



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

1 August 2022*

(Reference for a preliminary ruling – Public procurement – Concession contracts – Formation of a semi-public company – Award to that company of the management of an ‘integrated school service’ – Appointment of the private partner under a tender procedure – Directive 2014/23/EU – Article 38 – Directive 2014/24/EU – Article 58 – Applicability – ‘In-house’ criteria – Requirement for minimum participation of the private partner in the capital of the semi-public company – Indirect participation of the contracting authority in the capital of the private partner – Selection criteria)

In Case C-332/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 13 February 2020, received at the Court on 22 July 2020, in the proceedings

Roma Multiservizi SpA,

Rekeep SpA

v

Roma Capitale,

Autorità Garante della Concorrenza e del Mercato,

intervener:

Consorzio Nazionale Servizi Soc. coop. (CNS),

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, S. Rodin, J.-C. Bonichot, L. S. Rossi and O. Spineanu-Matei, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: Italian.

after considering the observations submitted on behalf of:

- Roma Multiservizi SpA, by F. Baglivo, T. Frosini, P. Leozappa, D. Lipani and F. Sbrana, avvocati,
- Rekeep SpA, by A. Liroso, M. Martinelli, G. Vercillo and A. Zoppini, avvocati,
- Roma Capitale, by L. D’Ottavi, avvocato,
- Consorzio Nazionale Servizi Soc. coop. (CNS), by F. Cintioli, G. Notarnicola and A. Police, avvocati,
- the European Commission, by G. Gattinara, P. Ondrůšek and K. Talabér-Ritz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2022,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 30 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), as amended by Commission Delegated Regulation (EU) 2017/2366 of 18 December 2017 (OJ 2017 L 337, p. 21) (‘Directive 2014/23’), and Articles 12 and 18 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 (OJ 2017 L 337, p. 19) (‘Directive 2014/24’), read in conjunction with Article 107 TFEU.
- 2 The request has been made in proceedings between Roma Multiservizi SpA and Rekeep SpA, on the one hand, and Roma Capitale (city of Rome, Italy) and the Autorità Garante della Concorrenza e del Mercato (Italian competition authority, Italy), on the other hand, concerning that city’s decision to exclude from the contract award procedure the consortium proposed by Roma Multiservizi and Rekeep.

Legal context

European Union law

Directive 2014/23

- 3 Article 3 of Directive 2014/23 provides as follows:

‘1. Contracting authorities and contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the concession award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.

2. Contracting authorities and contracting entities shall aim at ensuring the transparency of the award procedure and of the performance of the contract, while complying with Article 28.'

4 Article 5 of that directive provides:

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

(1) "concessions" means works or services concessions, as defined in points (a) and (b):

...

(b) "services concession" means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.

The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible;

...'

5 Article 8(1) of that directive states:

'This Directive shall apply to concessions the value of which is equal to or greater than EUR 5 548 000.'

6 Article 10(3) of the directive is worded as follows:

'This Directive shall not apply to concessions for air transport services based on the granting of an operating licence within the meaning of Regulation (EC) No 1008/2008 of the European Parliament and of the Council [of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3)] or to concessions for public passenger transport services within the meaning of Regulation (EC) No 1370/2007 [of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1)].'

7 Under Article 17 of Directive 2014/23:

‘1. A concession awarded by a contracting authority or a contracting entity as referred to in point (a) of Article 7(1) to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

- (a) the contracting authority or contracting entity exercises over the legal person concerned a control which is similar to that which it exercises over its own departments; and
- (b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or contracting entity or by other legal persons controlled by that contracting authority or contracting entity; and
- (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority or contracting entity as referred to in point (a) of Article 7(1) shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph of this paragraph, where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. That control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority or contracting entity.

...

4. A contract concluded exclusively between two or more contracting authorities or contracting entities as referred to in point (a) of Article 7(1) shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

- (a) the contract establishes or implements a cooperation between the participating contracting authorities or contracting entities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
- (b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and
- (c) the participating contracting authorities or contracting entities perform on the open market less than 20% of the activities concerned by the cooperation.

...’

8 Article 19 of that directive provides:

‘Concessions for social and other specific services listed in Annex IV falling within the scope of this Directive shall be subject only to the obligations arising from Article 31(3) and Articles 32, 46 and 47.’

