



Reports of Cases

OPINION OF ADVOCATE GENERAL

RANTOS

delivered on 30 April 2025¹

Case C-692/23

AVR-Afvalverwerking BV

v

**NV BAR-Afvalbeheer,
Gemeente Barendrecht,
Gemeente Albrandswaard,
Gemeente Ridderkerk,
NV Irado,
Afvalsturing Friesland NV**

(Request for a preliminary ruling from the Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands))

(Reference for a preliminary ruling – Approximation of laws – Public procurement – Directive 2014/24/EU – Article 12(3) – Public contracts awarded ‘in-house’ – Conditions – Threshold of the activities of the controlled legal person carried out in the performance of tasks entrusted to it by the contracting authorities – Consideration of the turnover of affiliated undertakings within a group – Consideration of the turnover achieved through activities carried out on behalf of the contracting authorities)

Introduction

1. The present request for a preliminary ruling concerns the interpretation of point (b) of the first subparagraph of Article 12(3) and Article 12(5) of Directive 2014/24/EU on public procurement.²
2. This request was made in proceedings between AVR-Afvalverwerking BV (‘AVR’) and Gemeente Barendrecht (Municipality of Barendrecht, Netherlands), Gemeente Albrandswaard (Municipality of Albrandswaard, Netherlands), Gemeente Ridderkerk (Municipality of Ridderkerk, Netherlands) (together, ‘the BAR municipalities’), NV BAR-Afvalbeheer (‘BAR’), NV Irado (‘Irado’) and Afvalsturing Friesland NV (‘AF’), together, ‘the defendants in the main proceedings’, concerning public contracts for the collection and processing of residual household waste in the BAR municipalities which were directly awarded to Irado and AF under the ‘in-house’ exception.

¹ Original language: French.

² 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).

3. As a reminder, in accordance with that exception, established by the Court in the judgment in *Teckal*³ and subsequently codified, inter alia, in Article 12 of Directive 2014/24,⁴ public contracts awarded to controlled legal persons by the contracting authority are not subject to the application of the public procurement rules where the latter exercises over the legal person concerned a control which is similar to that which it exercises over its own departments and that person carries out the essential part of its activities for the benefit of the contracting authority. The *ratio legis* of that rule lies in the fact that, in such a situation, the contracting authority is in fact acting using its own resources and that the contractor is almost one of its internal departments.⁵ While paragraph 1 of that article lays down the conditions for the application of that exception in the case of contracts awarded by a contracting authority which alone exercises control over the legal person, paragraph 3 thereof extends the same exception to contracts awarded by a contracting authority which exercises such control jointly with other contracting authorities. That is the situation in the present case, in which the legal person concerned (namely AF) is controlled by several Netherlands municipalities, including the BAR municipalities.

4. In that regard, the first subparagraph of Article 12(3) of Directive 2014/24 requires three conditions to be met in order for an in-house⁶ award to be made, including the condition laid down in point (b) of paragraph 3 of that Article, which is the subject of the case at issue in the main proceedings, which requires the controlled legal person to carry out ‘more than 80% of [its] activities’ in the performance of tasks entrusted to it by the controlling contracting authorities (‘the activities condition’). Article 12(5) of that directive states that that ‘percentage of activities’ may, inter alia, be determined on the basis of the ‘average total turnover ... for the three years preceding the contract award’.

5. In that context, the Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands) seeks to ascertain, in essence, whether, where the controlled legal person is part of a group of undertakings – such as AF in the present case – the ‘percentage of activities’ must be calculated solely on the basis of the turnover of that legal person or on the basis of the group’s consolidated turnover.

6. While the Court has already had occasion to clarify the scope of the in-house exception following its codification by Directive 2014/24,⁷ in the context of the present case, it is being asked, for the first time, about the specific application of the activities condition and the relevance, for that purpose, of other areas of EU law, in particular the concept of ‘undertaking’ within the meaning of EU competition law or that of ‘consolidated financial statements’ in accounting law under Directive 2013/34/EU.⁸

³ See judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562, paragraph 50).

⁴ See recital 31 of Directive 2014/24. See also judgment of 22 December 2022, *Sambre & Biesme and Commune de Farciennes* (C-383/21 and C-384/21, ‘the judgment in *Sambre*’, EU:C:2022:1022, paragraph 43). That exception was also codified in Article 28 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).

⁵ See, in that regard, first sentence of recital 5 of Directive 2014/24 and judgment of 8 December 2016, *Undis Servizi* (C-553/15, EU:C:2016:935; ‘the judgment in *Undis Servizi*’, paragraph 30 and the case-law cited).

⁶ Directive 2014/24 does not expressly use the terms ‘internal’ and ‘in-house’ or ‘quasi-internal’ and ‘quasi-in-house’ but they are now generally used in practice and in the legal literature. See, on that terminology, Opinion of Advocate General Hogan in *Irgita* (C-285/18, EU:C:2019:369, point 38 and the case-law cited).

⁷ See, inter alia, judgments of 3 October 2019, *Irgita* (C-285/18, EU:C:2019:829; ‘the judgment in *Irgita*’); of 28 May 2020, *Informatikgesellschaft für Software-Entwicklung* (C-796/18, EU:C:2020:395); of 4 June 2020, *Remondis* (C-429/19, EU:C:2020:436; ‘the judgment in *Remondis*’); of 12 May 2022, *Comune di Lerici* (C-719/20, EU:C:2022:372), and the judgment in *Sambre*.

⁸ Directive of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ 2013 L 182, p. 19).

Legal framework

7. Recitals 5, 31 and 32 of Directive 2014/24 state:

‘(5) It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive. ...

...

(31) There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules.

Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union. The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules. ...

It should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors.

(32) Public contracts awarded to controlled legal persons should not be subject to the application of the procedures provided for by this Directive if the contracting authority exercises a control over the legal person concerned which is similar to that which it exercises over its own departments, provided that the controlled legal person carries out more than 80% of its activities in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority, regardless of the beneficiary of the contract performance.

The exemption should not extend to situations where there is direct participation by a private economic operator in the capital of the controlled legal person since, in such circumstances, the award of a public contract without a competitive procedure would provide the private economic operator with a capital participation in the controlled legal person an undue advantage over its competitors. ... It should further be clarified that the decisive element is only the direct private participation in the controlled legal person. Therefore, where there is private capital participation in the controlling contracting authority or in the controlling contracting authorities, this does not preclude the award of public contracts to the controlled legal person, without applying the procedures provided for by this Directive as such participations do not adversely affect competition between private economic operators.

...’

8. Article 2 of that directive, entitled ‘Definitions’, provides, in paragraph 1 thereof:

‘For the purposes of this Directive, the following definitions apply:

- (1) “contracting authorities” means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;

...

