Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

21 December 2016 *

(References for a preliminary ruling — Article 4(2) TEU — Respect for the national identity of Member States inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government — Internal organisation of the Member States — Regional authorities — Legal instrument creating a new public-law entity and organising the transfer of powers and responsibilities for the performance of public tasks — Public procurement — Directive 2004/18/EC — Article 1(2)(a) — Concept of 'public contract')

In Case C-51/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Celle (Higher Regional Court of Celle, Germany), made by decision of 17 December 2014, received at the Court on 6 February 2015, in the proceedings

Remondis GmbH & Co. KG Region Nord

v

Region Hannover,

intervening parties:

Zweckverband Abfallwirtschaft Region Hannover,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Vilaras, J. Malenovský, M. Safjan and D. Šváby (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 20 April 2016,

after considering the observations submitted on behalf of:

— Remondis GmbH & Co. KG Region Nord, by M. Figgen and R. Schäffer, Rechtsanwälte,

— the Region Hannover, by H. Jagau, Regionspräsident, and R. Van der Hout, advocaat, and by T. Mühe and M. Fastabend, Rechtsanwälte,

* * Language of the case: German.

— the Zweckverband Abfallwirtschaft Region Hannover, by W. Siederer and L. Viezens, Rechtsanwälte,

— the French Government, by D. Colas and J. Bousin, acting as Agents,

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

— the European Commission, by A.C. Becker and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 June 2016,

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, and corrigendum in OJ 2004 L 351, p. 44).

2 The request has been made in proceedings between Remondis GmbH & Co. KG Region Nord ('Remondis') and the Region Hannover (Region of Hannover, Germany) regarding the lawfulness of the transfer by the Region of Hannover of waste treatment tasks that were its responsibility to a public body, the Zweckverband Abfallwirtschaft Region Hannover (a special-purpose association for waste management created by local authorities in the Region of Hannover; 'the RH Special-Purpose Association').

Legal context

EU law

3 Under Article 1(2)(a) of Directive 2004/18, applicable to the main proceedings for the purposes of that directive, '"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'.

4 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 (OJ 2014 L 94, p. 65) repealed Directive 2004/18 with effect from 18 April 2016.

5 Recital 4 in the preamble to Directive 2014/24 states:

'The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not however broaden the scope of this Directive compared to that of Directive 2004/18/EC. The Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract. …'

6 Article 1(6) of that directive provides as follows:

‘Agreements, decisions or other legal instruments that organise the transfer of powers and responsibilities for the performance of public tasks between contracting authorities or groupings of contracting authorities and do not provide for remuneration to be given for contractual performance, are considered to be a matter of internal organisation of the Member State concerned and, as such, are not affected in any way by this Directive.’

German law

7 Under the federal legislation on waste and the Niedersächsische Abfallgesetz (Lower Saxony Law on waste), both in the version which was in force on the date the RH Special-Purpose Association, intervener in the main proceedings, was formed, and in the version currently in force, waste treatment is the responsibility of the regional authorities designated thereby or of the special-purpose associations formed by those districts.

8 The Niedersächsisches Zweckverbandsgesetz (Lower Saxony Law on special-purpose associations), in the version which was in force on the date the RH Special-Purpose Association was formed, provided in Paragraph 1 that municipalities could, with a view to the joint performance of certain tasks which they were entitled or required to carry out, form voluntary special-purpose associations or be formed into compulsory special-purpose associations. In that case, under Paragraph 2(1) of that law, the rights and obligations to perform those duties are transferred to the association.

9 Under Paragraph 4 of that law, special-purpose associations are public authorities which are self-managed under their own responsibility.

10 Paragraph 29(1) of that law requires regional authorities that are members of a special-purpose association to pay annually determined contributions in so far as the association’s other revenue is not sufficient to cover the costs associated with its duties.

