Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 2 April 2020[1]

Case C-3/19

Asmel società consortile a r.l.
v
A.N.A.C. — Autorità Nazionale Anticorruzione,
with the intervention of:
A.N.A.C.A.P. — Associazione Nazionale Aziende Concessionarie Servizi entrate

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling — Public procurement — Central purchasing bodies — Small municipalities — Restriction to only two public-law organisational models for purchasing bodies — Prohibition of the involvement of private capital — Member States' margin of discretion — Territorial restrictions on their activities)

1. Under the Italian law in force at the time of the events, as interpreted by the Consiglio di Stato (Council of State, Italy), small local authorities may make use of central purchasing bodies in order to purchase works, goods and services, provided that they use organisational models that are exclusively public, such as municipal consortia or associations of municipalities.

2. The referring court has doubts as to whether this measure is consistent with EU law, since it could restrict the use of central purchasing bodies in a way that is incompatible with Directive 2004/18/EC,[2] which applies *ratione temporis* at the time addressed in the question referred, and with 'the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts'.

I. Legal framework

A. EU law. Directive 2004/18

3. Recital 15 of the directive reads as follows:

'Certain centralised purchasing techniques have been developed in Member States. Several contracting authorities are responsible for making acquisitions or awarding public contracts/framework agreements for other contracting authorities. In view of the large volumes purchased, those techniques help increase competition and streamline public purchasing. Provision should therefore be made for a

1 Original language: Spanish.

2 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

Community definition of central purchasing bodies dedicated to contracting authorities. A definition should also be given of the conditions under which, in accordance with the principles of non-discrimination and equal treatment, contracting authorities purchasing works, supplies and/or services through a central purchasing body may be deemed to have complied with this Directive.'

4. Recital 16 states that:

'In order to take account of the different circumstances obtaining in Member States, Member States should be allowed to choose whether contracting authorities may use framework agreements, central purchasing bodies, dynamic purchasing systems, electronic auctions or the competitive dialogue procedure, as defined and regulated by this Directive.'

5. According to Article 1 ('Definitions'):

'…

9. "Contracting authorities" means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A "body governed by public law" means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

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

10. A "central purchasing body" is a contracting authority which:

– acquires supplies and/or services intended for contracting authorities, or

– awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities.

…'

6. Article 11 ('Public contracts and framework agreements awarded by central purchasing bodies') establishes that:

'1. Member States may stipulate that contracting authorities may purchase works, supplies and/or services from or through a central purchasing body.

2. Contracting authorities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(10) shall be deemed to have complied with this Directive in so far as the central purchasing body has complied with it.'

B. Italian law

1. Testo unico degli enti locali (Consolidated law on local authorities)[3]

7. Under Article 30(1):

'In order to discharge certain functions and to provide certain services in a coordinated manner, local bodies may enter into appropriate agreements with each other.'

8. Article 31(1) provides that:

'Local bodies for the associated management of one or more services and for the associated exercise of functions may form a consortium in accordance with the rules laid down for special undertakings provided for in Article 114, in so far as they are compatible. Other public bodies may participate in the consortium, when they are authorised to do so, in accordance with the laws to which they are subject.'

9. According to Article 32(1):

'An association of municipalities is a local body formed of two or more municipalities, usually contiguous, for the associated exercise of functions and provision of services.'

2. Codice dei contratti pubblici (Public procurement code)[4]

10. Article 3(25) classifies as contracting authorities:

'State administrative authorities; regional or local authorities; other non-economic public bodies; bodies governed by public law; associations, consortia, however named, established by those entities.'

11. According to Article 3(34), a central purchasing body is:

'A contracting authority which:

– acquires supplies or services intended for contracting authorities or other contracting entities, or

– awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities or other contracting entities.'

12. The original version of Article 33(3)*bis*[5] stipulates that:

'Municipalities with a population not exceeding 5 000 inhabitants situated within the territory of each province shall compulsorily entrust to a single central purchasing body the acquisition of works, services and supplies within the framework of the associations of municipalities, as provided for in Article 32 of the consolidated text contained in Legislative Decree No 267 of 18 August 2000, where they exist, or by establishing a special consortium agreement between those municipalities and relying on the support of the relevant departments.'