- (5) “public contracts” means 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;

...

- (10) “economic operator” means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market;

...’

9. Article 12 of that directive, entitled ‘Public contracts between entities within the public sector’, provides:

‘1. 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.

...

3. A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled.

- (a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;
- (b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; 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.

For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:

- (i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;
- (ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and
- (iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

...

5. For the determination of the percentage of activities referred to in point (b) of the first subparagraph of paragraph 1, point (b) of the first subparagraph of paragraph 3 and point (c) of paragraph 4, the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.

...'

The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

10. In 1995, the municipalities of the province of Friesland (Netherlands) established the joint non-profit waste-processing organisation AF. After that date, other municipalities situated outside Friesland also became shareholders.

11. AF is at the head of a group of subsidiaries, some of which, in the view of the referring court, operate in a field other than the performance of the tasks entrusted to AF or those subsidiaries by AF's shareholder municipalities⁹. AF prepares consolidated annual accounts which, in accordance with Article 22 of Directive 2013/34, include its own financial data and those of its subsidiaries over which it may exercise control or which are under its sole management.

12. In addition, AF itself operates a landfill site ('the landfill at issue') on behalf of the municipalities of the province of Friesland. The landfill receives residual non-household waste,¹⁰ inter alia, industrial waste and waste from municipal projects, such as soil remediation in connection with building construction and asbestos removal.

13. In 2000, three municipalities in the province of South Holland (Netherlands) founded the non-profit organisation Irado to carry out, inter alia, their waste management. In 2017, Irado became a shareholder in AF and, since 1 February 2017, has had AF process the residual household waste that it collects in the three abovementioned municipalities.

14. In 2015, the BAR municipalities, which are also located in the province of South Holland, founded the non-profit organisation BAR with a view to carrying out their waste management.¹¹

15. Until 31 December 2019, each of the BAR municipalities had concluded an agreement with different waste processing undertakings. On the basis of those agreements, AVR, a commercial undertaking specialising in that sector, processed the residual household waste of those municipalities, partly as a subcontractor.

16. In 2019, the BAR municipalities decided that BAR would acquire a stake in Irado, which would be responsible for collecting and processing their residual household waste.

17. On 13 December 2019, Irado and AF concluded a contract with effect from 1 January 2020 for the delivery, transport and processing of residual household waste from the BAR municipalities ('the Irado-AF award').

18. On 20 December 2019, BAR and Irado concluded a contract which also covered the processing of residual household waste from the BAR municipalities ('the BAR-Irado award').

19. On 31 December 2019, BAR became a shareholder in Irado.

20. AVR brought an action before the rechtbank Den Haag (District Court, The Hague, Netherlands), seeking, primarily, the annulment or, in the alternative, termination or non-performance of the awards referred to in points 17 and 18 of the present Opinion on the ground that the conditions for an in-house award are not satisfied. That action also sought an order for a call for tenders for those contracts if the BAR municipalities still wished to award them.

⁹ I note that, at the hearing, AF nevertheless asserted that its subsidiaries do not perform any activities other than those carried out for AF's shareholders.

¹⁰ That waste is not waste which is prohibited from going to landfill under Article 5(1) to (4) of Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste (OJ 1999 L 182, p. 1).

¹¹ In particular, regarding the measures required to achieve the objectives set out in Article 11 of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3).

21. Following the dismissal of that action on the ground that the conditions for an in-house award were satisfied, AVR brought an appeal against that judgment before the Gerechtshof Den Haag (Court of Appeal, The Hague), which is the referring court.

22. That court states that it is common ground between the parties that the two abovementioned awards fall, in principle, within the scope of the obligation to call for competition laid down in Directive 2014/24, unless the in-house exception may be applied.

23. Accordingly, that court considers that, for the purpose of resolving the dispute before it, it is necessary, in essence, to assess whether, in its relationship with the contracting authorities controlling it, AF satisfies the requirements laid down in point (b) of the first subparagraph of Article 12(3) and the first subparagraph of Article 12(5) of that directive. In accordance with the first of those provisions, the legal person to which the contract is awarded must carry out more than 80% of its activities in the performance of tasks entrusted to it by its controlling contracting authorities. The second provision states that that percentage of activities is to be determined, *inter alia*, on the basis of average total turnover.

24. In that regard, that court has doubts, in particular, about two aspects.

25. First, it asks whether, for the purpose of calculating the turnover to be used when assessing whether the condition relating to the threshold of 80% of activities is met, account should be taken only of AF's turnover or also that of the group to which it belongs. In the present case, depending on the way in which the group's consolidated turnover is considered, that threshold is either reached or not reached.

26. In that regard, the referring court notes that the defendants in the main proceedings submit that, since point (b) of the first subparagraph of Article 12(3) of Directive 2014/24 expressly refers to the activities of the legal person to which the public contract is awarded, the relevant turnover can only be that of that legal person itself, namely AF. To use the consolidated turnover of the group to which it belongs would constitute an application *contra legem* of that provision. Moreover, they claim that consolidated turnover is not a good indicator since the doctrine of consolidation in accounting law is too technical and complex. AVR, on the other hand, argues that the turnover of the group must be taken into account since it is the only way to take account of the factual and economic reality of a person belonging to a group.¹² Otherwise, a legal person controlled by contracting authorities could circumvent the requirement laid down in point (b) of the first subparagraph of Article 12(3) of that directive by operating as part of a group, within which that legal person itself carries out more than 80% of its activities for the benefit of those contracting authorities, while having one or more undertakings in that group operate on the free market.

27. Secondly, that court considers that, even if the Court were to consider that only AF's unconsolidated turnover must be taken into account, it would then be necessary to determine whether it had to take account of AF's turnover from operating the landfill as turnover achieved in the performance of the tasks entrusted to it by the contracting authority. In that regard, the referring court points out that AVR argues that landfills of industrial waste located in the Netherlands are partly operated by private economic operators, with the result that, since in that context AF operates in competition with those operators, the turnover related to the landfill should not be taken into account. The defendants in the main proceedings, for their part, claim

¹² In support of that approach, AVR refers to the judgment of 11 May 2006, *Carbotermo and Consorzio Alisei* (C-340/04, 'the judgment in *Carbotermo*', EU:C:2006:308, paragraphs 60 to 62), and the judgment in *Undis Servizi* (paragraph 33).

that AF's turnover in respect of the landfill at issue derives from the performance of the tasks entrusted to it by the contracting authorities and that it should therefore be taken into account, irrespective of whether that turnover is achieved in connection with third-party undertakings who deposit their waste there.

