Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

5 October 2017 *

(Reference for a preliminary ruling — Public works contracts, public supply contracts and public service contracts — Directive 2004/18/EC — Article 1(9) — Concept of contracting authority — Company wholly owned by a contracting authority — Transactions internal to the group)

In Case C-567/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania), made by decision of 21 October 2015, received at the Court on 2 November 2015, in the proceedings

**'LitSpecMet' UAB**

v

**'Vilniaus lokomotyvų remonto depas' UAB,**

intervening party:

**'Plienmetas' UAB,**

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Fourth Chamber, E. Juhász (Rapporteur), C. Vajda and C. Lycourgos, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and following the hearing of 9 February 2017,

after considering the observations submitted on behalf of:

– 'LitSpecMet' UAB, by C. Maczkovics, R. Martens and V. Ostrovskis, advokatai,

– 'Vilniaus lokomotyvų remonto depas' UAB, by D. Soloveičik, advokatas, and G. Jokubauskas, representative of the undertaking,

– the Lithuanian Government, by D. Kriaučiūnas and by D. Stepanienė and R. Butvydytė, acting as Agents,

* Language of the case: Lithuanian.

– the German Government, by J. Möller, acting as Agent,

– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and F. Batista, acting as Agents,

– the European Commission, by A. Tokár and A. Steiblytė and J. Jokubauskaitė, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2017,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(9) 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), as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 (OJ 2011 L 319, p. 43; 'Directive 2004/18').

2 The request has been made in proceedings between 'LitSpecMet' UAB ('LSM') and 'Vilniaus lokomotyvų remonto depas' UAB ('VLRD') concerning a contract for the supply of ferrous metal bars awarded in part by VLRD to LSM.

### Legal context

#### *European Union law*

3 Directive 2004/18 was repealed and replaced, with effect from 18 April 2016, by Directive 2014/24/EU 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).

4 Article 1(2)(c) of Directive 2004/18 defined 'Public supply contracts' as public contracts other than public works contracts having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products.

5 Article 1(9) of that directive stated:

'"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) 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.

…'

6 Article 7 of Directive 2004/18, entitled ‘Threshold amounts for public contracts’, provided as follows:

‘This directive shall apply to public contracts which are not excluded in accordance with the exceptions provided for in Articles 10 and 11 and Articles 12 to 18 and which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

…

(b) EUR 200 000:

– for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV,

…’

### *Lithuanian law*

7 The Lietuvos Respublikos viešųjų pirkimų įstatymas (Lithuanian Law on public contracts), which transposes Directive 2004/18 into Lithuanian law, provides in Article 4, entitled ‘Contracting authorities’:

‘1. A contracting authority is:

(1) a State or local authority;

(2) a legal person governed by public or private law meeting the conditions set out in paragraph 2 of this article;

(3) an association of authorities referred to in subparagraph 1 of this paragraph and/or of the legal persons governed by public or private law referred to in point 2 of this paragraph;

(4) the contracting undertakings operating in the water, energy, transport and postal services sectors referred to in points 2 to 4 of Article 70(1) of this law.

2. A legal person governed by public or private law (other than national or local governments) established for the purpose of specifically meeting needs in the general interest, not having an industrial or commercial character, and which satisfies at least one of the following conditions is a contracting authority if:

(1) more than 50% of its activity is financed from State or local authority budgets or from other resources of the State or local authorities or from the funds of other legal persons governed by public or private law referred to in this paragraph;

(2) it is controlled (managed) by national or local government or by other legal persons governed by public or private law referred to in this paragraph;

(3) more than half of the members of its administrative, managerial or supervisory board are appointed by national or local government or by legal persons governed by public or private law referred to in this paragraph. ...’

8 Article 10(5) of the Lithuanian Law on public contracts provides:

‘The provisions of this law are not applicable where the contracting authority concludes an agreement with an entity that is legally separate, over which the contracting authority exercises an exclusive control which is similar to that which it exercises over its own departments or organs (or in respect of which the contracting authority is the only shareholder and exercises the rights and duties of the State or of a local authority) and where at least 90% of the turnover of the controlled entity in the previous accounting period (or in the period since its creation if it has been operating for less than a full accounting period) has been generated through activities intended to meet the needs of the contracting authority or to enable it to perform its functions.’

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

9 VLRD is a commercial company which was established in 2003, following a restructuring of ‘Lietuvos geležinkeliai’ AB (Lithuanian Railways, the State railway company; ‘LG’), and its object is the manufacture and maintenance of locomotives and railway carriages.

10 VLRD is a subsidiary of LG, which is its only partner company. LG was, at the material time, the main client of VLRD, its orders representing nearly 90% of the turnover of VLRD.