9 Article 20(1) of that directive provides:

‘Concessions which have as their subject matter both works and services shall be awarded in accordance with the provisions applicable to the type of concession that characterises the main subject matter of the contract in question.

In the case of mixed concessions consisting partly of social and other specific services listed in Annex IV and partly of other services, the main subject matter shall be determined according to which of the estimated values of the respective services is the higher.’

10 Article 30 of Directive 2014/23 states:

‘1. The contracting authority or contracting entity shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with this Directive.

2. The design of the concession award procedure shall respect the principles laid down in Article 3. In particular during the concession award procedure, the contracting authority or contracting entity shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others.

...’

11 Article 38(1) of Directive 2014/23 is worded as follows:

‘Contracting authorities and contracting entities shall verify the conditions for participation relating to the professional and technical ability and the financial and economic standing of the candidates or tenderers, on the basis of self-declarations, reference or references to be submitted as proof in accordance with the requirements specified in the concession notice that shall be non-discriminatory and proportionate to the subject matter of the concession. The conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject matter of the concession and the purpose of ensuring genuine competition.’

Directive 2014/24

12 Under Recital 32 of Directive 2014/24:

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

The exemption should not extend to situations where there is direct participation by a private economic operator in the capital of the controlled legal person since, in such circumstances, the award of a public contract without a competitive procedure would provide the private economic operator with a capital participation in the controlled legal person an undue advantage over its competitors. However, in view of the particular characteristics of public bodies with compulsory

membership, such as organisations responsible for the management or exercise of certain public services, this should not apply in cases where the participation of specific private economic operators in the capital of the controlled legal person is made compulsory by a national legislative provision in conformity with the Treaties, provided that such participation is non-controlling and non-blocking and does not confer a decisive influence on the decisions of the controlled legal person. It should further be clarified that the decisive element is only the direct private participation in the controlled legal person. Therefore, where there is private capital participation in the controlling contracting authority or in the controlling contracting authorities, this does not preclude the award of public contracts to the controlled legal person, without applying the procedures provided for by this Directive as such participations do not adversely affect competition between private economic operators.

It should also be clarified that contracting authorities such as bodies governed by public law, that may have private capital participation, should be in a position to avail themselves of the exemption for horizontal cooperation. Consequently, where all other conditions in relation to horizontal cooperation are met, the horizontal cooperation exemption should extend to such contracting authorities where the contract is concluded exclusively between contracting authorities.'

13 Article 2(1) of that directive provides:

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

...

(9) "public service contracts" means public contracts having as their object the provision of services other than those referred to in point 6;

...'

14 Article 3 of that directive provides:

'1. Paragraph 2 shall apply to mixed contracts which have as their subject matter different types of procurement all of which are covered by this Directive.

Paragraphs 3 to 5 shall apply to mixed contracts which have as their subject matter procurement covered by this Directive and procurement covered by other legal regimes.

2. Contracts which have as their subject two or more types of procurement (works, services or supplies) shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject of the contract in question.

In the case of mixed contracts consisting partly of services within the meaning of Chapter I of Title III and partly of other services or of mixed contracts consisting partly of services and partly of supplies, the main subject shall be determined in accordance with which of the estimated values of the respective services or supplies is the highest.

3. Where the different parts of a given contract are objectively separable, paragraph 4 shall apply. Where the different parts of a given contract are objectively not separable, paragraph 6 shall apply.

Where part of a given contract is covered by Article 346 TFEU or Directive 2009/81/EC [of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76)], Article 16 of this Directive shall apply.

4. In the case of contracts which have as their subject matter procurement covered by this Directive as well as procurement not covered by this Directive, contracting authorities may choose to award separate contracts for the separate parts or to award a single contract. Where contracting authorities choose to award separate contracts for separate parts, the decision of which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

Where contracting authorities choose to award a single contract, this Directive shall, unless otherwise provided in Article 16, apply to the ensuing mixed contract, irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to.

In the case of mixed contracts containing elements of supply, works and service contracts and of concessions, the mixed contract shall be awarded in accordance with this Directive, provided that the estimated value of the part of the contract which constitutes a contract covered by this Directive, calculated in accordance with Article 5, is equal to or greater than the relevant threshold set out in Article 4.