11 The Niedersächsisches Gesetz über die kommunale Zusammenarbeit (Lower Saxony Law on inter-municipal cooperation), currently in force, contains comparable provisions, including provision that authorities that transfer duties to an association are, to the extent that they do so, released from the obligation to perform them.

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

12 Under the federal legislation and the legislation of the *Land* Niedersachsen (*Land* of Lower Saxony), the Region of Hannover and the Stadt Hannover (City of Hannover) were entrusted with waste disposal and treatment tasks in the former Landkreis Hannover (District of Hannover) and the City of Hannover respectively.

13 In view of a reorganisation planned by those two authorities, initially, on 29 November 2002, the City of Hannover transferred its responsibility for waste disposal tasks to the Region of Hannover. In a second stage, on 19 December 2002, those authorities jointly adopted the Verbandsordnung des Zweckverbandes Abfallwirtschaft Region Hannover (articles of association for the special-purpose association for waste management created by local authorities in the Region of Hannover; ‘the articles of association of the RH Special-Purpose Association), by which they organised the operation of the association, a public-law corporation that the two founding authorities vested with various tasks, some of which were initially common to both authorities and others allocated to each of them, and which in particular took the place of the Region of Hannover for waste disposal. That entity was formed on 1 January 2003.

14 In order to enable the RH Special-Purpose Association to carry out the tasks with which it was entrusted, under Article 5 of the articles of association of the RH Special-Purpose Association, the Region of Hannover and the City of Hannover transferred to the RH Special-Purpose Association, at no cost, their respective bodies responsible for waste disposal, street cleaning and winter road maintenance tasks and 94.9% of the shares in Abfallentsorgungsgesellschaft Region Hannover mbH (Region of Hannover limited company for waste treatment), a company providing waste treatment services for the Region of Hannover which was up to then wholly owned by the Region of Hannover.

15 To the same end, Article 4(5) of the articles of association of the RH Special-Purpose Association also allow it to have recourse to the services of third parties for the performance of its tasks and to that end acquire holdings in undertakings and entities, as allowed under paragraph 22 of the Kreislaufwirtschaftsgesetz (Law on closed cycle management).

16 Article 4(4) of those articles of association provides that the RH Special-Purpose Association is to dispose of waste for recovery and, for that purpose, may enter into dual system contracts ('Duale Systeme') for the collection of packaging, which tasks may be transferred to the Abfallentsorgungsgesellschaft Region Hannover.

17 Under Article 4(6) of those articles of association, the RH Special-Purpose Association is empowered to adopt statutes and regulations on inter alia the imposition of fees.

18 Under Article 7 of the articles of association of the RH Special-Purpose Association the general meeting of the RH Special-Purpose Association involves the chief administrative officers of the Region of Hannover and of the City of Hannover, who are bound by the instructions given by the authority they represent. Those officers are entitled to vote in the general meeting on tasks transferred by the authority they represent.

19 Article 8 of the articles of association provides that the general meeting has the power inter alia to amend the articles of association and to appoint the RH Special-Purpose Associations managing director (Geschäftsführerin/führer)

20 Under Article 16 of the articles of association, the RH Special-Purpose Association must, in the long term, at least ensure that its expenditure is covered by its revenue. However, in so far as its revenue is not sufficient to cover the costs of its tasks, the two constituent authorities are required to pay contributions to be determined annually.

21 The order for reference indicates that the transfer of tasks to the RH Special-Purpose Association releases the transferring member authorities from the obligation to carry out the tasks concerned.

22 In 2011, the ninth year in which the RH Special-Purpose Association was in operation, the RH Special-Purpose Association and Abfallentsorgungsgesellschaft Region Hannover jointly generated a turnover of EUR 189 020 912, of which EUR 11232173.89 (approximately 6%) came from commercial transactions with third-party entities and, according to forecasts for 2013, those amounts would be EUR 188670370.92 and EUR 13085190.85 respectively.

23 Remondis, a commercial company active in the waste sector, made an application for review of the award of the public contract, which is currently pending before the referring court.