3 Legislative Decree No 267 of 18 August 2000 ('the TUEL').

4 Legislative Decree No 163 of 12 April 2006 ('the CCP').

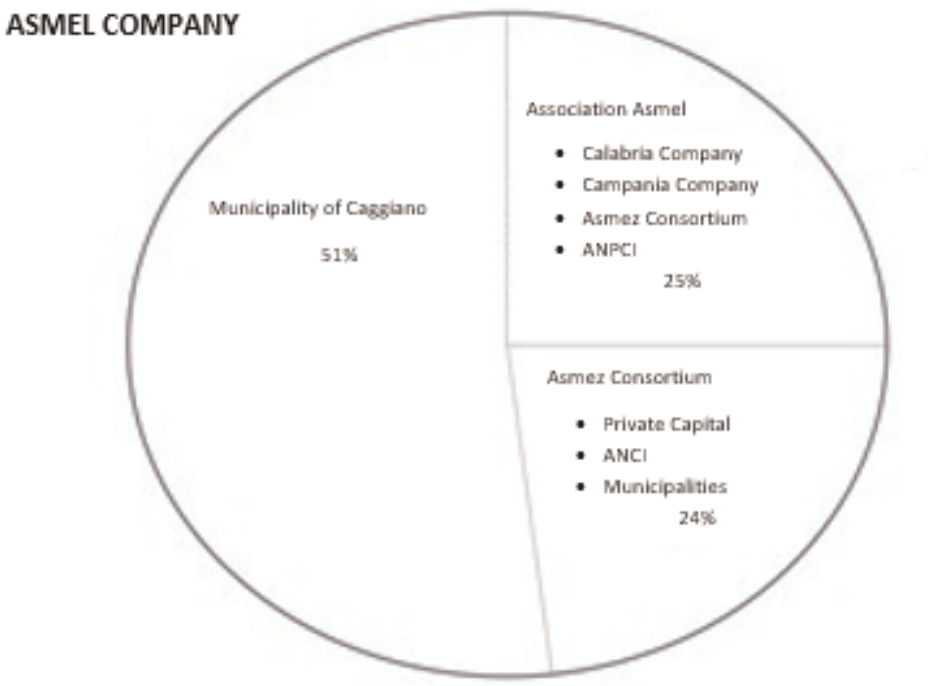
5 Inserted by Article 23(4) of Decree-Law No 201 of 6 December 2011, approved by Law No 214 of 22 December 2011.

13. The amended wording[6] (introduced in 2014) of Article 33(3)*bis* reads as follows:

'Municipalities that are not the provincial capital shall acquire works, goods and services within the framework of the associations of municipalities provided for in Article 32 of Legislative Decree No 267 of 18 August 2000, where they exist, or by establishing a special consortium agreement between those municipalities and relying on the support of the relevant departments, or using an aggregator or the provincial authorities, pursuant to Law No 56 of 7 April 2014. Alternatively, those municipalities may carry out their own purchases by means of the electronic purchasing tools managed by Consip SpA or by another reference aggregator.'

II. Facts and question referred

14. Asmel società consortile a r.l. ('Asmel s.c.a.r.l.') is a limited liability consortium company, established on 23 January 2013, whose shares are held by the Asmez Consortium (24%),[7] the private association Asmel (25%)[8] and the municipality of Caggiano (51%).



15. Over the years, Asmel s.c.a.r.l. has acted as the central purchasing body for the local authorities.[9]

6 Article 9(4) of Decree-Law No 66 of 24 April 2014, approved by Law No 89 of 23 June 2014. Article 3(3)*bis* of the CCP was subsequently repealed by Article 217 of Legislative Decree No 50 of 18 April 2016.

7 The Asmez Consortium was established in Naples on 25 March 1994 by private undertakings. It came into operation when Selene service s.r.l., which has an agreement with the Associazione Nazionale Comuni Italiani (National Association of Italian Municipalities), joined its membership. Municipalities in Basilicata and Calabria subsequently became members.

8 The Asmel association was formed on 26 May 2010 by Asmenet Campania and Asmenet Calabria, both of which are limited liability consortium companies, and by the Asmez Consortium and the Associazione Nazionale Piccoli Comuni Italiani (National Association of Small Italian Municipalities).

9 Specifically, according to the order for reference, it organised an invitation to tender for framework agreements to provide the service for collecting and overseeing municipal property taxes and enforcing tax debts, as well as 152 e-tender procedures of various kinds for municipalities connected with Asmel s.c.a.r.l.

16. Under the relationship between Asmel s.c.a.r.l. and non-member municipalities, the governments of non-member municipalities took the procurement decisions in which:

– firstly, they referred to a previous decision under which they had resolved to join the Asmel association and form a consortium within the meaning of Article 33(3)*bis* of the CCP;

– secondly, they gave Asmel s.c.a.r.l. responsibility for carrying out the public procurement processes on an electronic platform. [10]

17. Following several complaints, the Autorità Nazionale Anticorruzione (National Anti-Corruption Authority, 'the ANAC') began an investigation which found that Asmel s.c.a.r.l. and the Asmez Consortium did not comply with the organisational models for central purchasing bodies established in the CCP.

18. According to the ANAC, Asmel s.c.a.r.l. was a private entity, more specifically, a company governed by private law made up, in turn, of other associations. Therefore, it could not be a central purchasing body, because the Italian legislation requires these to behave as public bodies acting through public entities or associations of local authorities, such as associations or consortia of municipalities established under agreements concluded pursuant to Article 30 of the TUEL. The ANAC also noted that, while private entities can be used, these must be in-house bodies that operate only within the territory of the founding municipalities, whereas in the case under consideration in these proceedings the requirement for comparable oversight was not met and there was no territorial restriction on the activities performed.