5. In the case of contracts which have as their subject both procurement covered by this Directive and procurement for the pursuit of an activity which is subject to Directive 2014/25/EU [of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243)], the applicable rules shall, notwithstanding paragraph 4 of this Article, be determined pursuant to Articles 5 and 6 of [Directive 2014/25].

6. Where the different parts of a given contract are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject matter of that contract.'

15 Article 4 of that directive states:

'This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

...

- (b) EUR 144 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III;
- (c) EUR 221 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities; that threshold shall also apply to public supply contracts awarded by central government authorities that operate in the field of defence, where those contracts involve products not covered by Annex III;

(d) EUR 750 000 for public service contracts for social and other specific services listed in Annex XIV.’

16 Article 7 of Directive 2014/24 is worded as follows:

‘This Directive shall not apply to public contracts and design contests which, under Directive [2014/25], are awarded or organised by contracting authorities exercising one or more of the activities referred to in Articles 8 to 14 of that Directive and are awarded for the pursuit of those activities ...’

17 Under Article 12 of that directive:

‘1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

- (a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
- (b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and
- (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.

...

4. A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

- (a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
- (b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and
- (c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.

...’

18 Article 18 of that directive provides:

‘1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.’

19 Article 57 of that directive provides:

‘1. Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:

- (a) participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA [of 24 October 2008 on combating organised crime (OJ 2008 L 300, p. 42)];
- (b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union ... and Article 2(1) of Council Framework Decision 2003/568/JHA [of 22 July 2003 on combating corruption in the private sector (OJ 2003 L 192, p. 54)] as well as corruption as defined in the national law of the contracting authority or the economic operator;
- (c) fraud within the meaning of Article 1 of the Convention on the protection of the European Communities’ financial interests ...;
- (d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA [of 13 June 2002 on combating terrorism (OJ 2002 L 164, p. 3)] respectively, or inciting or aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;
- (e) money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council [of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15)];
- (f) child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council [of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ 2011 L 101, p. 1)].

The obligation to exclude an economic operator shall also apply where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.

2. An economic operator shall be excluded from participation in a procurement procedure where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority.

Furthermore, contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure an economic operator where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

This paragraph shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

...

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

- (a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2);
- (b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national laws and regulations;
- (c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
- (d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- (e) where a conflict of interest within the meaning of Article 24 cannot be effectively remedied by other less intrusive measures;
- (f) where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure, as referred to in Article 41, cannot be remedied by other, less intrusive measures;

- (g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;
- (h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59; or
- (i) where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

Notwithstanding point (b) of the first subparagraph, Member States may require or may provide for the possibility that the contracting authority does not exclude an economic operator which is in one of the situations referred to in that point, where the contracting authority has established that the economic operator in question will be able to perform the contract, taking into account the applicable national rules and measures on the continuation of business in the case of the situations referred to in point (b).

...'

20 Article 58 of that directive states:

'1. Selection criteria may relate to:

- (a) suitability to pursue the professional activity;
- (b) economic and financial standing;
- (c) technical and professional ability.

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.

...

3. With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract. For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the

ratios, for instance, between assets and liabilities. They may also require an appropriate level of professional risk indemnity insurance.

The minimum yearly turnover that economic operators are required to have shall not exceed two times the estimated contract value, except in duly justified cases such as relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate the main reasons for such a requirement in the procurement documents or the individual report referred to in Article 84.

The ratio, for instance, between assets and liabilities may be taken into consideration where the contracting authority specifies the methods and criteria for such consideration in the procurement documents. Such methods and criteria shall be transparent, objective and non-discriminatory.

Where a contract is divided into lots this Article shall apply in relation to each individual lot. However, the contracting authority may set the minimum yearly turnover that economic operators are required to have by reference to groups of lots in the event that the successful tenderer is awarded several lots to be executed at the same time.

Where contracts based on a framework agreement are to be awarded following a reopening of competition, the maximum yearly turnover requirement referred to in the second subparagraph of this paragraph shall be calculated on the basis of the expected maximum size of specific contracts that will be performed at the same time, or, where it is not known, on the basis of the estimated value of the framework agreement. In the case of dynamic purchasing systems, the maximum yearly turnover requirement referred to in the second subparagraph shall be calculated on the basis of the expected maximum size of specific contracts to be awarded under that system.

