effect, judgments of 18 November 1999, *Teckal*, C-107/98, EU:C:1999:562, paragraph 50, and of 11 May 2006, *Carbotermo and Consorzio Alisei*, C-340/04, EU:C:2006:308, paragraph 33).

67 Under the Court's settled case-law, the first condition, relating to control by the public authority is deemed to be satisfied where the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer. That circumstance tends to indicate, generally, that the contracting authority exercises over that company a control similar to that which it exercises over its own departments (judgments of 19 April 2007, *Asemfo*, C-295/05, EU:C:2007:227, paragraph 57, and of 13 November 2008, *Coditel Brabant*, C-324/07, EU:C:2008:621, paragraph 30).

68 Although use of an in-house award has so far been accepted by the Court only in cases where a contracting authority held all or part of the shares in a contractor, it cannot be inferred from this that, in an arrangement such as the 'responsible municipality' model in Finnish law, it is impossible for a contracting authority, in this case the responsible municipality, to opt for an in-house award in order to meet the needs of the contracting authorities with which it has entered into an agreement based on that model for the sole reason that the other municipalities which are parties to that agreement do not hold any shares in the in-house entity. The criterion of holding part of the shares cannot constitute the only means of achieving that objective, since control similar to that exercised by a contracting authority over its own departments may take a form other than a shareholding.

69 In that regard, it should be noted, first, that it follows from the answer to the first question and from paragraphs 40 to 42 of this judgment that, in this case, the City of Pori was transferred powers by the other municipalities not only under the public transport cooperation agreement but also the healthcare services cooperation agreement. Furthermore, paragraphs 60 to 64 of this judgment make clear that, as a result of those transfers of powers, the City of Pori, as the 'responsible municipality', assumed, on behalf of the contracting municipalities, the tasks which they entrusted to it. Moreover, it is common ground that the contractor Porin Linjat is an entity linked to the City of Pori, which controls it. It follows that the City of Pori must necessarily be regarded, as concerns the award of services, as the contracting authority for those tasks.

70 Second, assuming that, following a transfer of powers for the purposes of Article 4(2) TEU as interpreted in the judgment of 21 December 2016, *Remondis* (C-51/15 EU:C:2016:985), the requirement of control over the in-house entity exercised jointly by the contracting authority benefiting from the transfer of powers and the other contracting authorities which have relinquished the power concerned, it suffices to observe that the 'responsible municipality' model enables contracting municipalities that are parties to an agreement based on that model – despite the fact that they do not hold shares in the in-house entity – to exercise, like the responsible municipality, decisive influence on both the contractor's strategic objectives and important decisions and, therefore, effective, structural and functional control over that entity (see, by analogy, judgments of 13 October 2005, *Parking Brixen*, C-458/03, EU:C:2005:605, paragraph 65;

of 11 May 2006, *Carbotermo and Consorzio Alisei*, C-340/04, EU:C:2006:308, paragraph 36; of 29 November 2012, *Econord*, C-182/11 and C-183/11, EU:C:2012:758, paragraph 27; and of 8 May 2014, *Datenlotsen Informationssysteme*, C-15/13, EU:C:2014:303, paragraph 26).

71 As regards the second condition referred to in paragraph 66 of this judgment, namely that the contractor must carry out the essential part of its activities for the benefit of the contracting authority or authorities which control it, it must be observed that, where an undertaking is controlled by several authorities, that condition may be satisfied if that undertaking carries out the essential part of its activities with those authorities taken as a whole and not merely with one of those authorities in particular (see, to that effect, judgment of 11 May 2006, *Carbotermo and Consorzio Alisei*, C-340/04, EU:C:2006:308, paragraphs 70 and 71). That requirement is designed to ensure that Directive 2004/18 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. 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 (judgment of 8 December 2016, *Undis Servizi*, C-553/15, EU:C:2016:935, paragraphs 32 and 33 and the case-law cited).

72 It is therefore necessary to consider whether services awarded to an in-house entity pursuant to two cooperation agreements which each, first, transfer powers to the same responsible municipality, second, relate to different services, third, do not involve the same parties and, fourth, are intended to cover both the needs of the contracting authority itself and those of the other contracting authorities which are parties to those agreements, may be treated as activities carried out for the benefit of the contracting authority.

73 Subject to verification by the national court, the information available to the Court, referred to in paragraphs 10, 24 to 26, 29 to 31 and 33 of this judgment, indicates that the implementation of each of the two cooperation agreements at issue in the main proceedings appears to entail a number of safeguards such as to prevent the in-house entity from becoming market-oriented and gaining a degree of independence that would render tenuous the control exercised by the City of Porin and its contractual partners (see, by analogy, judgment of 13 November 2008, *Coditel Brabant*, C-324/07, EU:C:2008:621, paragraph 36).

74 Since those cooperation agreements contain sufficient safeguards to protect against any harm to competition, it is immaterial that the personal and material scope of those agreements does not coincide.

75 As a result, in order to determine whether the in-house entity carries out the essential part of its activities for the benefit of the contracting authority or authorities controlling it, account must be taken of all the activities which it carries out under the two cooperation agreements at issue in the main proceedings.

76 Thus, in the circumstances of the main proceedings, in calculating the share of Porin Linjat's turnover derived from operating the services at issue in the main proceedings, the turnover realised by that company at that city's behest under the healthcare services cooperation agreement and the public transport cooperation agreement with a view to meeting that city's own needs, must be added to the turnover realised by that company at the behest of the municipalities that are parties to those agreements.

77 In the light of the foregoing considerations, the answer to the second and fourth questions is that Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that a cooperation agreement under which the municipalities which are parties to that agreement transfer to one among them responsibility for organising services for the benefit of those municipalities allows that municipality, in awards made subsequent to that transfer, to be regarded as a contracting authority and empowers it to entrust to an in-house entity, without a prior call for competitive tendering, services fulfilling not only its own needs but also those of the other municipalities that are parties to that agreement whereas, without that transfer of powers, those municipalities would have had to fulfil their own needs themselves.

The third question

78 In the light of the answer given to the first question, there is no need to answer the third question.

Costs

79 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 1(2)(a) 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 an agreement under which the municipalities which are parties to that agreement entrust to one among them responsibility for organising services for the benefit of those municipalities is excluded from the scope of Directive 2004/18 on the ground that it constitutes a transfer of powers for the purposes of Article 4(2) TEU as interpreted in the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985).**

2. **Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that a cooperation agreement under which the municipalities which are parties to that agreement transfer to one among them responsibility for organising services for the benefit of those municipalities allows that municipality, in awards made subsequent to that transfer, to be regarded as a contracting authority and empowers it to entrust to an in-house entity, without a prior call for competitive tendering, services fulfilling not only its own needs but also those of other municipalities that are parties to that agreement whereas, without that transfer of powers, those municipalities would have had to fulfil their own needs themselves.**

[Signatures]