19. The ANAC found that Asmel s.c.a.r.l. was performing its activity of purchasing goods for member organisations, but that members were only indirectly involved in the central purchasing body. The ANAC explained that, first, the local authorities became members of the Asmel association and then, under a decision of the Board, they entrusted responsibility for procurement to Asmel s.c.a.r.l.

20. In decision No 32 of 30 April 2015, the ANAC ruled that Asmel s.c.a.r.l. could not be classed as a body governed by public law, prohibited it from performing brokerage activities in the field of public procurement and declared that the tendering procedures it had conducted were unlawful.

21. Asmel s.c.a.r.l. challenged the ANAC's decision in the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy). Asmel considered that although it was a body governed by ordinary law, it had legal personality, met public interest needs, was non-industrial and non-commercial in nature, was funded by its local authority members and operated under their dominant influence. It therefore maintained that it was a contracting authority that satisfied the requirements needed in order to be classed as a 'central purchasing body'.

22. The court of first instance dismissed the appeal by Asmel s.c.a.r.l. in judgment No 2339 of 22 February 2016. In view of the way it was financed and the supervision of its management, the court ruled that it was not a body governed by public law. The court found that it did not conform to the organisational models for central purchasing bodies laid down by the CCP and ruled that its activities should be confined to the territory of the founding municipalities.

10 Payment for these services was set at 1.5% of the contract price, payable by the successful tenderer for each contract concluded via the platform.

23. Asmel s.c.a.r.l. brought an appeal against the judgment of the court of first instance to the Consiglio di Stato (Council of State), citing various grounds; the Council of State considers two of those grounds to be relevant for present purposes:

– the ruling that the organisational model consisting in a consortium in the form of a company is incompatible with the CCP's provisions on central purchasing bodies is incorrect; and

– the CCP does not impose any territorial restrictions on the operations of those central purchasing bodies.

24. The Consiglio di Stato (Council of States) notes that regional and local public authorities are included among the contracting authorities referred to in Article 3(25) of the CCP. In principle, any of these authorities may act as a central purchasing body (Article 3(34) of the CCP). However, small municipalities must do so through a 'specific organisational model' (Article 33(3)*bis* of the CCP) which is different from the model generally established for other administrative authorities.

25. Under this 'specific model', small municipalities [11] may only use central purchasing bodies that conform to one of the following two models: (a) the associations provided for in Article 32 of the TUEL; and (b) the consortia between local authorities established in Article 31 of the TUEL. [12]

26. In the opinion of the Consiglio di Stato (Council of State), this obligation on small municipalities seems to be at odds with the possibility of using central purchasing bodies without any restrictions on the forms of cooperation.

27. The Consiglio di Stato (Council of State) also considers that the national legislation contains an additional restriction on municipal consortia that excludes participation by private entities. [13] That exclusion could be contrary to the EU legal principles of free movement of services and maximum possible competition, in that the provision of services which can be classed as commercial activities and which, as such, could be better provided under a system of free competition within the internal market, is reserved solely to Italian public-law bodies as specified in an exhaustive list.

28. In addition, according to its interpretation, while the domestic legislation does not define a geographical operating area for central purchasing bodies, it does provide that the operating area must be the same as the territory of the municipalities using the central purchasing body. The operating area is therefore restricted to the territory of the municipalities in the association or the consortium. In its view, this restriction is also contrary to the principles of free movement of services and maximum possible competition, since it establishes exclusive operating zones for central purchasing bodies.

29. Against this background, the Consiglio di Stato (Council of States), refers the following questions to the Court of Justice for a preliminary ruling:

'Does a provision of national legislation, such as Article 33(3)*bis* of Legislative Decree No 163 of 12 April 2006, which restricts the autonomy of municipalities to entrust [procurement] to a central purchasing body to only two organisational models (an association of municipalities, if it already exists, or a consortium to be established between municipalities), infringe EU law?

11 Originally, under the first version of this provision, municipalities with a population of less than 5 000 inhabitants; then, under the 2014 wording, all municipalities that were not provincial capitals.

12 It should be added, however, that, as noted by the Italian Government, following the amendment introduced in 2014, the provision at issue permits that 'alternatively, those municipalities may carry out their own purchases by means of the electronic purchasing tools managed by Consip SpA or by another reference aggregator'. The ANAC's decision of 30 April 2015 referred to these two possibilities, stressing that small municipalities could also use the central purchasing body established at a national level for public procurement (Consip) or other 'reference aggregators' including, among others, the regional central purchasing bodies.

