



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

8 May 2014*

(Public supply contracts — Directive 2004/18/EC — Award of a contract without initiating a tendering procedure — In-house award — Contractor legally separate from the contracting authority — Condition of ‘similar control’ — Contracting authority and contractor not linked by a relationship of control — Third party public authority exercising partial control over the contracting authority and control over the contractor which could be qualified as ‘similar’ — ‘Horizontal in-house transaction’)

In Case C-15/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hanseatisches Oberlandesgericht Hamburg (Germany), made by decision of 6 November 2012, received at the Court on 10 January 2013, in the proceedings

Technische Universität Hamburg-Harburg,

Hochschul-Informations-System GmbH

v

Datenlotsen Informationssysteme GmbH,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), A. Rosas, D. Šváby and C. Vajda, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 November 2013,

after considering the observations submitted on behalf of:

- the Technische Universität Hamburg-Harburg, by T. Noelle and I. Argyriadou, Rechtsanwälte,
- Hochschul-Informations-System GmbH, by K. Willenbruch and M. Kober, Rechtsanwälte,
- Datenlotsen Informationssysteme GmbH, by S. Görgens, Rechtsanwalt,
- the Czech Government, by M. Smolek, acting as Agent,

* Language of the case: German.

— the Spanish Government, by J. García-Valdecasas Dorrego, acting as Agent,
— the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,
— the Hungarian Government, by M. Fehér, K. Szijjártó and K. Molnár, acting as Agents,
— the European Commission, by A. Tokár and M. Noll-Ehlers, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 23 January 2014,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).
- 2 The request has been made in proceedings between, on the one hand, the Technische Universität Hamburg-Harburg (the Polytechnic University of Hamburg; ‘the University’) and Hochschul-Informationssystem GmbH (‘HIS’) and, on the other, Datenlotsen Informationssysteme GmbH concerning the lawfulness of the award of a contract by the University directly to HIS without applying the award procedures under Directive 2004/18.

Legal context

EU law

- 3 Directive 2004/18 establishes the regulatory framework for contracts awarded by contracting authorities.
- 4 Article 1(2)(a) of that directive, entitled ‘Definitions’ provides:

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

- 5 Article 1(8) provides:

‘The terms “contractor”, “supplier” and “service provider” mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The terms “economic operator” shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interests of simplification.

...’

- 6 Article 1(9) of Directive 2004/18 defines in detail the entities which are regarded as contracting authorities and which must, for the purposes of concluding a contract for pecuniary interest with an economic operator, initiate a procedure for awarding the contract in accordance with the rules of that directive.
- 7 Article 7 of Directive 2004/18, entitled ‘Threshold amounts for public contracts’, sets the thresholds for the estimated values on the basis of which a contract must be awarded in accordance with the rules of that directive. Those thresholds are amended at regular intervals by Commission regulations and adapted to economic circumstances. At the material time, the threshold relating to supply contracts awarded by contracting authorities other than central government authorities was set at EUR 193 000 by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64).

Award of a public contract without applying the procedures laid down by Directive 2004/18 — In-house award

- 8 The conditions for making such an award have been established and developed by the case-law of the Court, which has held that a call for tenders through the initiation of a procedure under Directive 2004/18 is not mandatory in a case where the contracting authority exercises over a person, legally separate from that authority, a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling contracting authority or authorities (see, to that effect, Case C-107/98 *Teckal* EU:C:1999:562, paragraph 50).

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 9 The University is a public higher education establishment of the Bundesland (Federal State) of the Freie und Hansestadt Hamburg (Free and Hanseatic City of Hamburg) (‘the City of Hamburg’). It is a body governed by public law for the purposes of Article 1(9) of Directive 2004/18, and therefore a contracting authority. With a view to purchasing an IT system for higher education management, the University carried out an assessment exercise in which it compared the IT systems developed by Datenlotsen Informationssysteme GmbH and HIS. At the end of that assessment, the University elected to purchase HIS’s system, and on 7 April 2011 it concluded a supply contract by direct award with that company, without applying the tendering procedures laid down in Directive 2004/18. The estimated value of that contract was EUR 840 000.
- 10 It is apparent from the file before the Court that HIS is a limited company governed by private law, one third of its capital being owned by the Federal Republic of Germany and two thirds by the 16 German Länder, with the City of Hamburg’s share corresponding to 4.16% of that capital. In accordance with Paragraph 2 of the company’s articles of incorporation, the object of its business is to support higher education establishments and the competent authorities in their efforts to achieve the rational and effective fulfilment of their higher educational role. HIS’s IT systems are used in more than 220 public and religious higher education establishments in Germany.
- 11 Under Paragraph 12(1) of HIS’s articles of incorporation, its supervisory board is made up of ten members, seven of whom are appointed on a proposal from the Conference of Ministers of the Länder, two on a proposal from the Conference of Rectors of the higher education establishments, an association bringing together German universities and higher education establishments which are public or recognised by the State, and one on a proposal from the Federal authorities. Under Paragraph 15(1) of its articles of incorporation, HIS has a board of trustees (Kuratorium), and 19 of its 37 members come from the Conference of Ministers of the Länder. As regards the volume of its activities, 5.14% of HIS’s turnover relates to activities on behalf of entities other than public higher education authorities.