...'

21 Article 74 of Directive 2014/24 is worded as follows:

'Public contracts for social and other specific services listed in Annex XIV shall be awarded in accordance with this Chapter, where the value of the contracts is equal to or greater than the threshold indicated in point (d) of Article 4.'

Directive 2014/25

22 Under Article 6(2) of Directive 2014/25:

'A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.'

23 Article 11 of that directive provides:

'This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.'

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.’

Italian law

- 24 Article 5(9) of decreto legislativo n. 50 – Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull’aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d’appalto degli enti erogatori nei settori dell’acqua, dell’energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture (Legislative Decree No 50 implementing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, on public procurement and on procurement by entities operating in the water, energy, transport and postal services sectors, and reforming the existing provisions in relation to public works, service and supply contracts) of 18 April 2016 (ordinary supplement to GURI No 91 of 19 April 2016; ‘Legislative Decree No 50/2016), states:

‘Where the provisions in force authorise the formation of mixed companies for the performance and management of public works or for the organisation and management of a service of general interest, the private partner must be selected by means of a procedure for the award of a public contract.’

- 25 Article 4 of Legislative Decree No 175 – Testo unico in materia di società a partecipazione pubblica (Legislative Decree No 175 establishing the Consolidated Law on publicly owned companies) of 19 August 2016 (GURI No 210 of 8 September 2016; ‘Legislative Decree No 175/2016’) provides that the objectives pursued by public authorities when where they create companies in which they have a shareholding are to be subject to a double constraint. First, they must be companies whose purpose is to undertake activities that are strictly necessary to achieve the institutional objectives of the authority concerned. Second, the activities to be undertaken must fall within those expressly indicated in paragraph 2 of that article, namely, inter alia, the generation of a service of general interest, including the establishment and operation of networks and facilities used for those services and the organisation and management of a service of general interest through a partnership contract referred to in Article 180 of Legislative Decree No 50/2016, with a contractor selected in accordance with the detailed rules laid down in Article 17(1) and (2) of Legislative Decree No 175/2016.

- 26 Article 7(5) of Legislative Decree No 175/2016 requires private partners to be selected in advance by means of a public procurement procedure, in accordance with Article 5(9) of Legislative Decree No 50/2016.

- 27 Article 17(1) of Legislative Decree No 175/2016 is worded as follows:

‘In public-private mixed companies, the percentage participation of the private partner may not be less than 30%, and that partner must be selected via a public procurement procedure in accordance with Article 5(9) of [Legislative Decree No 50/2016]. which covers both the subscription or the acquisition of the participation by the private partner and the award of the contract or concession forming the sole object of the activities of the semi-public company’.

28 According to Article 17(2) of Legislative Decree No 175/2016:

‘The private partner must meet the qualification requirements laid down in the legal or regulatory provisions in relation to the purpose for which the company has been created ...’.