11 In 2013, VLRD published a notice of a simplified tendering procedure for the procurement of bars of ferrous metals to which LSM responded before being awarded the contract in respect of part of its bid.

12 LSM sought the annulment of that contract and the publication of a new notice which complied with the Lithuanian Law on public contracts on the ground that, in its view, VLRD was a contracting authority within the meaning of the Lithuanian Law on public contracts.

13 LSM argued, in essence, firstly, that VLRD had been established to meet the needs of LG, which was an undertaking financed by the State and which had a public service remit, and, secondly, that the conditions under which VLRD governing the services and sales which it carried out to the benefit of its parent company did not reflect normal competitive conditions. According to LSM, those elements were a sufficient indication of the fact that the activity of VLRD was intended to meet needs in the general interest, not having an industrial or commercial character, and that it was therefore a contracting authority and subject to the rules on public procurement.

14 The Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania) rejected LSM’s claims. That decision was upheld by the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania).

15 In confirming the decision given at first instance, the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) noted in particular that VLRD had been established to carry out commercial activity and make profits, which was shown by the fact that it alone bore the risks of its activity without the State covering its losses. The Court of Appeal also considered that VLRD’s activity could not be regarded as meeting a need in the general interest of all citizens, since it had been shown that VLRD was developing in a competitive environment and that although, at the material time, almost all its sales were concluded with LG, the projections made showed that, in 2016, those sales would no longer represent more than 15% of VLRD’s commercial transactions.

16 The Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) overturned the decision of the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania).

17 To that effect, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) took as its basis the premiss that the resolution of the dispute before it depended on the interpretation to be given to the expression 'body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character' used in the second subparagraph, (a), of Article 1(9) of Directive 2004/18 and repeated in Article 4 of the Lithuanian Law on public contracts.

18 In that regard, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) pointed out in particular that the functional approach to the concept of 'body governed by public law' adopted by the Court led to various factors being taken into account to determine whether a person was a contracting authority, such as whether or not there was competition in the market in which it operates, the circumstances in which the entity under consideration was established, whether or not it is possible to replace that entity by another operator or whether or not that entity bore the risks engendered by its activity.

19 The Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) has stated, in essence, that both the court of first instance and the appeal court had failed to examine the specific nature of the economic activities carried out by VLRD, in particular as regards the intensity of the competition prevalent in the economic sector in which that company was developing. It took the view that those courts had attributed too great an importance to the legal form of VLRD, that of a commercial company, to find that VLRD was not a contracting authority.

20 The Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) noted in addition that VLRD carried out on average 15 internal transactions per year in favour of its parent company which, for that type of transactions, was exempted from the rules on public contracts. In that regard, it pointed out that, if the parent company itself carried out the activities undertaken by its subsidiary, it would be subject to those rules as regards the purchase of vehicles, materials and other supplies necessary to the maintenance of locomotives and rolling stock or to other work, in accordance with the Lithuanian Law on public contracts. It stated that, in such a situation, it was necessary to analyse whether the fact that a parent company used the services of a subsidiary to carry out economic transactions in the general interest was not such as to permit circumvention of the legislation on public contracts.

21 The case was referred back to the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) which, after having set aside the decision of the Vilniaus apygardos teismas (Regional Court, Vilnius), referred the matter back to it.

22 Under those circumstances, the Vilniaus apygardos teismas (Regional Court, Vilnius) decided to stay its proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 1(9) of Directive 2004/18 be interpreted as meaning that a company:

– which has been founded by a contracting authority which engages in activity in the field of rail transport, namely: management of public railway infrastructure; passenger and freight transportation;

– which independently engages in business activity, establishes a business strategy, adopts decisions concerning the conditions of the company's activity (product market, customer segment and so forth), participates in a competitive market throughout the European Union and outside the EU market, providing the services of rolling stock manufacture and rolling stock repair, and participates in procurement procedures connected with that activity, seeking to obtain orders from third parties (not the parent company);

– which provides rolling stock repair services to its founder on the basis of in-house transactions and the value of those services represents 90 per cent of the company's entire activity;

– whose services provided to its founder are intended to ensure the founder's passenger and freight transportation activity;

is not to be considered to be a contracting authority?

(2) If the Court determines that the company is to be considered to be a contracting authority in the circumstances set out above, must Article 1(9) of Directive 2004/18 be interpreted as meaning that the company loses the status of contracting authority where the value of the rolling stock repair services provided on the basis of in-house transactions to the contracting authority which is the company's founder falls and constitutes less than 90% or not the main part of the total financial turnover from the company's activity?'