13 According to the definition of 'contracting authority' in Article 3(25) of the CCP, consortia that are classed as contracting authorities can be formed only between bodies governed by public law.

In any event, does a provision of national legislation, such as Article 33(3)*bis* of Legislative Decree No 163 of 12 April 2006 which, read in conjunction with Article 3(25) of that legislative decree, regarding the organisational model based on consortia of municipalities, excludes the possibility of creating entities governed by private law, such as a consortium under ordinary law whose members include private entities, infringe EU law, in particular the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts?

Lastly, does a provision of national legislation, such as Article 33(3)*bis* which, if interpreted in the sense of allowing consortia of municipalities that are central purchasing bodies to operate in a territory corresponding to that of the participating municipalities as a whole, and so, at most, to the provincial territory, limits the scope of operation of those central purchasing bodies, infringe EU law, in particular the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts?'

III. Proceedings before the Court of Justice

30. The order for reference was received at the Court of Justice on 3 January 2019.

31. Written observations were submitted by Asmel s.c.a.r.l., the Government of Italy and the European Commission, all of whom attended the hearing held on 29 January 2020.

IV. Assessment

A. Admissibility of the questions referred

32. Both the Commission and the Government of Italy raise some objections concerning the admissibility of the questions referred.

33. In the Italian Government's opinion, the entire set of questions is inadmissible because they are hypothetical. It states that, whatever answer is given by the Court of Justice, it would not render the appeal to the referring court admissible, because Asmel s.c.a.r.l. was not entrusted with any procurement service as the result of a competitive procedure.

34. This objection cannot be upheld, because it is for the referring court to assess whether a reference is needed in order for it to rule on the proceedings before it, and the Court of Justice could refuse to reply to the question only if it were absolutely clear that no such need existed (which is not the case here).

35. The objection raised by the Italian Government relates more to the substance of the dispute than to the admissibility of the actual reference. Determining the type of central purchasing bodies that may be used by small municipalities — that is, whether these are public bodies or may include private-sector participation — is not a hypothetical issue but a real one, and in order to answer it the restrictions imposed by Italian legislation must be examined in the light of EU law.

36. The Commission states, first, that the provision applied by the ANAC, about which the Consiglio di Stato (Council of State) has doubts as regards its compatibility with EU law, *seems* to have been repealed, in which case any potential damage to Asmel s.c.a.r.l. that is addressed in the reference will have disappeared. The litigation may therefore in the interim have become devoid of purpose.

37. The repeal referred to by the Commission is the 2016 repeal relating to the text of Article 33(3)*bis* of the CCP, following its amendment in 2014. It is for the national court to verify the impact of that repeal in the proceedings being heard in the referring court but, so far as the point at issue here is concerned, it is not possible to speak of the reference for a preliminary ruling having become devoid of purpose, particularly if the case is to be decided under the legislation in force at the material time. [14]

38. With regard to the objection of inadmissibility raised by the Commission in connection with the third question referred, I shall address this point in my analysis of that question.

B. Preliminary observations

39. To summarise, the Consiglio di Stato (Council of State) wishes to know whether an *organisational model* which, in the case of small local authorities, restricts them [15] to two types of central purchasing bodies (associations and consortia of municipalities) is compatible with EU law.

40. The order for reference mentions the freedom to provide services (Article 56 TFEU) as being the principle that could be called into question by the Italian legislation, and also expressly cites the provisions in Directive 2004/18 regarding central purchasing bodies.

41. In cases concerning government procurement, the case-law of the Court of Justice looks to the fundamental freedoms in the TFEU where the relevant directive does not apply. In the present case, the directive which, *ratione temporis*, governed public procurement (and, therefore, the legal framework for central purchasing bodies under EU law) was Directive 2004/18.

42. Moreover, Article 3(34) of the CCP reproduces the definition of central purchasing body found in Article 1(10) of Directive 2004/18, thus demonstrating that this national legislation incorporates the directive into domestic law.

43. Consequently, I agree with the Commission that the response to the questions referred must be found within the framework provided by Directive 2004/18.

44. The fact that the order for reference does not specify the amount of any public contract being challenged in the main proceedings, which would allow us to know whether it reaches the applicable threshold in Directive 2004/18, is irrelevant. The description of the scale of the activities of Asmel s.c.a.r.l. provides sufficient grounds to assume that it exceeds the minimum laid down in Article 7 of Directive 2004/18, [16] and it is to that activity, in general, that the order for reference refers.

45. While I will give a single final answer to the three questions referred, I believe it is more appropriate to analyse them separately, in the order proposed by the Consiglio di Stato (Council of State).

14 At the hearing, the Italian Government stated that the new regulation of central purchasing bodies (Article 37(4) of Legislative Decree No 50 of 18 April 2016), which was to replace the repealed Article 33(3)*bis* of the CCP, would not come into force until 31 December 2020, pursuant to Article 1 of Law No 55 of 2019. In the light of this information, the Commission acknowledged that the reply to the reference for a preliminary ruling would be helpful in deciding the case, in spite of the 2016 amendments to the legislation.