28. In those circumstances, the Gerechtshof Den Haag (Court of Appeal, The Hague) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Should the activity criterion set out in point (b) of the first subparagraph of Article 12(3) of Directive [2014/24], read in conjunction with Article 12(5) of that directive,

be interpreted as meaning that,

where the percentage of activities referred to in those provisions is determined on the basis of turnover and the controlled legal person is part of a group,

only the turnover of the controlled legal person itself should be taken into consideration, or also the turnover of affiliated or non-affiliated companies within the group, such as:

(i) the consolidated turnover in which the turnover of the relevant legal person is to be added to that of other group entities pursuant to the national transposition of Articles 22 and 24 of Directive [2013/34]; or

(ii) the turnover of the entities with which the controlled legal person constitutes an economic unit within the meaning of the concept of “undertaking” under EU competition law?

(2) If the answer to Question 1 is that only the turnover of the controlled legal person itself should be taken into consideration, should the activity criterion referred to in that question

be interpreted as meaning that

the turnover derived from third-party users who dispose of waste in a landfill which the controlled legal person operates on behalf of controlling contracting authorities is to be regarded as turnover achieved in the performance of tasks entrusted to that legal person by those controlling contracting authorities, having regard to the fact that the controlled legal person competes, *inter alia*, with private parties in operating the landfill?’

29. Written observations were submitted by AVR, AF, Irado, BAR, the BAR municipalities, the Italian and Austrian Governments and the European Commission. Those parties, with the exception of the Austrian Government, also presented oral argument at the hearing held on 5 February 2025.

Analysis

Preliminary observations

30. The present case concerns the conditions relating to in-house awards, namely direct awards of public contracts without a call for competition where the contracting authorities exercise joint control over the legal person concerned, in accordance with Article 12(3) of Directive 2014/24.

31. As a reminder, that provision stipulates that a public contract awarded by a contracting authority to a legal person governed by private or public law falls outside the scope of that directive where, first, the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own activities (*first condition*); secondly, more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by those authorities (*second condition*), and, thirdly, there is, in principle, no direct private capital participation in that controlled legal person (*third condition*).

32. In the present case, the questions raised by the referring court relate exclusively to the second condition and arise from a dispute concerning the processing of household waste in the BAR municipalities through a relatively complex legal structure.

33. In view of that complexity, it seems appropriate to me, in the first place, to provide clarification which will better frame those questions. Thus, the subject matter of the dispute in the main proceedings relates, in essence, to the lawfulness of the direct award, by the BAR municipalities to AF, of a contract for the delivery, transport and processing of residual household waste from those municipalities by means of a detailed arrangement designed to establish the BAR municipalities' joint control over AF through two intermediate entities, BAR and Irado. More specifically, the BAR municipalities initially founded BAR, a non-profit organisation, to carry out their waste management. BAR then awarded Irado, under an in-house award, a contract for the collection and processing of residual household waste from the three municipalities concerned (the BAR-Irado award). Irado, for its part, is a non-profit organisation founded by three other municipalities in the same province as the BAR municipalities for the purpose of carrying out the waste management of those other municipalities. Subsequently, Irado also awarded a contract directly to AF for the delivery, transport and processing of residual household waste from the BAR municipalities (the Irado-AF award). AF, for its part, is a joint non-profit waste-processing organisation founded by municipalities in the province of Friesland and other municipalities which are not situated in that province, which subsequently also became shareholders in that organisation. AF is at the head of a group of subsidiaries whose activities include generating electricity and steam from the combustion of residual waste, and organic fermentation of such waste in order to obtain biogas. In addition, AF itself operates a landfill on behalf of the municipalities of the province of Friesland. That landfill receives residual non-household waste, inter alia, industrial waste and waste from municipal projects, such as soil remediation in connection with building construction and asbestos removal.

34. The dispute in the main proceedings was brought before the referring court, on appeal, by AVR, a commercial undertaking active in the field of waste processing, in order to challenge the legality of the BAR-Irado and Irado-AF awards under the in-house exception.

35. In determining whether it is possible to rely on the in-house exception, that court points out that it is necessary to assess whether AF, in its relations with BAR and Irado, satisfies the second condition laid down in point (b) of the first subparagraph of Article 12(3) of Directive 2014/24, according to which AF must carry out more than 80% of its activities in the performance of tasks entrusted to it by AF's shareholders, namely Irado and the other Friesland municipalities. Such an assessment is contingent on two elements: first, the turnover taken into account in assessing the activities condition, the threshold of 'more than 80%' of the activities being reached only by AF's turnover taken in isolation and not by that of the group to which it belongs (*first question referred for a preliminary ruling*) and, secondly, whether the turnover achieved by AF's landfill is considered turnover generated in the performance of the tasks entrusted to AF by the controlling shareholders (*second question referred for a preliminary ruling*).

36. Having made those clarifications, I consider it appropriate, in the second place, before examining the substance of those questions, to highlight certain aspects relating to the application of the in-house exception which, in my view, also appear to be relevant for the purposes of the present analysis, without, however, being the subject of the present reference for a preliminary ruling.

37. First, I note that the referring court does not in any way refer to the first condition laid down in point (a) of the first subparagraph of Article 12(3) of Directive 2014/24, which requires that contracting authorities exercise jointly a control over that legal person which is similar to that which they exercise over their own departments. As the Court pointed out in its judgment in *Sambre*, unlike paragraphs 1 and 2 of that article, paragraph 3 thereof does not provide that the conditions relating to control of the contracting authority over the legal person to whom the contract is awarded may be satisfied indirectly, namely where the control is exercised by another legal person, which is itself controlled in the same way by the contracting authority.¹³ In addition, the concept of 'joint control' over the legal person, in the context of the application of the aforementioned paragraph 3, has specific features which are set out in the second subparagraph of that provision, which lays down three cumulative conditions relating to the following elements: (i) the composition of the decision-making bodies of the controlled legal person; (ii) the ability to exercise decisive influence over the objectives and the significant decisions of that person; and (iii) the pursuit of interests consistent with those of the contracting authorities.¹⁴

38. In that regard, I note, in the present case, that it is not apparent from the information in the file before the Court that the BAR municipalities participate directly in the composition of AF's decision-making bodies, so as to be able to exert a decisive influence on the significant decisions taken by the latter. Rather, it appears that the BAR municipalities participate indirectly through Irado, which is controlled by BAR, which, in turn, is jointly controlled by the BAR municipalities.¹⁵ Nevertheless, in a situation of such indirect control through two intermediate entities, I find it difficult to understand how that type of cascade control could be distinguished from the indirect control which the Court has expressly excluded in the context of joint audits. Moreover, that type of cascade control would lead, de facto, to a dilution of the control initially exercised, thus departing from the *ratio legis* of the in-house exception, which is based on the idea that contracting authorities perform their public service tasks using their own

¹³ See the judgment in *Sambre* (paragraph 61).