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

- 29 On 4 September 2018, the city of Rome issued a call for tenders seeking, first, to appoint a partner in order to form a company with mixed public and private capital (‘a semi-public company’) and, second, to award that company a contract to manage the ‘integrated school service’, valued at EUR 277 479 616.21. According to the tender documents, the city of Rome was to own 51% of the shares in that company, with the remaining 49% to be acquired by its partner, which was also to bear the entire operational risk.
- 30 Only one tender was submitted by a consortium which was in the process of being formed, consisting of Roma Multiservizi and Rekeep. It was envisaged that that consortium would be 10% owned by Rekeep, as principal, and 90% by Roma Multiservizi, as the lead company, and that those two companies would hold a stake in the semi-public company to be formed with the city of Rome, in proportion to their participation in that consortium.
- 31 Roma Multiservizi, established in 1994 by the city of Rome, is 51% owned by AMA SpA, while the remainder of its capital is owned by Rekeep and La Vendita Servizi SpA. AMA is, itself, wholly owned by that city.
- 32 On 1 March 2019, the consortium in the process of being formed consisting of Roma Multiservizi and Rekeep was excluded from the ongoing procedure on the ground that, taking into account AMA’s participation in the capital of Roma Multiservizi, the city of Rome, in practice, would have owned 73.5% of the semi-public company which would have been formed with that consortium, thus exceeding the limit of 51% set out in the call for tenders and bringing the share of risk capital in that company owned by private operators below the 49% threshold.
- 33 That exclusion decision was challenged by Rekeep and Roma Multiservizi before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy). That court dismissed their actions by two judgments delivered on 18 June 2019.
- 34 Roma Multiservizi and Rekeep brought an appeal against those two judgments before the referring court.
- 35 During the appeal proceedings, the city of Rome awarded, following a negotiated procedure, the contract for the ‘integrated school service’ to the Consorzio Nazionale Servizi Soc. coop. (CNS). That award was suspended by the referring court.
- 36 In its request for a preliminary ruling, the Consiglio di Stato (Council of State, Italy) states, first, that under the applicable national legislation, where semi-public companies have as their object the carrying out of public works or the organisation and management of a service of general interest, by means of a partnership contract with a contractor selected in accordance with the detailed rules laid down in Article 17(1) and (2) of Legislative Decree No 175/2016, the private person’s participation may not be less than 30% and the selection of that private partner must be made through the award of a public contract.

- 37 The referring court notes, in that regard, that the lawfulness of the maximum participation of the contracting authority in a semi-public company has not been challenged before it and that it is required only to examine whether account should be taken of the indirect participation of the city of Rome in the capital of Roma Multiservizi in order to determine whether that limit was complied with.
- 38 In the second place, according to that court, the direct award of a service to a semi-public company is not, as such, incompatible with EU law, provided, first, that the call for tenders organised, for the purposes of selecting the private partner of the contracting authority in the successful company, is conducted in compliance with Articles 49 and 56 TFEU, and with the principles of equal treatment, non-discrimination and transparency and, second, that the criteria for selecting that private partner are related not only to the latter's capital contribution but also to its technical capacities and the characteristics of its tender, with regard to the specific services to be provided, so that the selection of the contractor may be regarded as resulting indirectly from the selection of the partner of the contracting authority. That partner should, therefore, be a suitable operational partner and not merely a shareholder, the justification for its participation being precisely the lack, within the public authority, of the necessary expertise which the private partner possesses.
- 39 According to the referring court, it is in order to ensure such suitability that the Italian legislature set the minimum threshold for private participation in semi-public companies at 30%. It states that the cap of 70% on public participation in such companies corresponds to the threshold above which the activity of those companies may distort competition by depriving the relevant market of its attractiveness and by allowing the private partner to limit excessively the financial risk of its participation in those companies.
- 40 The referring court notes, in the third place, that if the percentage of the participation of the partner of the contracting authority in the capital of the semi-public company were to be calculated taking into account only the legal form of that partner, the exclusion of the consortium proposed by Roma Multiservizi and Rekeep from the award procedure at issue in the main proceedings would not be justified. By contrast, if account had to be taken of the indirect participation of the city of Rome in the capital of Roma Multiservizi, the private partner's share resulting from the participation in the consortium proposed by Roma Multiservizi and Rekeep in the semi-public company, formally set at 49%, would in reality be 26.5%, which would give rise to a situation of market inefficiency and constitute a breach of the principle of competition in so far as that partner could unduly benefit from the advantages of the public participation and thus ensure a substantial profitable position.
- 41 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- '(1) For the purposes of determining the minimum limit of 30% participation by the private partner in a future semi-public company – the limit deemed appropriate by the Italian legislature in implementation of the principles [of EU law] set in relation to European case-law – is it compatible with [EU] law and the correct interpretation of recitals 14 and 32 and Articles 12 and 18 of Directive [2014/24] and of Article 30 of Directive [2014/23], with reference also to Article 107 TFEU, for consideration to be given solely to the legal form/on-paper composition of that partner or may – or in fact must – the authority launching the tender also consider its own indirect participation in the private partner submitting a bid?

- (2) If the answer to the above question is yes, is it consistent and in line with the principles [of EU law], and in particular with the principles of fair competition, proportionality and appropriateness, for the authority launching the tender to be able to exclude from the tender a private partner submitting a bid, where the effective participation of that private partner in the future semi-public company is in fact less than 30%, on account of the direct or indirect public participation identified?’