15 This assertion provides the basis for the order for reference. See, however, the clarification provided by the Italian Government concerning the scope for small municipalities also to use national or regional central purchasing bodies (see footnote 12).

16 Paragraph 1.4 of the order for reference, referred to by the Commission in paragraph 34 of its observations, notes that Asmel s.c.a.r.l. conducted at least 152 procurement procedures on behalf of various local authorities (see footnote 9 of this Opinion).

C. First question referred

46. According to the referring court, Article 33(3)*bis* of the CCP 'restricts the autonomy of municipalities to entrust procurement to a central purchasing body to only two organisational models (an association of municipalities, if it already exists, or a consortium to be established between municipalities)'. Its question is whether that provision infringes EU law (with no further details). [17]

47. The degree of autonomy enjoyed by local authorities in each Member State, which is mentioned by the referring court, is a matter for the legislature in constitutional terms or the ordinary legislature of those States to determine; EU law does not lay down specific rules on this point.

48. I shall therefore focus on Directive 2004/18, which introduced 'central purchasing bodies' into EU law, reflecting a practice common in some Member States that was designed to enable public authorities to purchase goods or services through such a centralised system. [18]

49. While not applicable here, *ratione temporis*, Directive 2014/24/EU [19] has opted to retain this centralised purchasing technique in even clearer terms than the previous directive. [20]

50. According to the definition in Article 1(10) of Directive 2004/18, 'a "central purchasing body" is a contracting authority which … acquires supplies and/or services intended for contracting authorities, or … awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities'.

51. Under Article 11 of Directive 2004/18, Member States *may* stipulate that contracting authorities 'may purchase works, supplies and/or services from or through a central purchasing body'. [21]

52. Article 1(9) of Directive 2004/18 defines which entities are contracting authorities: 'the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law'.

53. In the structure of Directive 2004/18, there is nothing to prevent a body governed by public law from including private entities, under strict conditions. According to the second paragraph of Article 1(9) of Directive 2004/18, whether or not a body is governed by public law is determined by certain factors relating to its origin and legal personality [22] on the one hand, and its dependence on and supervision by the State, regional or local authorities or other bodies governed by public law, on the other. [23]

17 On other options available to municipalities, see footnote 12.

18 Recital 15 of Directive 2004/18.

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

20 Recital 59 of Directive 2014/24: 'There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management'.

21 According to the English version of the article, 'contracting authorities may purchase works, supplies and/or services *from* or *through* a central purchasing body' (no italics in the original). The use of that dual phrase (*from or through*) would seem to anticipate the dual classification and functions of central purchasing bodies that are set out more clearly in the subsequent Directive 2014/24: they may act either as *wholesalers*, which buy, stock and resell, or as *intermediaries* for the contracting authorities, for which they award contracts, operate dynamic purchasing systems or conclude framework agreements to be used by contracting authorities (see recital 69 of Directive 2014/24).

22 They must be bodies established for the specific purpose of meeting needs in the general interest, may not have an industrial or commercial character, and must have legal personality.

23 They must be bodies 'financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law'.

54. A private legal person could, therefore, in principle, be part of a public body that is classed as a contracting authority, provided that the body in question satisfies the above requirements. [24]

55. According to the order for reference, where small local authorities are concerned, in order to create local central purchasing bodies they must establish bodies composed exclusively of public persons, such as associations or consortia of municipalities. Therefore, these central purchasing bodies, which can be used by small local authorities in order to purchase works, goods and services, may not include participation by private legal persons.

56. While Directive 2004/18 stipulates that central purchasing bodies must be contracting authorities, it does require Member States to ensure that any body governed by public law (whether or not it includes participation by private persons) that is classed as a contracting authority must use these central purchasing bodies.

57. Directive 2004/18 gives Member States considerable discretion in this area. 'In order to take account of the different circumstances obtaining in Member States', recital 16 emphasises that 'Member States should be allowed to choose whether contracting authorities may use … central purchasing bodies, … as defined and regulated by this Directive'.

58. This recital is given legislative force in Article 11(1) of Directive 2004/18, which I alluded to earlier. Under this provision, Member States may *opt* to permit their contracting authorities (in this case, local authorities) to use central purchasing bodies.

59. In my opinion, that same option extends to choosing the regulation that best meets the public interest, given that Directive 2004/18 does not establish specific rules on the inclusion of private legal persons in central purchasing bodies. It will therefore suffice for national legislation not to distort the essential features of that body and to require those central bodies to comply with the provisions of Directive 2004/18 in their operations (final part of Article 11(2)).