24 Remondis asserts that the overall operation, consisting in the formation of the RH Special-Purpose Association and the concomitant transfer of tasks to it by the regional authorities, constitutes a public contract within the meaning of, inter alia, Article 1(2)(a) of Directive 2004/18 even though initially it did not come within the scope of the rules governing public contracts because it fell within the exception established in the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562, paragraph 50). The two conditions for EU rules on public procurement not to apply were met at the

time, it being a situation where a public entity exercises over the entity which provides it supplies or services a control which is similar to that which it exercises over its own departments and, at the same time, the latter entity carries out the essential part of its activities with the controlling public entity or entities. However, Remondis claims that, given the significant turnover achieved by the RH Special-Purpose Association since 2013 with third-party entities, it no longer carries out the essential part of its activities with the authorities that formed it. It infers therefrom that the overall operation should now be regarded as an unlawful award and therefore invalid. Consequently, the Region of Hannover, which is the public-law entity responsible for waste disposal, should organise a tendering procedure in so far as it does not intend itself to provide those services.

25 The Region of Hannover and the RH Special-Purpose Association assert that the creation of the RH Special-Purpose Association and the transfer of tasks to it do not fall within the scope of public procurement law.

26 The creation and the transfer were, in their submission, based on a statutory decision and not on an administrative contract or agreement. They refer to Directive 2014/24, in particular Article 1(6), relating to mechanisms for transferring powers and responsibilities for the performance of public tasks.

27 The referring court states that the outcome of the main proceedings turns firstly on the question whether the creation by the Region of Hannover and the City of Hannover of the RH Special-Purpose Association and the transfer of certain public tasks to it constituted a public contract within the meaning of Article 1(2)(a) of Directive 2004/18. It does not question that the transfer was effected for pecuniary interest given, on the one hand, the transfer, free of charge, of resources previously used by those two regional authorities to perform the public tasks transferred to the association and, on the other hand, the undertaking of those authorities to cover any cost overruns the association might incur in relation to its revenues.

28 The referring court states that such an operation might nevertheless be held not to be the award of a public contract. There is in fact no contract and no undertaking is involved. It is, moreover, a measure of internal State organisation that is constitutionally guaranteed as a matter of municipal autonomy, consisting in a reallocation of powers amongst regional authorities, as a result of which the authorities initially responsible for the tasks in question are completely relieved of those tasks.

29 The referring court has doubts, however, as to the relevance of that view in the light of the Court's case-law, including the judgment of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385), under which the very existence of a delegation of tasks, entailing release of the authority initially responsible, has no bearing on categorisation as a public contract.

30 It can also be inferred from that judgment that only two exceptions to the application of the rules governing public contracts must be taken into consideration, being the one identified in the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562), and the so-called inter-municipal 'horizontal' agreements. Consequently, it could be argued that, as the creation of a special-purpose association accompanied by a transfer of tasks to that association does not fall under either of those exceptions, public procurement law is applicable to that type of operation.

31 Conversely, however, the referring court observes, firstly, that such an operation is strictly the result of a horizontal agreement between a number of public entities and not of an agreement concluded between those entities and the RH Special-Purpose Association.

32 Secondly, not only may the decision to create a special-purpose association be taken freely by those regional authorities, it may also be imposed on those authorities by their supervisory authority. In such a scenario, there is no contract, with the result that it is difficult to see how there could be a

public contract. The question arises as to whether an operation of that nature, being a transfer of tasks to a public special-purpose association, could be treated differently, depending on whether the transfer is voluntary or imposed.

33 The referring court then asks about the potential consequences of a finding that an overall operation such as that at issue in the main proceedings constitutes a public contract, in particular whether such a contract should be considered from the angle of the exception identified in the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562), or rather viewed as a form of cooperation between regional authorities for the performance of tasks incumbent on them.