Consideration of the questions referred

Admissibility of the questions referred

- 42 According to settled case-law, questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraphs 59 and 61, and of 25 November 2021, *État luxembourgeois (Information on a group of taxpayers)*, C-437/19, EU:C:2021:953, paragraph 81).
- 43 The need to provide an interpretation of EU law which will be of use to the referring court requires that court to define the factual and legislative context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (judgment of 10 March 2022, *Commissioners for Her Majesty’s Revenue and Customs (Comprehensive sickness insurance)*, C-247/20, EU:C:2022:177, paragraph 75 and the case-law cited).
- 44 The referring court does not explain either the reasons why it considers that it is necessary to interpret Article 107 TFEU or the link it establishes between that provision and the national legislation at issue in the main proceedings.
- 45 On the other hand, contrary to what CNS maintains, the referring court, first, identifies with sufficient precision the provisions of Directives 2014/23 and 2014/24 which it seeks to have interpreted and, second, does not ask the Court to apply EU law to the dispute in the main proceedings.
- 46 It follows from the foregoing that the questions referred for a preliminary ruling are admissible, except, as regards the first of those questions, in so far as it concerns the interpretation of Article 107 TFEU.

Substance

- 47 The dispute at issue in the main proceedings concerns the exclusion of the consortium proposed by Roma Multiservizi and Rekeep from the procedure initiated on 4 September 2018, which – before it was abandoned by the city of Rome precisely because of the exclusion of that consortium, which had been the only one to submit a tender – was intended for the conclusion

of an agreement the object of which was, first, to form a semi-public company with an economic operator selected by that city and, second, to entrust to that company the provision of a set of services ancillary to main school activities, consisting essentially of general support, handling services, cleaning services, collection and delivery services and assistance services for private school transport. It follows that the objective of such a procedure was to conclude a mixed contract.

- 48 It is apparent, moreover, from the order for reference that the city of Rome took the view that, if it had formed the semi-public company at issue in the main proceedings with the consortium proposed by Roma Multiservizi and Rekeep, it would in practice have owned 73.5% of that company, whereas the relevant national legislation limits the maximum share that a contracting authority may hold in such a company to 70% and the call-for-tenders documents drawn up by that city set the participation of that city in the capital of that company at 51%.
- 49 However, the city of Rome reached the conclusion that, in practice, it would have owned 73.5% of the semi-public company to be formed only because it took account of the fact that one of its subsidiaries, namely AMA, which it owned entirely, held 51% of the shares in Roma Multiservizi.
- 50 Furthermore, it is apparent from the request for a preliminary ruling and from the answers to the questions put by the Court that the exclusion of the consortium proposed by Roma Multiservizi and Rekeep from the procedure at issue in the main proceedings was justified, at the very least, both by the impossibility of complying, if that group was selected by the city of Rome, with the maximum participation limit of that city in the semi-public company, laid down by the relevant national legislation, and by the fact that it was impossible to comply with the stricter limit on such participation that was set out in the call-for-tenders documents.
- 51 In order to provide a useful answer to the referring court, it is therefore sufficient to examine whether, in order to examine whether that limit is complied with, EU law precludes a contracting authority from also taking into account its indirect participation in an economic operator which has expressed an interest in becoming its partner.
- 52 On the basis of those observations, it must be held that, by its two questions referred for a preliminary ruling, which it is appropriate to examine together, the referring court asks, in essence, whether Directive 2014/24 and Directive 2014/23 must be interpreted as meaning that a contracting authority may not exclude an economic operator from a procedure seeking, first, to form a semi-public company and, second, to award that company a service contract, where that exclusion is justified by the fact that, on account of the indirect participation of that contracting authority in the capital of that economic operator, the maximum participation of that contracting authority in the capital of that company, as determined in the call-for-tenders documents, would, in practice, be exceeded if it selected that economic operator as its partner.