60. The recent judgment in *Irgita* [25] provides some interpretation guidelines that can also be applied in this reference for a preliminary ruling. Although that judgment was given in a different context [26] (albeit one that still concerned public procurement) and concerned a provision of legislation (Article 12(1) of Directive 2014/24) that does not deal with public purchasing bodies, the judgment underlines that the provision in question does not deprive Member States 'of the freedom to give preference to one means of providing services, performing work or obtaining supplies to the detriment of others'. [27]

61. In *Irgita*, the Court of Justice:

– states that 'the freedom of the Member States as to the choice of means of providing services whereby the contracting authorities meet their own needs follows moreover from recital 5 of Directive 2014/24'; [28]

24 With regard to Asmel s.c.a.r.l, the decision not to recognise it as a body governed by public law was based on the way it was financed and the fact that it included businesses and other private entities over the management or supervision of which the State, regional or local authorities or other bodies governed by public law cannot exercise the oversight required by the legislation. It will be for the referring court to determine whether or not this assessment by the court of first instance is correct.

25 Judgment of 3 October 2019, *Irgita* (C-285/18, EU:C:2019:829).

26 That case concerned whether national restrictions went beyond '… the conditions which a contracting authority must observe when it wishes to conclude an in-house transaction'.

27 *Irgita*, paragraph 44.

28 Ibid. paragraph 45. While the references are to Directive 2014/24, which, *ratione temporis*, does not apply to this case, that same paragraph 45 notes that recital 5 '[reflects] the case-law of the Court prior to that directive'. According to that recital, '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'.

– looks to Directive 2014/23/EU [29] as a supporting argument, in so far as this highlights the freedom of Member States to decide how best to manage the performance of works or the provision of services. [30] In support of its position, it cites Article 2(1) of that directive. [31]

62. Based, therefore, on this freedom of choice available to Member States, in my view, Directive 2004/18 does not prevent a Member State from opting to require its small local authorities that wish to use their own central purchasing body to have recourse to cooperative structures, such as associations and consortia of municipalities, that are exclusively public in nature.

63. I reiterate that Member States are free to establish centralised public procurement models or techniques (which may operate at national, regional, provincial or local level), depending on their own interests and on the particular circumstances at any given time. [32] As was later to be confirmed by the final part of Article 37(1) of Directive 2014/24, they may also 'provide that certain procurements are to be made by having recourse to central purchasing bodies or to one or more specific central purchasing bodies'.

64. Associations and consortia of municipalities are *organisational models* available to local authorities which, like the authorities themselves, are public law bodies. There is therefore nothing unusual in the fact that the national law that governs those *models*, which were established to enable joint management of services or the joint exercise of public functions, does not provide that private individuals or undertakings may participate in them.

65. The national legislature may choose either a decentralised local public procurement system (in which each municipality purchases its goods, works or services separately) or a centralised or aggregated system (that is, a model involving joint procurement run by several municipalities or by central purchasing bodies used by the municipalities). [33]

66. With regard to this latter system, Directive 2004/18, I repeat, gives the national legislature freedom to design the system. While not expressly stated in that directive (although it is stated in Directive 2014/24), that freedom includes power to make the system compulsory for some contracting authorities.

67. There would be nothing to prevent the involvement of private persons in the central purchasing bodies. But I cannot see why it would be contrary to Directive 2004/18, or any other rule of EU law, for the public organisational model followed by the associations and consortia of municipalities also to apply to the central purchasing bodies established by those associations or consortia to enable the municipalities in question to purchase work, services and supplies.

29 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).

30 *Irgita*, paragraph 47.

31 'This Directive recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services. Those authorities may choose to perform their public interest tasks with their own resources, or in cooperation with other authorities or to confer them upon economic operators.'

32 In reproducing part of the ANAC's decision of 30 April 2015, the Italian Government notes that the disputed provision was introduced to guard against the risk of infiltration by the mafias (Article 13 of Law 136/2010, 'extraordinary plan against the mafias'). Under the subsequent 'Salva-Italia' Decree (Article 23(4) of Decree Law No 201 of 6 December 2011, approved by Law No 214 of 22 December 2011), centralisation of procurement by the smallest municipalities was made compulsory and became a means of controlling expenditure, with the introduction of the new version of Article 33(3)*bis* of the CCP.

33 The question of the limits which the Constitution of each State may impose on the legislative power as regards the local autonomy of regional or local authorities (that is, their capacity for self-organisation) is outside the remit of these proceedings.

68. Nevertheless, it is true that the freedom of the national legislature is not unlimited — as was also noted, in a similar context, in *Irgita* — and that its chosen option must not contravene the rules and principles in the FEU Treaty or the freedoms enshrined in that treaty. [34]

69. On this point, the Consiglio di Stato (Council of State) restricts itself to stating that, as 'the central purchasing bodies are undertakings which offer contracting authorities the service of purchasing goods and supplies', [35] the restriction imposed by the Italian legislature could be in breach of the freedom to provide services recognised by Article 57 TFEU.