34 In those circumstances, the Oberlandesgericht Celle (Higher Regional Court of Celle, Germany) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Does an agreement between two regional authorities — on the basis of which the regional authorities form, by constituent statutes, a common special-purpose association with separate legal personality, which from that point on carries out, under its own responsibility, certain duties which hitherto were incumbent on the regional authorities concerned — constitute a “public contract” within the meaning of Article 1(2)(a) of [Directive 2004/18] in the case where that transfer of duties concerns services within the meaning of that directive and is effected for consideration, the special-purpose association carries out activities going beyond the ambit of the exercise of duties previously incumbent on the regional authorities concerned and the transfer of duties does not belong to “the two types of contracts” which, although entered into by public entities, do not, according to the case-law of the Court of Justice (most recently, judgment of 13 June 2013, *Piepenbrock*, C-386/11, EU:C:2013:385, paragraph 33 et seq.), come within the scope of European Union public procurement law?

2. If the answer to Question 1 is in the affirmative: does the question whether the creation of a special-purpose association and the related transfer of duties to that association exceptionally does not come within the scope of European Union public procurement law depend on the principles which the Court of Justice has developed with regard to contracts concluded by a public entity with a person legally distinct from that entity — principles in accordance with which an application of European Union public procurement law is excluded — in the case where, at the same time, that entity exercises over the person concerned a control which is similar to that which it exercises over its own departments and where that person carries out the essential part of its activities with the entity or with the entities which control it (see, to that effect, inter alia, judgment of 18 November 1999, *Teckal*, C-107/98, EU:C:1999:562, paragraph 50), or, by contrast, do the principles which the Court of Justice has developed concerning contracts which establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out apply (in that respect, judgment of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 34 et seq.) …?’

Consideration of the questions referred

The first question

35 By its first question, the referring court asks, in essence, whether Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that an agreement concluded by two regional authorities, such as that at issue in the main proceedings, on the basis of which they adopt constituent statutes forming a

special-purpose association with legal personality governed by public law and transfer to that new public entity certain competences previously held by those authorities and henceforth belonging to that special-purpose association constitutes a 'public contract'.

36 Article 1(2)(a) defines 'public contracts' as '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 [Directive 2004/18]'.

37 For possible categorisation of a multi-stage operation as a public contract under that definition, the operation must be examined as a whole, taking account of its purpose (see, to that effect, judgment of 10 November 2005, *Commission* v *Austria*, C-29/04, EU:C:2005:670, paragraph 41).

38 In the present case, therefore, it is necessary to take into account, as a whole, the various stages of the operation at issue in the main proceedings. It is apparent from the order for reference that the Region of Hannover and the City of Hannover decided together to create, by regulatory act, a new entity governed by public law in order to confer on it certain competences, some of them common to those authorities and some of them belonging to each of them individually. At the same time, they conferred on that new entity certain powers in order to enable it to perform the tasks for which it was now competent. In effect they gave it the means they had hitherto had when so competent and undertook to cover any budgetary shortfalls of that entity, which was also given the power to charge and collect fees and the right to engage in certain activities not strictly within the remit of the competences transferred to it but being of the same type as certain activities performed as part of the tasks entrusted to it. Lastly, the new entity is characterised by autonomy in the performance of its tasks but must abide by the decisions of a general meeting of representatives of its two founding authorities, which is a body of the association and is responsible, inter alia, for appointing its managing director.

39 In that context, it should be noted, as a preliminary point, that the referring court's indication that the activities at issue in the main proceedings constitute 'services' within the meaning of Directive 2004/18 is aimed solely at clarifying that the application of that directive cannot be dismissed in that regard. On the other hand, the fact that an activity coming within a public authority's competence constitutes a service covered by that directive is not in itself sufficient to make that directive applicable, as public authorities are free to decide whether or not to have recourse to the contract mechanism in the accomplishment of their public interest tasks (see, to that effect, judgment of 9 June 2009, *Commission* v *Germany*, C-480/06, EU:C:2009:357, paragraph 45 and the case-law cited).