**Consideration of the questions referred**

23 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether the second subparagraph of Article 1(9) of Directive 2004/18 must be interpreted as meaning that a company which, firstly, is wholly owned by a contracting authority the activity of which is to meet needs in the general interest and which, secondly, carries out both transactions for that contracting authority and transactions on the competitive market may be classified as a 'body governed by public law' within the meaning of that provision and if so, in that regard, what is the effect of the fact that the value of the in-house transactions may in future represent less than 90% or not the main part of the total financial turnover of the company.

24 As a preliminary point, it is appropriate to note that the referring court does not give any indication in the present case as regards the value of the contract at issue in the main proceedings, so that it is not possible to determine with certainty whether or not the value of that contract exceeds the threshold set in Article 7(b) of Directive 2004/18 and, in consequence, whether or not one of the essential conditions for the application of that directive is satisfied in the case giving rise to the main proceedings.

25 By reason of the spirit of cooperation in relations between the national courts and the Court of Justice in the context of the procedure for a preliminary ruling, the lack of such preliminary findings by the referring court does not lead to the request being inadmissible if, in spite of those failings, the Court, having regard to the information available from the file, considers that it is in a position to provide a useful answer to the referring court. That is the case, in particular, where the order for reference contains sufficient relevant information for it to be determined whether the conditions for application of a measure of secondary legislation are likely to be satisfied. Nevertheless, the answer provided by the Court is given subject to the proviso that the referring court has found that those conditions are met (see, by analogy, judgment of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 48).

26 It is therefore for the referring court to ascertain whether, in the present case, the condition concerning the threshold of EUR 200 000, as laid down in Article 7(b) of Directive 2004/18, is met.

27 It is not in dispute that the activity of LG, which includes the supply of public passenger transport services, is regarded as being carried out to meet needs in the general interest and that that company must be classified as a 'body governed by public law' and, accordingly, a 'contracting authority'.

28 Thus, the first question seeks to clarify whether VLRD must also be classified as a 'body governed by public law'.

29 Under the second subparagraph, points (a) to (c), of Article 1(9) of Directive 2004/18, a 'body governed by public law' is any body which, firstly, was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, secondly, has legal personality

and, thirdly, is 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.

30 As the Court has consistently held, the conditions set out in that article are cumulative, so that if a single one of those conditions is unfulfilled a body cannot be regarded as a 'body governed by public law' and, therefore, as a 'contracting authority' within the meaning of Directive 2004/18 (see, to that effect, judgments of 22 May 2003, *Korhonen and Others*, C-18/01, EU:C:2003:300, paragraph 32, and of 10 April 2008, *Ing. Aigner*, C-393/06, EU:C:2008:213, paragraph 36 and the case-law cited.

31 The concept of 'contracting authority', including that of 'body governed by public law', must, in the light of the objectives of the directives on public procurement, seeking to exclude both the risk of preferring national tenderers or bidders in any contract award made by the contracting authorities and the possibility that a body financed or controlled by the State, regional authorities or other bodies governed by public law may be guided by considerations other than economic ones, must be interpreted in functional terms and broadly (see, to that effect, judgment of 15 May 2003, *Commission* v *Spain*, C-214/00, EU:C:2003:276, paragraph 53 and the case-law cited).

32 It must be noted that VLRD appears to satisfy the conditions laid down in the second subparagraph, (b) and (c), of Article 1(9) of Directive 2004/18. It is not, in fact, in dispute that it has legal personality. In addition, the referring court has noted that VLRD is a wholly owned subsidiary of LG and that it is 'controlled' by the latter company.

33 Consequently, the only question which needs to be analysed concerns whether or not VLRD constitutes a 'body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character' within the meaning of the second subparagraph, (a), of Article 1(9) of Directive 2004/18.

34 It is clear from the wording of the second subparagraph, (a), of Article 1(9) of Directive 2004/18 that the requirement laid down therein must be satisfied by the entity whose classification is being examined and not by another entity, even if the latter is the parent company of the former which supplies the latter with goods or services. It is therefore not sufficient that an undertaking was established by a contracting authority or that its activities are financed by funds derived from activities pursued by a contracting authority in order for it to be regarded as a contracting authority itself (judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others*, C-44/96, EU:C:1998:4, paragraph 39).

35 In addition, it is necessary to take into consideration the fact that the use of the term 'specific' shows the EU legislature's intention to make only entities established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, the activity of which meets such needs, subject to the binding rules on public contracts.

36 Accordingly, it is necessary to determine, first of all, whether VLRD was established for the specific purpose of meeting needs in the general interest, the activity of which meets such needs before, if necessary, examining whether or not those needs have an industrial or commercial character (see, to that effect, judgment of 22 May 2003, *Korhonen and Others*, C-18/01, EU:C:2003:300, paragraph 40).