- 12 The direct award of the contract by the University to HIS is, according to those contracting parties, justified on the ground that, although there is no relationship of control between the two entities, the condition of ‘similar control’, established by the above case-law of the Court, is satisfied because both those parties are under the control of the City of Hamburg.
- 13 Datenlotsen Informationssysteme GmbH challenged the decision to award the contract directly in an action brought before the Vergabekammer of the City of Hamburg, a body with jurisdiction at first instance in public procurement cases, which granted the application. The Vergabekammer found that the conditions required by the case-law of the Court for an in-house award were not satisfied in the present case. Specifically, the condition for ‘similar control’ was not satisfied since the University, as contracting authority, was not in a position to exercise control over HIS similar to that which it exercised over its own departments. It is true that the University was a legal person under public law emanating from the City of Hamburg and that that city had a 4.16% share in the capital of HIS. Nevertheless, the University and the City of Hamburg were separate legal entities.
- 14 Likewise, the consideration that the City of Hamburg controlled both the University and HIS was also insufficient to satisfy that condition as such a form of ‘indirect control’ had no basis in the case-law of the Court. The Vergabekammer also observed that the University was autonomous and that the city of Hamburg’s power over it to monitor compliance and expediency in relation to the management of allotted funds was not the same as the managerial power which a contracting authority must have. Nor could there be any question of the City of Hamburg exercising control over HIS, since the city did not have a permanent representative on the supervisory board of that company.
- 15 HIS and the University challenged that decision of the Vergabekammer before the referring court.
- 16 The referring court observes that the issue, keenly debated in academic writings at national level, of whether the award of a contract within a relationship between three entities, known as a ‘horizontal in-house transaction’, is covered by the case-law stemming from *Teckal* (EU:C:1999:562) has not yet been addressed by the case-law of the Court. It considers that the spirit and the purpose of the exemption for in-house awards established by that judgment could allow horizontal in-house transactions, such as the one at issue in the main proceedings, to come within that exemption. However, it states that in the present case there is no municipal cooperation within the meaning of the case-law of the Court (Case C-480/06 *Commission v Germany* EU:C:2009:357, and Case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* EU:C:2012:817), since neither the University nor HIS are public authorities, and HIS is not entrusted directly with the performance of a public service task.
- 17 The referring court states that, in accordance with their statutes, public higher education establishments have a large degree of autonomy in the areas of research and education, and that the exercise of those autonomous powers is subject only to supervision of legality. However, the contract at issue in the main proceedings falls within the management of funds allotted to the University, in which the competent authorities have a power of control which goes as far as allowing them to annul or amend decisions taken in relation to procurement.
- 18 The referring court considers that, in the area of procurement and supplies for public higher education establishments, the condition of ‘similar control’ is satisfied. However, it is unsure whether that condition requires that the control should concern all fields of activity of the subordinate entity, so that a restriction of that control to supply contracts does not permit the inference that that condition has been satisfied. This approach is also supported by the case-law of the Court according to which the contracting authority must be able to exercise decisive influence over both the strategic objectives and the important decisions of the subordinate entity.

- 19 As regards the control exercised by the City of Hamburg over HIS, the referring court states that the fact that the City of Hamburg owns only 4.16% of that company's capital and does not have a permanent representative on its supervisory board could militate against the existence of control similar to that which it exercises over its own departments. As regards the second condition imposed by the case-law of the Court, relating to the carrying out of the essential part of the contractor's activity, the referring court considers that that condition is satisfied in the present case, since HIS's business is predominantly devoted to public higher education establishments and its other business activities are ancillary in nature.
- 20 In those circumstances, the Hanseatisches Oberlandesgericht Hamburg (Hamburg Higher Regional Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must a "public contract" within the meaning of Article 1(2)(a) of Directive 2004/18 ... be interpreted as including a contract in the case of which, although the contracting authority does not exercise over the contractor a control similar to that which it exercises over its own departments, both the contracting authority and the contractor are controlled by the same body, which is itself a public contracting authority within the meaning of Directive 2004/18 and the contracting authority and the contractor carry out the essential part of their activities with that common body (horizontal in-house transaction)?

If the first question is answered in the affirmative:

(2) Must the control similar to that which the contracting authority exercises over its own departments extend to all aspects of the contractor's activity or is it sufficient for it to be confined to the area of procurement?'