70. The fact that a central purchasing body may be classed as an economic operator in its relations with third parties [36] is not sufficient on its own to determine the application of Articles 56 and 57 TFEU when that concept cannot be separated from that of a contracting authority and, under Directive 2004/18, the latter concept covers only 'the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law'.

71. Consequently, I agree with the Italian Government when it argues that the status of a central purchasing body that is responsible, on a permanent basis, for performing the function of a contracting authority on behalf of public authorities, can be reserved by the national legislature to persons governed by public law. [37]

72. Under Directive 2004/18, those central purchasing bodies did not compete in a non-existent *market for central purchasing bodies' services* with private legal persons who provided the same services to public bodies. The fact that private undertakings or entities may be able to supply the contracting authorities with purely ancillary activities in support of their procurement activities (in the form of consultancy services, for example), in return for payment, is a separate matter.

73. The situation may have changed following Directive 2014/24, Article 37(4) of which permits the award of a 'public service contract for the provision of centralised purchasing activities to a central purchasing body'.

74. The fact that such an award may be made 'without applying the procedures provided for in this Directive', as the provision expressly states, could be due to the fact that the award must be made to central purchasing bodies governed by public law (which may include some limited private participation under public oversight). Otherwise — that is to say, if the award could be made to a private legal person — it would be hard to see how such a person could be awarded the contract without first having been made subject to the procedures laid down in Directive 2014/24.

75. Based on these premisses, in my view Articles 56 and 57 TFEU do not apply directly to the present case. Quite apart from the fact that the situation in these proceedings is confined in all respects to Italy, and there is no indication of any cross-border links, [38] the key point is that the interpretation of the EU law that must be deemed to apply (Directive 2004/18) does not require the central purchasing bodies established by small local authorities necessarily to include private legal persons.

34 *Irgita*, paragraph 48: 'The freedom of the Member States as to the choice of the management method that they judge to be most appropriate for the performance of works or the provision of services cannot however be unlimited. That freedom must, on the contrary, be exercised with due regard to the fundamental rules of the FEU Treaty, in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency'.

35 Paragraph 10.3 of the order for reference.

36 As is the case with Asmel s.c.a.r.l., whose clients pay for its services.

37 Observations of the Italian Government, paragraph 70 et seq.

38 Judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 47), citing previous case-law: 'the provisions of the FEU Treaty on … the freedom to provide services … do not apply to a situation which is confined in all respects within a single Member State'.

76. I do not consider that the Italian legislation, when assessed from the perspective of competition law [39] in connection with public procurement, is in breach of that law. The competition which EU law seeks to protect in this field is, fundamentally, competition between economic operators who provide works, goods or services to contracting authorities. Provided that those authorities (in this case, the central purchasing bodies established by the associations and consortia of municipalities) comply with the procedures in Directive 2004/18 when they obtain those supplies, competition between those economic operators is preserved.

77. In other words, the requirement for small local authorities to use their own central purchasing bodies (through associations or consortia of municipalities) does not mean that the competitive market for the supply of goods, works or services to those public authorities by the economic operators concerned becomes closed.

D. Second question referred

78. The Consiglio di Stato (Council of State) seeks to ascertain whether a provision of national legislation which 'excludes the possibility of creating entities governed by private law, such as a consortium under ordinary law whose members include private entities' infringes EU law ('in particular the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts').

79. I should begin by pointing out that, in spite of its actual wording, the second question referred is not asking whether private entities must, in general, be permitted to participate in consortia of municipalities. Viewed in context, the referring court's question is instead asking whether the prohibition on private-sector participation in the central purchasing bodies established by those consortia is compatible with EU law.

80. When the question is interpreted in this way, I believe that the answer to it can be inferred from the answer to the first question referred, and therefore no further comment would be required.

81. The Commission, however, maintains [40] that the decision by the ANAC that gave rise to the proceedings goes further than it should in that it imposes an absolute prohibition on Asmel s.c.a.r.l. acting as an 'aggregator' under any circumstances and rules that the company cannot be classed as a contracting authority. [41]

82. According to the Commission, a provision of national legislation which, as in the present case, excludes entities that have a particular legal form and involve the participation of private legal persons is compatible with EU law provided that, for functions *other* [42] than those that are the subject of that provision, those entities can be classed as bodies governed by public law within the meaning of Article 1(9) of Directive 2004/18.

83. At the hearing, the Commission qualified its position: having first confirmed that Article 11(1) of Directive 2004/18 is compatible with a provision of national legislation such as that at issue, which restricts the organisational models for central purchasing bodies available to smaller local authorities to two, the Commission stated that its objection related solely to other methods of awarding public contracts that did not involve the use of such central bodies.