40 Moreover, it should be borne in mind, first of all, that the division of competences within a Member State benefits from the protection conferred by Article 4(2) TEU, according to which the Union must respect national identities, inherent in their fundamental structures, political and constitutional, including local and regional self-government (see, to that effect, judgment of 12 June 2014, *Digibet and Albers*, C-156/13, EU:C:2014:1756, paragraph 34).

41 Moreover, as that division of competences is not fixed, the protection conferred by Article 4(2) TEU also concerns internal reorganisations of powers within a Member State, as observed by the Advocate General in points 41 and 42 of his Opinion. Such reorganisations, which may take the form of reallocations of competences from one public authority to another imposed by a higher-ranking authority or voluntary transfers of competences between public authorities, have the consequence that a previously competent authority is released from or relinquishes the obligation or power to perform a given public task, whereas another authority is henceforth entrusted with that obligation or power.

42 Secondly, such a reallocation or transfer of competence does not meet all of the conditions required to come within the definition of public contract.

43 Only a contract concluded for pecuniary interest may constitute a public contract coming within the scope of Directive 2004/18, the pecuniary nature of the contract meaning that the contracting authority which has concluded a public contract receives a service which must be of direct economic benefit to that contracting authority (see, to that effect, judgment of 25 March 2010, *Helmut Müller*, C-451/08, EU:C:2010:168, paragraphs 47 to 49). The synallagmatic nature of the contract is thus an essential element of a public contract, as observed by the Advocate General in point 36 of his Opinion.

44 Moreover, irrespective of the fact that a decision on the allocation of public competences does not fall within the sphere of economic transactions, the very fact that a public authority is released from a competence with which it was previously entrusted by that self-same fact eliminates any economic interest in the accomplishment of the tasks associated with that competence.

45 Consequently, the reassignment of resources used to perform the tasks associated with the competence, which are transferred by the authority that ceases to be competent to the authority that acquires competence, cannot be analysed as a payment of a price, but on the contrary is the logical — and even necessary — consequence of the voluntary transfer or imposed reallocation of that competence from the first authority to the second.

46 Similarly, nor does the fact that the authority that takes the initiative to transfer a competence or decides on the reassignment of a competence undertakes to cover potential cost overruns in relation to revenues that may arise as a result of the exercise of that competence constitute remuneration. That is a guarantee intended for third parties, the necessity of which follows, in the present case, from the principle that a public authority cannot be sued in insolvency proceedings. The existence of such a principle itself follows from the internal organisation of a Member State.

47 It must be emphasised, however, as a third point, that in order to be considered an internal organisation measure and, accordingly, come under the freedom of Member States guaranteed by Article 4(2) TEU, a transfer of competence between public authorities must meet certain conditions.

48 In that regard, a situation such as that at issue in the main proceedings is not identical to the scenario referred to in the judgment of 20 October 2005, *Commission* v *France* (C-264/03, EU:C:2005:620). That case involved a determination of whether the type of mandate concerned constituted a specific transfer by a public authority to an entity for the completion of a project in principle coming within the competence of another entity and not a transfer of that competence itself. Nevertheless, those various types of transfers are identical in nature, although of different magnitudes, with the result that the essential point of that judgment on this point can be extrapolated for the purposes of the present case.

49 As observed by the Advocate General in point 53 of his Opinion, in order to be considered as such, a transfer of competence must concern not only the responsibilities associated with the transferred competence, including the obligation to perform the tasks that competence entails, but also those powers that are the corollary thereof. This requires that the public authority on which competence has been conferred has the power to organise the performance of the tasks coming within that competence and to draw up the regulatory framework for those tasks, and that it has financial autonomy allowing it to ensure the financing of those tasks. That is not the case, however, where the authority initially competent retains primary responsibility over those tasks, retains financial control over them or must give prior approval for decisions envisaged by the entity on which it has conferred powers.