Consideration of the questions referred

- 21 By its questions, which it is appropriate to consider together, the national court asks, in essence, whether Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that a contract for the supply of products concluded between (i) a university which is a contracting authority and whose purchases of products and services are controlled by a German Federal State, and (ii) an undertaking under private law, owned by the Federation and by Federal States, including the abovementioned Federal State, constitutes a public contract for the purposes of that provision.
- 22 In accordance with the case-law of the Court, the principal objective of the EU rules in the field of public procurement is the opening-up to undistorted competition in all the Member States with regard to the execution of works, the supply of products or the provision of services; that entails an obligation on all contracting authorities to apply the relevant rules of EU law where the conditions for such application are satisfied (see, to that effect, Case C-26/03 *Stadt Halle and RPL Lochau* EU:C:2005:5, paragraph 44).
- 23 Any exception to the application of that obligation must consequently be interpreted strictly (see *Stadt Halle and RPL Lochau* EU:C:2005:5, paragraph 46).
- 24 The Court concluded that, in view of the application of the procedures for awarding public contracts laid down in Directive 2004/18, it suffices in principle, in accordance with Article 1(a) of that directive, if a contract for pecuniary interest was concluded between, on the one hand, a contracting authority and, on the other, a person legally distinct from that contracting authority (see, to that effect, *Teckal* EU:C:1999:562, paragraph 50).

- 25 The exception to the application of that principle, recognised by the Court in relation to in-house awards, is justified by the consideration that a public authority which is a contracting authority has the possibility of performing its public-interest tasks by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments, and that that exception may be extended to situations in which the other contracting party is an entity legally distinct from the contracting authority, where the latter exercises control over the contractor similar to that which it exercises over its own departments and that contractor carries out the essential part of its activities with the contracting authority or authorities which own it (see, to that effect, *Teckal* EU:C:1999:562, paragraph 50, and *Stadt Halle and RPL Lochau* EU:C:2005:5, paragraphs 48 and 49). In such a situation, the contracting authority can be regarded as employing its own resources.
- 26 The Court has further clarified the meaning of the term ‘similar control’, stating that the contracting authority must have a power to exercise decisive influence over both the strategic objectives and the significant decisions of the contractor, and that the control exercised by the contracting authority must be genuine, structural and functional (see, to that effect, Joined Cases C-182/11 and C-183/11 *Econord* EU:C:2012:758, paragraph 27 and the case-law cited).
- 27 Furthermore, the Court has acknowledged that, under certain conditions, ‘similar control’ may be exercised jointly by a number of public authorities which are joint owners of the contractor (see, to that effect, *Econord* EU:C:2012:758, paragraphs 28 to 31 and the case-law cited).
- 28 In the action in the main proceedings, it is common ground that there is no relationship of control between the University, as the contracting authority, and HIS, the contractor. The University holds no share in the capital of that entity and has no legal representative in its management bodies.
- 29 Accordingly, the reason which justifies recognition of the exception for in-house awards, that is to say, the existence a specific internal link between the contracting authority and the contractor, is absent in a situation such as that in the main proceedings.
- 30 Therefore, such a situation cannot be covered by that exception otherwise the limits of its application, which have been clearly defined by the case-law of the Court, would be extended in such a way as to reduce significantly the scope of the principle set out in paragraph 24 above.
- 31 Furthermore, it should be noted that, in any event, on the basis of the evidence in the file before the Court and in the light of the case-law set out above, the City of Hamburg is not in a position to exercise ‘similar control’ over the University.
- 32 The control exercised by the City of Hamburg over the University extends only to part of its activity, that is to say, solely in matters of procurement, but not to education and research, in which the University has a large degree of autonomy. Recognising the existence of ‘similar control’ in such a situation of partial control would run counter to the case-law cited in paragraph 26 above.
- 33 In those circumstances, there is no need to examine whether the exception concerning in-house awards is capable of applying to so-called ‘horizontal in-house transactions’, that is to say, a situation in which the same contracting authority or authorities exercise ‘similar control’ over two distinct economic operators, one of which awards a contract to the other.
- 34 As regards the applicability, in the main proceedings, of the case-law on inter-municipal cooperation resulting from *Commission v Germany* (EU:C:2009:357) and *Ordine degli Ingegneri della Provincia di Lecce and Others* (EU:C:2012:817), it must be noted, as the referring court did, that for the reasons set out in paragraph 16 above the conditions for the application of the exception provided for in that case-law have not been satisfied.

- 35 Thus, the cooperation between the University and HIS is not aimed at carrying out a public task which both of them have to perform, within the meaning of the case-law (see *Ordine degli Ingegneri della Provincia di Lecce and Others* EU:C:2012:817, paragraphs 34 and 37).
- 36 Having regard to the foregoing considerations, the answer to the questions referred is that Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that a contract for the supply of products concluded between (i) a university which is a contracting authority and whose purchases of products and services are controlled by a German Federal State, and (ii) an undertaking under private law, owned by the Federation and by Federal States, including the abovementioned Federal State, constitutes a public contract for the purposes of that provision, and must therefore be subject to the public procurement rules laid down in that directive.

Costs

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

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

Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that a contract for the supply of products concluded between (i) a university which is a contracting authority and whose purchases of products and services are controlled by a German Federal State, and (ii) an undertaking under private law, owned by the Federation and by Federal States, including the abovementioned Federal State, constitutes a public contract for the purposes of that provision, and must therefore be subject to the public procurement rules laid down in that directive.

[Signatures]