¹⁴ See the judgment in *Sambre* (paragraphs 62 to 64). I note that, in the Commission's proposal for a directive, the fulfilment of those three conditions formed a 'presumption of control' and not an established 'control' (see the second subparagraph of Article 11(3) of that proposal COM(2011) 896 final – 2011/0438 (COD)).

¹⁵ Moreover, the Irado-AF award does not concern the performance of tasks for which Irado is responsible, but those which have been delegated to it by BAR. In that regard, I note that, in the national proceedings, AVR challenged the fact that BAR exercised effective control over Irado, given that BAR has very limited voting rights in Irado.

resources.¹⁶ It will therefore be for the referring court to ascertain whether, in the circumstances of the present case, the control exercised over AF by the BAR municipalities constitutes actual control similar to that which they exercise over their own departments.

39. Secondly, I note that the order in which the various relationships at issue in the main proceedings were established also raises some questions as to when the conditions of the two awards at issue were met. The conditions for the proper application of a provision derogating from the EU legislation on public procurement must, in principle, be met at the time the award contract is concluded.¹⁷ In the present case, as is apparent from points 17 to 19 of the present Opinion, neither the BAR municipalities nor BAR itself held any shares in Irado when the two contracts at issue were awarded. The Irado-AF award occurred on 13 December 2019 and the BAR-Irado award occurred on 20 December 2019, whereas BAR – and thus, indirectly, the BAR municipalities – did not become a shareholder in Irado until 31 December 2019. Thus, the question of the application of Article 12 of Directive 2014/24 to the dispute in the main proceedings depends on whether, having regard to the chronological order in which those contracts were concluded, they must be assessed as a whole, with the result that the time at which BAR became a shareholder in Irado, namely 31 December 2019, is taken into account as the time of conclusion of the two contracts at issue.¹⁸ It should be noted in that regard that in order to determine whether a multi-stage operation should be categorised as a ‘public contract’, the operation must be examined as a whole, taking account of its purpose.¹⁹ Therefore, if the relevant time for the purpose of taking into account the conditions relating to the in-house exception is 31 December 2019, such an application would require, at the very least, confirmation that the BAR-Irado award entered into force after that date, namely on 1 January 2020.²⁰

40. Thirdly and in the context of that same issue, although the referring court states that the questions referred for a preliminary ruling relate to the two direct awards, namely the BAR-Irado and the Irado-AF awards, it is difficult to see why AF’s activities would be relevant, in the present case, to an assessment of the legality of the BAR-Irado award when AF is not a party to the contract relating to that deal. Those two awards should be examined separately; the BAR-Irado award should be assessed on the basis of Irado’s turnover.²¹

41. In the third and last place, as regards the questions asked by the referring court, I would point out that, as the Court has already held, the main objective of the rules of EU law in the field of public contracts, namely the free movement of goods and services and the opening-up of undistorted competition in all the Member States, implies the obligation to apply the rules on the

¹⁶ See, to that effect, the judgments in *Sambre* (paragraph 72) and in *Carbotermo* (paragraphs 39 and 40), and point 3 of the present Opinion.

¹⁷ See judgment of 12 May 2022, *Comune di Lerici* (C-719/20, EU:C:2022:372, paragraph 40).

¹⁸ See, by analogy, judgment of 10 November 2005, *Commission v Austria* (C-29/04, EU:C:2005:670, paragraph 38).

¹⁹ See, to that effect, judgment of 28 May 2020, *Informatikgesellschaft für Software-Entwicklung* (C-796/18, EU:C:2020:395, paragraphs 38 and 39 and the case-law cited).

²⁰ See, in that regard, point 17 of the present Opinion. It would also have been useful to know if the BAR-Irado award contract had also stated that BAR would become a shareholder in Irado on 31 December 2019.

²¹ The turnover of AF could only be relevant if it were established, in addition to the fact that Irado exercised a control over AF comparable to the control exercised over its own services, that the sole purpose of the BAR – Irado award was to award the waste-processing contract to AF, with the result that the two awards would be regarded as a whole. However, this does not appear to be the case, since, as is apparent from the oral argument presented by BAR, the agreement for cooperation between BAR and Irado was much broader and more comprehensive and concerned not only the processing of residual household waste in the BAR municipalities but also a series of other services (such as, among others, services of financial assistance and of human resources management).

award of public contracts where a contracting authority is planning to enter into a contract for pecuniary interest with a separate legal body, whether or not that body is itself a contracting authority. Any exception to the application of that obligation must be interpreted strictly.²²

42. It is in the light of that case-law of the Court that those questions must be analysed, in particular since, as is apparent from recital 31 of Directive 2014/24, the clarification to be provided on contracts concluded between entities in the public sector must be guided by the principles set out in that case-law.²³

The first question referred for a preliminary ruling

43. By its first question, the referring court seeks, in essence, to ascertain whether point (b) of the first subparagraph of Article 12(3) of Directive 2014/24, read in conjunction with the first subparagraph of Article 12(5) thereof, must be interpreted as meaning that the condition that the controlled legal person carries out more than 80% of its activities in the performance of the tasks entrusted to it by the controlling contracting authorities, where the percentage of activities referred to in those provisions is determined on the basis of turnover and that legal person in turn controls other undertakings with which it forms a group, must be assessed solely on the basis of the turnover of that legal person or that of that group. In that second case, that court asks whether it is possible to take into account the consolidated turnover of the group, in accordance with Articles 22 and 24 of Directive 2013/34, or that of the entities with which the controlled legal person constitutes an ‘economic unit’ within the meaning of the concept of ‘undertaking’ under EU competition law.

44. As a reminder, the first subparagraph of Article 12(5) of Directive 2014/24 provides that the ‘percentage of activities’ referred to in point (b) of the first subparagraph of Article 12(3) of that directive is to be determined, inter alia, ‘[by taking into consideration] the average total turnover ... for the three years preceding the contract award’. In the present case, the referring court states that, on the basis of the consolidated turnover of the group to which AF belongs, that ‘percentage of activities’ is less than 80% and that, therefore, the awards at issue in the main proceedings do not satisfy the second condition laid down in that provision. On the other hand, on the basis of AF’s (unconsolidated) turnover alone, the ‘percentage of activities’ is higher than 80% and the BAR municipalities could legitimately rely on the in-house exception, since that higher rate attests to the fact that AF carries out the essential part of its activities on behalf of the BAR municipalities and the other contracting authorities that control it.