50 In that regard, a situation such as that at issue in the main proceedings is readily distinguishable from that at the heart of the case which gave rise to the judgment of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385), in which a regional authority merely entrusted another regional entity with the performance of certain material tasks, in return for financial compensation, whilst reserving the power to supervise the proper execution thereof, as held by the Court in paragraph 41 of that judgment.

51 There can thus be no transfer of competence if the newly competent public authority does not act autonomously and under its own responsibility in the performance of its tasks.

52 As observed by the Advocate General in point 56 of his Opinion, such autonomy of action does not mean that the newly competent entity must be shielded from any influence whatsoever by another public entity. An entity that transfers competence may retain a certain degree of influence over the tasks associated with the public service. That influence does, however, in principle, preclude any involvement in the actual performance of the tasks coming within the transferred competence. In a situation such as that in the main proceedings, that influence may be brought to bear through a body, such as the general meeting, made up of representatives of the previously competent regional authorities.

53 Nor does autonomy of action mean that an imposed reassignment or voluntary transfer of competence must be irreversible. As observed in paragraph 41 above, the division of competences within a Member State cannot be regarded as fixed, so successive reorganisations are entirely possible. Moreover, the situations at issue in the judgment of 20 October 2005, *Commission* v *France* (C-264/03, EU:C:2005:620), were not permanent in nature, involving as they did specific transfers of public authority to an entity for the purposes of a project that, in principle, fell within the competence of another entity that retained its general competence. Those situations should have been held to fall outside the sphere of public procurement law had they not borne the hallmarks highlighted by the Court in paragraph 54 of that judgment, which led it to conclude that there was no genuine transfer in that case. Consequently, as observed by the Advocate General in point 54 of his Opinion, there is nothing precluding a competence transferred or reassigned as part of a reorganisation of public services from being subsequently retransferred or reassigned again under a later reorganisation.

54 Lastly, in order to address all of the aspects referred to by the referring court, it must be remembered that the authorisation or prohibition for public entities of Member States or certain categories thereof to engage in an activity on the market lying outside their general interest sphere of action is a matter that comes under the domestic rules of the Member States, to whom it falls to determine whether or not such an activity is compatible with their objectives as an institution and those laid down in their statutes (see, to that effect, judgment of 23 December 2009, *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 48). Thus, the fact that the public entities concerned by a transfer of competence may or may not pursue certain activities on the market also comes within the internal organisation of the Member States and is, moreover, of no import for the nature of such a transfer once the conditions set out in paragraphs 47 to 51 of this judgment are satisfied.

55 In the light of all the foregoing considerations, the answer to the question referred is that:

— Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that an agreement concluded by two regional authorities, such as that at issue in the main proceedings, on the basis of which they adopt constituent statutes forming a special-purpose association with legal personality governed by public law and transfer to that new public entity certain competences previously held by those authorities and henceforth belonging to that special-purpose association, does not constitute a ‘public contract’.

— However, such a transfer of competences concerning the performance of public tasks exists only if it concerns both the responsibilities associated with the transferred competence and the powers that are the corollary thereof, so that the newly competent public authority has decision-making and financial autonomy, which it is for the referring court to verify.

The second question

56 In the light of the answer given to the first question, there is no need to answer the second question.

Costs

57 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 (Third 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 an agreement concluded by two regional authorities, such as that at issue in the main proceedings, on the basis of which they adopt constituent statutes forming a special-purpose association with legal personality governed by public law and transfer to that new public entity certain competences previously held by those authorities and henceforth belonging to that special-purpose association, does not constitute a 'public contract'.

However, such a transfer of competences concerning the performance of public tasks exists only if it concerns both the responsibilities associated with the transferred competence and the powers that are the corollary thereof, so that the newly competent public authority has decision-making and financial autonomy, which it is for the à the referring court to verify.

[Signatures]