39 From that perspective, the risk that competition will be distorted may be prompted more by the aggregation and centralisation of purchases which, as noted by recital 59 of Directive 2014/24, could give rise to an 'excessive concentration of purchasing power and collusion'.

40 Paragraphs 60 to 63 of its written observations.

41 The Commission recognises that a decision on whether or not Asmel s.c.a.r.l. is a body governed by public law is purely a matter for the national court and that, in reaching its decision, the court would have to assess, among other factors, whether public authorities exercise a dominant influence over that company. Asmel s.c.a.r.l. agrees with this starting point.

42 Italicised in the original.

84. I do not believe that the Court of Justice needs to give a ruling on this observation by the Commission, given that the referring court's question relates only to the *specific* functions of associations and consortia of municipalities in establishing permanent central purchasing bodies, and not to any *other* functions. If local authorities have the power to carry out their own procurement, under non-centralised purchasing arrangements, that is something that goes beyond the scope of the reference for a preliminary ruling.

E. Third question referred

85. The Consiglio di Stato (Council of State) starts from the premiss that the provision of national legislation at issue should be interpreted 'in the sense of allowing consortia of municipalities that are central purchasing bodies to operate in a territory corresponding to that of the participating municipalities as a whole, and so, at most, to the provincial territory'.

86. Based on that interpretation, the referring court seeks to ascertain whether that provision of national law infringes the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts.

87. Both the Italian Government and the Commission express certain reservations about the way in which the question is posed:

– The Italian Government states that the reasons invoked by the referring court are unclear, which makes it impossible to take a position on this question. In its opinion, the court puts forward contradictory arguments in that it states, on the one hand,[43] that the provision would introduce 'exclusive operating zones for central purchasing bodies operating on behalf of small municipalities' (which, according to the Italian Government, would seem to imply that it gives consortia of municipalities an advantage); and, on the other, it asserts that the territorial restriction puts the central purchasing bodies at a disadvantage.

– In the Commission's view, the question is hypothetical, because the geographical restriction would benefit, rather than disadvantage, a central purchasing body such as Asmel s.c.a.r.l., in that it would extend (rather than reduce) its area of activity, which differs from that of the associations and consortia of municipalities.

88. In my opinion, the question is not hypothetical. The issue it raises, which goes beyond the literal wording in the order for reference, is whether the territorial restriction on the activities of certain central purchasing bodies, namely those formed by the associations and consortia of municipalities, infringes EU law (that is, the principles referred to above).

89. It is true that the full significance of this question would be in relation to a decision in a possible future dispute concerning the establishment of a (public) consortium of municipalities as a central purchasing body; but that is not the matter directly at issue in the main proceedings. Given that those proceedings concern only the decision by the ANAC on the ability of Asmel s.c.a.r.l. to operate as a central purchasing body on behalf of any municipality, with no geographical restrictions on its operations, the objections raised by the Commission carry some weight.

90. However, once again, the presumption must prevail that the question referred, as posed by the referring court, is relevant. If that court believes that a response is needed from the Court of Justice on a point of law which, in its opinion, requires the interpretation of a provision of EU law, the Court of Justice must provide that response, unless it is patently unnecessary to the main proceedings, which is not the case here.

43 Paragraph 11.3 of the order for reference.

91. With regard to the substance of the question, I cannot find any provision in Directive 2004/18 that imposes mandatory rules on Member States with regard to defining the territorial scope of the central purchasing bodies established by associations and consortia of municipalities.

92. Moreover, it seems to me to be consistent with the design of these models for cooperation between local authorities that the central purchasing bodies established by them should be restricted to the territory of the local authorities as a whole. From the perspective of the municipalities that are the recipients of the services provided by the central purchasing body, the effects of the relationship between the central purchasing body and those municipalities can only apply within the territory of those municipalities.

93. Once again, the potential difficulties in endorsing those models could arise from the requirement to respect the fundament freedoms enshrined in the treaties. However, for the reasons I set out in connection with the first question, I believe that neither Article 56 TFEU nor the rules of competition law are infringed. In any event, it is not clear from the wording of the decision to refer why any of those freedoms could be adversely affected.

94. I will add that, as regards the people who supply work, goods and services to the municipalities through the central purchasing bodies established by them, there is nothing to indicate that those works, services or supplies must come from undertakings based in the territory of the municipalities in question. In other words, there is no reason to think that the market is closed to undertakings from outside that territory, whether those undertakings are Italian or from any other Member State.

V. Conclusion

95. In the light of the above, I recommend that the Court of Justice should reply to the Consiglio di Stato (Council of State, Italy) in the following terms:

EU law, in particular, Article 11 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, does not preclude a provision of national legislation under which, according to the interpretation of the referring court, small local authorities are required to purchase works, goods and services through central purchasing bodies established in accordance with two specific organisational models, namely an association of municipalities or a consortium of municipalities, whose sphere of operation is restricted to the territory of the municipalities in question as a whole.