45. In that regard, I would point out at the outset that neither the concept of ‘percentage of activities’ nor that of ‘turnover’ in Article 12(5) is defined or specified in Directive 2014/24.²⁴

46. The Court has consistently held that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the

²² See, to that effect, judgment of 13 October 2005, *Parking Brixen* (C-458/03, EU:C:2005:605, paragraph 63); and the judgment in *Undis Servizi* (paragraphs 28 and 29 and the case-law cited); and Opinion of Advocate General Cosmas in *Teckal* (C-107/98, EU:C:1999:344, point 65).

²³ See, to that effect, the judgment in *Sambre* (paragraph 66 and the case-law cited).

²⁴ However, I observe that 80% is a minimum threshold and this threshold is set higher in certain Member States (see Hartung, W. and Kuźma, K., ‘Article 12 – Public contracts between entities within the public sector’, in Caranta, R. and Sanchez-Graells, A. (eds.), *European Public Procurement*, Edward Elgar Publishing, 2021, p. 135).

European Union; that interpretation must take into account not only its terms, but also its context and the objective pursued by the relevant legislation. The origins of a provision of EU law may also provide information relevant to its interpretation.²⁵

47. In the first place, *as regards the wording* of the first subparagraph of Article 12(5) of Directive 2014/24, it is apparent from that provision that the percentage of activities is to be '[determined by taking into consideration] the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant *legal person* or contracting authority with respect to services, supplies and works for the three years preceding the contract award'.²⁶ In addition, the second subparagraph of that provision provides that 'where, because of the date on which the relevant *legal person* or contracting authority was created or commenced activities or because of a reorganisation of its activities, the turnover ... [is] either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.'²⁷

48. It follows from the wording of those provisions that the turnover relates only to the 'legal person' or to the 'contracting authority' concerned by the award. That is explained by the very nature of Article 12(5) of Directive 2014/24, which seeks to clarify the manner in which the percentage of activities referred to in paragraphs 1, 3 and 4 of Article 12 is to be determined, which also, when referring to the activity criterion, use the terms 'legal person'²⁸ or 'adjudicating authority'.²⁹ For the purposes of the present analysis, only the reference to 'legal person' is relevant.

49. It therefore follows from a literal interpretation of the relevant provisions, on which the defendants in the main proceedings rely, that the concept of 'turnover', within the meaning of those provisions, should be assessed solely on the basis of the turnover of the legal person concerned, in the present case AF, and not that of the group to which it belongs.

50. Nevertheless, I consider that that finding, based on a literal interpretation, is not in itself sufficient to justify not taking into account the turnover of a group of undertakings, particularly in the light of the context and objectives pursued by Article 12 of Directive 2014/24. In my view, it is necessary not to be overly formalistic in interpreting those terms. Such an approach would, to my mind, run counter to the case-law of the Court, which invites the national court, when assessing whether the activity of a contractor is principally devoted to the controlling contracting authorities, to take into account 'all the facts of the case, both qualitative and quantitative'.³⁰

51. Thus, in the second place, *as regards the context and origins* of the first subparagraph of Article 12(5) of Directive 2014/24, I would point out that, under point 5 of Article 2(1) of that directive, 'public contracts' are defined as 'contracts for pecuniary interest concluded in writing between *one or more economic operators* and one or more contracting authorities'.³¹ The concept of 'economic operator', for its part, includes, in accordance with point 10 of that provision, '*any natural or legal person or public entity or group of such persons and/or entities ... which offers*

²⁵ See, to that effect, the judgments in *Remondis* (paragraphs 23 and 24 and the case-law cited) and in *Sambre* (paragraph 54 and the case-law cited).

²⁶ Emphasis added.

²⁷ Emphasis added.

²⁸ See point (b) of the first subparagraph of paragraph 1, paragraph 2, and point (b) of the first subparagraph of paragraph 3 of Article 12 of Directive 2014/24.

²⁹ See paragraph 2 and point (c) of paragraph 4 of Article 12 of Directive 2014/24.

³⁰ See the judgment in *Undis Servizi* (paragraphs 31 and 32 and the case-law cited).

³¹ Emphasis added.

the execution of works and/or a work, the supply of products or the provision of services on the market’.³² Therefore, it cannot be ignored, in the context of the analysis of Article 12 of that directive, that that provision, in so far as it refers to ‘public contracts between entities within the public sector’, uses the terminology used to define ‘public contracts’, irrespective of whether it constitutes an exception to the application of the rules governing their award. Thus, clearly, in paragraphs 1 and 3, Article 12 refers to ‘*a legal person governed by private or public law*’, in order to ensure consistency of terminology with the concept of ‘economic operator’, which also refers, in particular, to ‘legal persons’. Furthermore, since ‘public contracts’ are defined as ‘contracts for pecuniary interest’, even in the context of the exception provided for in Article 12(3) of that same directive, the award must be made to a person who is party to the contract. That contextual analysis therefore explains the choice made by the EU legislature to use the concept of ‘legal person’ and not a broader concept, such as ‘undertaking’ or ‘group of undertakings’, which would make it possible, on the basis of the wording of that provision alone, to conclude that the scope of the relevant turnover may be broader than that of the legal person concerned. While it is true that that legislature could have referred to the concept of ‘undertaking’, it is not apparent from that contextual analysis, or even from the *travaux préparatoires* for Directive 2014/24, that the term ‘legal person’ was chosen deliberately as counterpoint to the concept of ‘undertaking’ or that those two concepts cannot coexist.³³

52. In the third place, *as regards the objectives pursued* by Article 12 of Directive 2014/24, as the Court has explained, the requirement that the legal person perform the essential part of its activities with the controlling contracting authority or authorities is designed to ensure that that directive remains applicable in the event that that legal person is active in the market, and is therefore liable to be in competition with other undertakings. Such a legal person would not necessarily be deprived of its freedom of action merely because the decisions concerning it are controlled by the controlling contracting authorities, if it can still carry out a large part of its economic activities with other operators. By contrast, the Court has further stated that where the same legal person’s services are mostly intended for that authority or those authorities alone, it seems justified that that person should not be subject to the restrictions of that directive, since they are in place to preserve a state of competition which, in that case, no longer has any *raison d’être*.³⁴ In accordance with recital 31 of that directive, the exception to the obligation to call for competition may not lead to a distortion of competition in relation to private economic operators by placing a private provider of services in a position of advantage vis-à-vis its competitors.

53. It is that objective which should, in my view, guide the analysis when assessing the scope of the relevant turnover. Accordingly, the choice between consolidated or unconsolidated turnover, in the context of the application of the second condition laid down in Article 12(3) of Directive 2014/24, must be made in relation to the capacity of the latter to disclose whether the controlled legal person carries out a significant part of its economic activity under the controlling contracting authorities or, conversely, that it carries out only a marginal part of its activity with other private operators.³⁵

³² Emphasis added.