The legal regime applicable to the contract at issue in the main proceedings

- 53 In the first place, it must be borne in mind, first of all, that the creation of a joint venture by a contracting authority and a private economic operator is not covered as such by the rules of EU law on public contracts or services concessions. That being so, it is necessary to ensure that a capital transaction does not, in reality, conceal the award to a private partner of contracts which might be considered to be ‘public contracts’ or ‘concessions’. Furthermore, the fact that a private entity and a contracting entity cooperate within a mixed-capital entity cannot justify failure to

observe those rules when awarding such a contract to that private entity or to that mixed capital entity (see, to that effect, judgment of 22 December 2010, *Mehiläinen and Terveystalo Healthcare*, C-215/09, EU:C:2010:807, paragraphs 33 and 34).

- 54 Next, as the Advocate General stated, in essence, in points 57 to 59 of his Opinion, it is apparent from the order for reference and from the answers to the questions put by the Court that the specific features of the mixed contract at issue in the main proceedings required that both components of the mixed contract be concluded with a single partner having, as the documents in the call for tenders required, both the financial capacity necessary to purchase 49% of the capital of the semi-public company to be formed, and the financial and technical capacity necessary to be responsible, in practice, for the provision of all services ancillary to the school activities of the city of Rome. It follows that, subject to verification by the referring court, the two components of the contract at issue in the main proceedings appear to be inseparably linked and form an indivisible whole. (see, to that effect, judgment of 6 May 2010, *Club Hotel Loutraki and Others*, C-145/08 and C-149/08, EU:C:2010:247, paragraphs 53 and 54).
- 55 In such a case, the transaction at issue must be examined as a whole for the purposes of its legal classification and must be assessed on the basis of the rules which govern the aspect which constitutes the main object or predominant feature of the contract (judgments of 6 May 2010, *Club Hotel Loutraki and Others*, C-145/08 and C-149/08, EU:C:2010:247, paragraph 48, and of 22 December 2010, *Mehiläinen and Terveystalo Healthcare*, C-215/09, EU:C:2010:807, paragraph 36).
- 56 In that regard, it is apparent from the order for reference and the replies to the questions put by the Court that the essential objective of the procedure at issue in the main proceedings was not to create a semi-public company, but to require the partner of the city of Rome, within that company, to bear the entire operational risk connected with the provision of services ancillary to that city's school activities, that company being conceived solely as the means by which that city considered that the quality of the services would be best ensured.
- 57 Moreover, there is nothing to indicate that the mere ownership of part of the capital of the same semi-public company could constitute a significant source of income for the partner of the city of Rome.
- 58 It therefore appears, subject to verification by the referring court, that the component relating to the supply of services ancillary to main school activities constitutes the main object and the predominant feature of the contract at issue in the main proceedings.
- 59 In those circumstances, the answer to the questions referred for a preliminary ruling must be based on the premiss that the two parts of the contract at issue in the main proceedings constitute an indivisible whole and that its predominant component is that of allocating to the semi-public company the supply of services ancillary to the school activities of the city of Rome. Therefore, the legal rules applicable to the contract at issue in the main proceedings, considered in its entirety, are those which govern that component.
- 60 In the second place, it must be noted that the referring court did not rule on whether the contract at issue in the main proceedings sought to grant a services concession, capable of falling within the scope of Directive 2014/23, or a public service contract, capable of falling under Directive 2014/24, to the semi-public company. The first question refers without distinction to those two directives, even though their scope is mutually exclusive.