37 In the present case, it is apparent from the terms of the first question that VLRD supplies goods and services to 'enable [its parent company] to carry out its activity of passenger and freight transportation'.

38 It is apparent from the order for reference that VLRD was established after the restructuring of LG and that 'both the establishment of [VLRD] and its activity remain devoted to meeting its founder's needs, namely needs in the general interest'. In that regard, it must be noted that, in the main proceedings, VLRD's activity, in particular the manufacture and maintenance of locomotives and rolling stock and the supply of those goods and services to LG, appears necessary for LG to be able to carry out its activity intended to meet needs in the general interest.

39 It therefore appears that VLRD was established with the specific aim of meeting its parent company's needs and that the needs which VLRD was tasked with meeting constitute a condition necessary to the parent company's carrying out of activities in the general interest, which it is, however, for the referring court to ascertain.

40 It must be noted that it is irrelevant that, in addition to the activities intended to meet needs in the general interest, the entity in question also carries out other activities for profit on the competitive market (see, to that effect, judgments of 15 January 1998, *Mannesmann Anlagenbau Austria and Others*, C-44/96, EU:C:1998:4, paragraph 25, and of 10 April 2008, *Ing. Aigner*, C-393/06, EU:C:2008:213, paragraph 47 and the case-law cited).

41 Thus, the fact that VLRD does not carry out only activities intended to meet needs in the general interest through internal transactions with LG, so that LG may carry out its transport activities, but also other profit-making activities is irrelevant in that regard.

42 In order to assess whether a body is covered by the concept of a 'body governed by public law' within the meaning of the second subparagraph, (a), of Article 1(9) of Directive 2004/18, it is also necessary for it to meet needs in the general interest, not having an industrial or commercial character.

43 In that regard, it is appropriate to note that in the assessment of that character account must be taken of relevant legal and factual circumstances, such as those prevailing when the body concerned was formed and the conditions in which it carries on its activity, including, inter alia, lack of competition on the market, the fact that its primary aim is not the making of profits, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question.

44 As the Court has held, if, with regard to the activities intended to meet needs in the general interest, the body operates in normal market conditions, aims to make a profit and bears the losses associated with the exercise of its activity, it is unlikely that the needs it seeks to meet are not of an industrial or commercial nature (judgment of 16 October 2003, *Commission* v *Spain*, C-283/00, EU:C:2003:544, paragraphs 81 and 82 and the case-law cited).

45 That being the case, the existence of significant competition does not, of itself, allow the conclusion to be drawn that there is no need in the general interest, which is not of an industrial or commercial character.

46 In those circumstances, it is for the referring court to ascertain, on the basis of all the legal and factual circumstances of the case, whether, at the time of the award of the contract at issue in the main proceedings, the activities carried out by VLRD, seeking to meet needs in the general interest, were exercised in competitive conditions and in particular whether VLRD was able, having regard to the circumstances of the present case, to be guided by non-economic considerations.

47 The fact raised by the referring court, in the order for reference, that the extent of the internal transactions with LG in relation to the overall turnover of VLRD could diminish in future is irrelevant in that regard, given that it is for that referring court to examine the situation of that company at the time of award of the contract in question.

48 Consequently, the answer to the questions referred is that the second subparagraph of Article 1(9) of Directive 2004/18 must be interpreted as meaning that a company which, on the one hand, is wholly owned by a contracting authority whose activity consists of meeting needs in the general interest and which, on the other, carries out both internal transactions for that contracting authority and transactions on the competitive market must be classified as a 'body governed by public law' within the meaning of that provision, provided that the activities of that company are necessary for the contracting authority to exercise its own activity and, in order to meet needs in the general interest, that company is able to be guided by non-economic considerations, which it is for the referring court to ascertain. The fact that the value of the internal transactions may in future represent less than 90% or an insignificant part of the overall turnover of the company is irrelevant in that regard.

## Costs

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

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

**The second subparagraph of Article 1(9) 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, as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011, must be interpreted as meaning that a company which, on the one hand, is wholly owned by a contracting authority whose activity consists of meeting needs in the general interest and which, on the other, carries out both transactions for that contracting authority and transactions on the competitive market must be classified as a 'body governed by public law' within the meaning of that provision, provided that the activities of that company are necessary for the contracting authority to exercise its own activity and, in order to meet needs in the general interest, that company is able to be guided by non-economic considerations, which it is for the referring court to ascertain. The fact that the value of the internal transactions may in future represent less than 90% or an insignificant part of the overall turnover of the company is irrelevant in that regard.**

[Signatures]