³³ See Article 11 of the Commission’s proposal for a directive ((COM (2011) 896 final – 2011/0438 (COD)).

³⁴ See the judgment in *Undis Servizi* (paragraph 33 and the case-law cited), and also Opinion of Advocate General Léger in *ARGE* (C-94/99, EU:C:2000:330, point 77).

³⁵ See the judgment in *Carbotermo* (paragraph 63).

54. In that regard, I consider that where, as in the present case, the controlled legal person is at the head of a group, and therefore acts as the parent undertaking, the consolidated turnover of that group is more likely to reflect whether or not the services provided by that legal person are substantially intended for the contracting authority.

55. First, in principle, in such a situation, the consolidated turnover provides a more accurate picture of the real and effective size of that controlled legal person, thus making it possible to assess whether it is likely to enter into competition with other undertakings, even indirectly, namely with undertakings that are competitors of the subsidiaries which it controls. As a result of that control over the subsidiaries, from the point of view of competition, the turnover generated by the subsidiaries may be ‘attributed’ to the parent undertaking, with the result that it seems logical that the assessment of the percentage of activities carried out in the performance of the tasks entrusted to it by those contracting authorities should be made in relation to that consolidated turnover. It cannot be ruled out that the activities of the group’s controlled subsidiaries may be inextricably linked, if not indispensable, to the performance of the tasks entrusted to the parent undertaking, with the result that the turnover generated by those subsidiaries must be taken into account as turnover achieved in the performance of those tasks.³⁶

56. Secondly, if a parent undertaking is supported by an in-house award, then it is perfectly conceivable that a subsidiary, even if it is active in another market, will benefit from it from a material point of view, by placing it in a position of advantage vis-à-vis its competitors. In practice, that subsidiary could thus use the solvency and the human and material resources of the parent undertaking. In the same vein, a controlled legal person could allow itself to charge higher than market rates to public shareholders and to charge lower prices to non-shareholders through its subsidiaries and, in that way, give rise to unfair competition with regard to private operators providing competing services to non-shareholders.³⁷

57. Thirdly, and most importantly, the choice of consolidated group turnover would limit the risk that public bodies could circumvent the principle of open competition within the meaning of Directive 2014/24 by artificially dividing the structure of the controlled undertakings in order to comply, fictitiously, with the threshold of 80% of activities. Public operators could simply avoid market rules by splitting an undertaking into several subsidiaries in a purely formal manner and assigning to them the part of the turnover achieved on the private market, with the aim of circumventing that threshold. That would lead, in reality, to an unduly large number of exceptions to the application of that directive and, therefore, to a reduction in competition. The objectives pursued by that directive and, in particular, the opening-up to undistorted competition in all the Member States would be jeopardised if it were permissible for contracting authorities to resort to devices designed to conceal the award of public service contracts to semi-public companies.³⁸ The use of consolidated turnover would therefore make it possible to limit the possibility of such circumvention.

58. In the light of the foregoing, since the controlled legal person is a parent undertaking of a group, the ‘average total turnover’ of that controlled legal person, within the meaning of the first subparagraph of Article 12(5) of Directive 2014/24, must be considered the same as the

³⁶ In the present case, I note that it is clear from the file submitted to the Court that waste processing does not appear to be carried out exclusively by AF, but also by subsidiaries involved in the sorting and incineration of that waste. Those activities carried out by AF’s subsidiaries are therefore closely linked and essential for the implementation of the in-house contract.

³⁷ With regard to that risk of cross-subsidisation, I observe that, in the present case, AF has ruled it out, in that, as it explained at the hearing, the rates charged to third parties cannot be lower than the rates paid by the shareholders themselves.

³⁸ See, by analogy, judgment of 10 November 2005, *Commission v Austria* (C-29/04, EU:C:2005:670, paragraph 48).

consolidated turnover of that group. By contrast, the turnover of a group of undertakings is irrelevant where the controlled legal person is only one of the subsidiaries of that group, without any control over the other undertakings in the same group.

59. In the fourth and last place, as regards the questions raised by the referring court concerning, in essence, *the relevance*, for the purpose of determining the consolidated group turnover, *of the provisions of Directive 2013/34 or of the concept of ‘undertaking’ derived from EU competition law*, I consider that a functional approach is preferable for the reasons which I shall expand on in the following paragraphs.

60. First, *as regards Directive 2013/34*, it is clear from recital 31 thereof that ‘consolidated financial statements should present the activities of a parent undertaking and its subsidiaries *as a single economic entity (a group)*. Undertakings controlled by the parent undertaking should be considered as subsidiary undertakings. Control should *be based on holding a majority of voting rights*, but control may also exist *where there are agreements* with fellow shareholders or members. In certain circumstances control may be effectively exercised where the parent holds *a minority or none of the shares in the subsidiary*.’³⁹

61. It follows that that directive covers not only situations of capital control but also contractual and administrative control, so as to encourage a functional approach. Article 22 of that directive provides that Member States are to require parent undertakings to draw up ‘consolidated financial statements’ and a ‘consolidated management report’ where they exercise control over a subsidiary. That control is established on the basis of various elements, namely whether the parent undertaking holds, inter alia, a majority of the shareholders’ or members’ voting rights in a subsidiary; the right to appoint or remove a majority of the members of its administrative, management or supervisory body; or the right to exercise a dominant influence over it under a contract.

62. In that regard, I note, first, that while it is true that the essential objective pursued by the mandatory preparation of ‘consolidated financial statements’ is transparency of accounting and information, that is to say, the need to ensure that the shareholders in the parent undertaking and in the subsidiary and interested third parties, such as investors and contracting partners, have a true and fair view of the economic and financial performance of the undertakings concerned,⁴⁰ it seems to me that, in the light of the elements taken into account in order to draw up the abovementioned monitoring report, the fact that the parent undertaking draws up consolidated financial statements is such as to reveal the existence of a ‘single economic activity’, which appears to be relevant for the purpose of assessing the ‘percentage of activities’. The consolidation rules are ultimately based on a logic common to that underlying the concept of ‘undertaking’ under competition law.

63. Secondly, I note that an interpretation favouring the consideration of annual accounts, as determined by Directive 2013/34, in order to verify the percentage of activities also exists in the legislation on the award of contracts by entities operating in the utilities sector (Directive 2014/25) and the award of concession contracts (Directive 2014/23/EU⁴¹). When verifying whether an undertaking is ‘affiliated’ with a particular contracting entity, and therefore directly or indirectly subject to its dominant influence, those two directives expressly provide that consolidated accounts are a means of carrying out such verification ‘as [easily] ... as

³⁹ Emphasis added.

⁴⁰ See, in that regard, recital 29 of Directive 2013/34.

⁴¹ Directive of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

possible'.⁴² Thus, under those two directives, 'affiliated undertaking' means any undertaking 'the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Directive [2013/34]' and, where the same services are provided by 'more than one undertaking affiliated with the contracting entity with which they *form an economic group*', the required percentages are to be calculated 'taking into *account the total turnover deriving* respectively from the provision of services or works by those affiliated undertakings'.⁴³ There is no reason why those rules should not be applied and interpreted in the same way in the context of Directive 2014/24.⁴⁴

64. Consequently, I consider that the consolidated financial statements under Directive 2013/34 are capable of providing additional information to interpret the activities condition laid down, inter alia, in point (b) of the first subparagraph of Article 12(3) of Directive 2014/24.

65. Such a conclusion cannot, in my view, be called into question by the argument put forward by the defendants in the main proceedings that consolidated turnover is not a good indicator, on the ground that the consolidation rules in accounting law are too technical and complex and are also subject to numerous exceptions. On the contrary, it is precisely in so far as parent undertakings are required to consolidate, with their own accounts, the accounts of the undertakings in which they hold the majority of shareholders' voting rights, in respect of which they can appoint the majority of the members of the administrative body or over which they have the right to exercise a dominant influence, that the scope of consolidation provides a true and fair view of the real and effective size of the undertaking.⁴⁵ Moreover, the very spirit of Directive 2013/34 is to ensure legal certainty by providing a true and fair view of an undertaking's assets and liabilities, financial situation and results, which also contributes to ensuring the effectiveness of Directive 2014/24 by limiting the possibilities of circumventing it.⁴⁶

66. Secondly, *as regards the use of the concepts of 'undertaking' and 'economic unit'* from competition law, I note that EU rules on consolidated accounts are not applicable in a certain number of cases, for instance because of the size of the undertakings involved or because certain conditions relating to their legal form are not met.⁴⁷ Moreover, it cannot be ruled out that a 'controlled legal person' may have recourse, for the performance of the tasks entrusted to it, to another legal person in which the 'controlled legal person' has a minority shareholding, with the result that that undertaking would escape the consolidation obligation. In such a case, an alternative criterion may therefore be envisaged in order to ensure that the activities condition is applied consistently and it might indeed be useful to rely on the concepts of 'undertaking' and 'economic unit' within the meaning of EU competition law. The concept of 'undertaking', which appears in Articles 101 and 102 TFEU, is an autonomous term which designates the perpetrator of an infringement of competition law and covers 'any entity consisting of personal, tangible and intangible elements which is engaged in an economic activity, irrespective of its legal status and

⁴² See recital 39 of Directive 2014/23 and recital 41 of Directive 2014/25.

⁴³ Emphasis added. See, in that regard, Article 13(1) and (6) of Directive 2014/23 and Article 29(1) and (6) of Directive 2014/25.

⁴⁴ See, to that effect, recital 38 of Directive 2014/25. The fact that, unlike Directive 2014/24, those two directives refer expressly to the provisions of Directive 2013/34 is probably explained by the fact that, in the context of those directives, contracting entities are often organised as an economic group which may comprise a series of separate undertakings, and that it is therefore appropriate to exclude from the competition certain contracts awarded to an affiliated undertaking having as its principal activity the provision of services to the group of which it is part and not to offer them on the market (see recital 39 of Directive 2014/25 and recital 38 of Directive 2014/23).

⁴⁵ See also recital 20 of Directive 2013/34, which provides that 'a limited number of layouts for the balance sheet is necessary to allow users of financial statements to better compare the financial position of undertakings within the Union.'

⁴⁶ See, in that regard, recital 9 of Directive 2013/34.

⁴⁷ See Article 23 of Directive 2013/34, which lays down exceptions for 'small groups' and 'medium-sized groups'.

the way in which it is financed’.⁴⁸ Inspired by a functional approach, the Court has considered that the concept of ‘undertaking’ designates an economic unit even if in law that economic unit consists of several persons, natural or legal. In targeting the activities of undertakings, EU competition law enshrines as the decisive criterion the existence of unity of conduct on the market, without allowing the formal separation between various companies that results from their separate legal personalities to preclude such unity for the purposes of the application of the competition rules.⁴⁹ That concept of ‘economic unit’ was developed and applied in the pursuit of a twofold aim: first, so that agreements between entities belonging to the same undertaking would be excluded from the scope of Article 101 TFEU and, secondly, so that, within a group of undertakings, the anticompetitive conduct of a subsidiary could be imputed to the parent undertaking.

67. The first of those two objectives is analogous to the requirements of the concept of ‘legal person’ within the meaning of Article 12 of Directive 2014/24, to the extent that it is also directed at ‘agreements’ – public contracts, which are contracts for pecuniary interest concluded with one or more economic operators – so that if such a legal person, as parent undertaking, forms, together with the subsidiaries which it controls, a single economic unit, then the turnover of that undertaking is indicative of the activities of that legal person and must be taken into consideration in order to monitor compliance with the activities condition (including in the absence of consolidation). Accordingly, the use of alternative criteria to ensure the full effect of the activities condition cannot exclude the application of the concept of ‘undertaking’ within the meaning of competition law (for example, where there is no capital link but only contractual links between undertakings). The concept of ‘economic unit’ in competition law helps to prevent a parent undertaking from being able to escape the effects of that law simply because only its subsidiary commits an infringement. That argument can be made with regard to the activities condition. If the parent undertaking and its subsidiary constitute a single economic unit, then the turnover of that economic unit must be taken into consideration for the purpose of verifying compliance with the activities condition, even in the absence of consolidation.

68. In the light of the foregoing, I propose to answer the first question referred for a preliminary ruling to the effect that point (b) of the first subparagraph of Article 12(3) and the first subparagraph of Article 12(5) of Directive 2014/24 must be interpreted as meaning that the condition that the controlled legal person must carry out more than 80% of its activities in the performance of the tasks entrusted to it by the controlling contracting authorities, where the percentage of activities referred to in those provisions is determined on the basis of turnover and where the controlled legal person is the head of a group for which consolidated accounts are drawn up, must, in principle, be assessed on the basis of the consolidated turnover of that group in accordance with Articles 22 and 24 of Directive 2013/34, or, in particular, in so far as that directive does not apply, on the basis of the criteria derived from the concept of ‘undertaking’ derived from EU competition law.

⁴⁸ See judgment of 27 April 2017, *Akzo Nobel and Others v Commission* (C-516/15 P, EU:C:2017:314, paragraph 47 and the case-law cited). On the concepts of ‘undertaking’ and ‘economic unit’, see my Opinion in *Unilever Italia Mkt. Operations* (C-680/20, EU:C:2022:586, paragraphs 24 to 55 and the case-law cited). See my Opinion in *Finanzamt T II* (C-184/23, EU:C:2024:416, points 1 and 38) on the concept of ‘VAT group’, namely a group formed by persons who are legally independent but closely bound to one another by financial, economic and organisational links.

⁴⁹ See judgment of 6 October 2021, *Sumal* (C-882/19, EU:C:2021:800, paragraph 41 and the case-law cited).

The second question referred for a preliminary ruling

69. By its second question, the referring court asks, in essence, whether point (b) of the first subparagraph of Article 12(3) of Directive 2014/24, read in conjunction with the first subparagraph of Article 12(5) of that directive, must be interpreted as meaning that, in order to determine the turnover of the controlled legal person achieved in the performance of the tasks entrusted to it by the controlling contracting authorities, account must be taken of the turnover achieved from third-party users in markets in which it is also in competition with private operators.

70. As a reminder, in the present case, that court is unsure whether account should be taken of the turnover realised from third-party users who deposit waste in the landfill operated by AF as turnover achieved in the performance of the tasks entrusted to it by the BAR municipalities. While that question is formulated on the assumption that the answer to the first question is that only the turnover of the controlled legal person should be taken into account, *quod non*, it cannot be ruled out that that court may be required to make factual assessments and that it follows that an answer to the second question may be useful to it. I therefore consider it necessary to answer that question.

71. At the outset, I would point out that, unlike the first question referred for a preliminary ruling, that second question does not seek to determine whether the turnover achieved by the AF landfill must be taken into account as turnover generated by AF, since it is common ground that that is the case, but rather whether that turnover must be regarded as forming part of a '[task] entrusted to it by the controlling contracting authorities', within the meaning of point (b) of the first subparagraph of Article 12(3) of Directive 2014/24, and therefore as forming part of the threshold of 80% of turnover devoted to the performance of the tasks entrusted to it by the contracting authority.

72. In that regard, I note that neither that provision nor Article 2(1)(1) of that directive, which defines the concept of 'contracting authorities', specifies what is meant by 'tasks entrusted to it by the controlling contracting authorities'. The assessment of that expression is purely factual in nature. However, while the examination of whether the operation of a landfill falls within the scope of a '[task] entrusted to it by the controlling contracting authorities' is a matter for the referring court alone, I consider that the analysis set out in the following points may be of use to it.

73. In the first place, as the Court held in the judgment in *Carbotermo*, 'the activities of a successful undertaking which must be taken into account are all those activities which that undertaking carries out as part of a contract awarded by the contracting authority, regardless of who the beneficiary is: the contracting authority itself or the user of the services.'⁵⁰ Consequently, the fact that third-party users pay for the landfill service does not, in principle, have any impact on whether turnover is taken into account for the purpose of assessing the 'percentage of activities'. That means that it is irrelevant who benefits from the service, or who finances it; the decisive factor is whether that service actually results from the performance of the tasks entrusted to the legal person by the controlling contracting authorities. If that is the case, the turnover resulting from payments made by third-party users is indeed turnover derived from the performance of the tasks entrusted to it.

⁵⁰ See the judgment in *Carbotermo* (paragraphs 65 and 66) (emphasis added) and recital 32 of Directive 2014/24.

74. In the present case, it would therefore be irrelevant to take account of the fact that the landfill receives waste deposited exclusively by third parties. However, it will be for the referring court to ascertain whether AF has been entrusted with operating the landfill at issue on behalf of the municipalities which control it for the purpose of performing a public service task. It would appear from the order for reference that the landfill at issue receives residual non-household waste, that is to say, *inter alia*, industrial waste and waste from soil remediation. By contrast, the BAR-Irado and Irado-AF awards concern only the processing of the BAR municipalities' household waste.⁵¹ At first sight, those circumstances mean, in the absence of other factual elements, that the tasks carried out by AF in the context of the landfill which it operates do not fall within the scope of the tasks entrusted to it by the controlling contracting authorities, within the meaning of point (b) of the first subparagraph of Article 12(3) of Directive 2014/24.

75. In the second place, the exception relating to in-house awards does not contain any condition limiting its scope to sectors which are not open to competition. The only question to be examined is whether the operation of AF's landfill (including the processing of non-household waste, which is also carried out by private operators) is indeed part of the performance of a task entrusted to AF by the contracting authorities which control it. Accordingly, the fact that AF is in direct competition with private operators is not relevant in itself because the disposal of residual household waste is prohibited by the Netherlands legislation, with only industrial waste permitted to be deposited there, and because, in the Netherlands, the operation of landfills where industrial waste is deposited constitutes an activity carried on in part by private operators.

76. Consequently, I suggest that the reply to the second question referred for a preliminary ruling be that point (b) of the first subparagraph of Article 12(3) and the first subparagraph of Article 12(5) of Directive 2014/24 must be interpreted as meaning that, for the purpose of determining the turnover of the controlled legal person in the performance of tasks entrusted to it by the controlling contracting authorities, account must be taken of the turnover achieved from third-party users in markets in which that legal person also competes with private operators, provided that it is shown that those tasks have actually been entrusted to it by those contracting authorities.

Conclusion

77. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands) as follows:

Point (b) of the first subparagraph of Article 12(3) and the first subparagraph of Article 12(5) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

must be interpreted as meaning that:

- the condition that the controlled legal person must carry out more than 80% of its activities in the performance of the tasks entrusted to it by the controlling contracting authorities, where

⁵¹ More specifically, according to the BAR municipalities, following a consultation organised by BAR concerning a contract for the sustainable processing of household waste, it transpired that AVR was not capable of ensuring the sustainable processing of that waste, *inter alia*, in terms of the minimum guaranteed percentage of sorting for plastic packaging, metal packaging and beverage cartons, with the aim of incinerating as little waste as possible, which justified the in-house allocation to Irado and AF.

the percentage of activities referred to in those provisions is determined on the basis of turnover and where the controlled legal person is the head of a group for which consolidated accounts are drawn up, must, in principle, be assessed on the basis of the consolidated turnover of that group in accordance with Articles 22 and 24 of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, or, in particular, in so far as that directive does not apply, on the basis of the criteria derived from the concept of ‘undertaking’ derived from EU competition law; and

- for the purpose of determining the turnover of the controlled legal person in the performance of tasks entrusted to it by the controlling contracting authorities, account must be taken of the turnover achieved from third-party users in markets in which that legal person also competes with private operators, provided that it is shown that those tasks have actually been entrusted to it by those contracting authorities.