- 61 In that regard, it should be recalled that a public service contract differs from a services concession because of the nature of the consideration granted to the contractor for the services which it provides. Thus, the consideration provided by the tenderer to which a public contract is awarded consists of a price paid by the contracting authority, whereas the consideration for a concessionaire consists of the right to exploit the service which is the subject of the concession, that right being accompanied, where appropriate, by a price. The award of a concession therefore entails the transfer to the concessionaire of an operating risk (see, to that effect, judgments of 10 September 2009, *Eurawasser*, C-206/08, EU:C:2009:540, paragraph 51, and of 15 October 2009, *Acoset*, C-196/08, EU:C:2009:628, paragraph 39).
- 62 It is for the referring court to determine, in the light of the foregoing, whether the award to the semi-public company, at issue in the main proceedings, of the management of services ancillary to the school activities of the city of Rome, constituted a public service contract or a services concession. In order to provide a useful answer to the referring court, it is necessary, however, in the context of the present judgment, to examine the questions referred for a preliminary ruling having regard to each of those two situations.
- 63 Second, in so far as, as has been pointed out in paragraph 47 of the present judgment, assistance services for private school transport form part of the services covered by the contract at issue in the main proceedings, it is necessary to examine whether that fact is such as to affect the applicability of Directive 2014/23 or Directive 2014/24 to the procedure for the award of the contract at issue in the main proceedings.
- 64 In that regard, it should be noted, first, that, in accordance with Article 7 of Directive 2014/24, the scope of that directive does not extend to public contracts in the transport services sector, as defined in Article 11 of Directive 2014/25.
- 65 That being so, it is not apparent from the documents before the Court that the assistance services for school transport at issue in the main proceedings consist of the operation of a network intended to provide a transport service, in particular, a bus transport service, under the conditions laid down by the competent national authority, such as conditions on the routes to be served, capacity to be made available or the frequency of the service, within the meaning of Article 11.
- 66 In any event, it follows from Article 3(5) of Directive 2014/24 that, in the case of contract which have as their subject procurement covered by that directive and procurement for the pursuit of an activity which is subject to Directive 2014/25, account must be taken of Articles 5 and 6 of Directive 2014/25. Article 6(2) of Directive 2014/25 provides that a contract intended to cover several activities is to be subject to the rules applicable to the activity for which it is principally intended.
- 67 It is not apparent from the file submitted to the Court that the assistance services for private school transport, provided for by the contract at issue in the main proceedings, even if they satisfy the conditions laid down in Article 11 of Directive 2014/25, constitute the principal activity for which such a contract was concluded.
- 68 Second, by virtue of Article 10(3) thereof, Directive 2014/23 does not apply to concessions for public passenger transport services, within the meaning of Regulation No 1370/2007.

69 That said, it is even less apparent from that file that the provision of assistance for private school transport, covered by the contract at issue in the main proceedings, must be regarded as public passenger transport services to which Regulation No 1370/2007 applies.

Directive 2014/24

70 If the component of the contract at issue in the main proceedings, relating to the award of services ancillary to school activities, were to be classified as a ‘public service contract’ within the meaning of Article 2(1)(9) of Directive 2014/24, the following findings would have to be made as a preliminary point.

71 First, it is apparent from the order for reference that the estimated value of such a contract, and therefore of the contract at issue in the main proceedings, as a whole, is well above the thresholds above which, in accordance with Article 4 of Directive 2014/24, public service contracts fall within the scope of that directive.

72 Second, it is necessary to examine, as requested by the referring court, whether the contract at issue in the main proceedings is nevertheless capable of falling outside the scope of that directive, by virtue of Article 12 thereof.

73 In that regard, it should be noted, first, that Article 12(4) of Directive 2014/24 provides that a contract concluded exclusively between two or more contracting authorities is to fall outside the scope of that directive where the conditions laid down in that provision are fulfilled.

74 Without it being necessary to examine whether, in the present case, the semi-public company at issue in the main proceedings could have been regarded as a contracting authority within the meaning of Article 2(1)(1) of Directive 2014/24, it is sufficient to note that, in order for it to be covered by Article 12(4) of that directive, a cooperation agreement cannot have the effect of placing a private undertaking in a position of advantage vis-à-vis its competitors (judgment of 28 May 2020, *Informatikgesellschaft für Software-Entwicklung*, C-796/18, EU:C:2020:395, paragraph 76). As the Advocate General observed in point 78 of his Opinion, that would necessarily have been the case here, in view of the involvement of private capital in the semi-public company to be formed, with the result that that provision cannot exclude the procedure at issue in the main proceedings from the scope of Directive 2014/24.

75 Second, nor does it appear that the semi-public company at issue in the main proceedings could have satisfied the conditions laid down in Article 12(1) of Directive 2014/24 for it to be regarded as an in-house entity of the city of Rome.

76 In that regard, while it is true that, under that provision, an in-house entity may include forms of direct private capital participation it is also necessary that the latter do not have a controlling or blocking capacity, that they are required by national legislative provisions, in accordance with the Treaties, and that they do not exert a decisive influence on that company, since the contracting authority must, on the contrary, retain such influence.

77 As regards the condition that those forms of participation must be imposed by national legislative provisions, it must be held that the formation of the semi-public company, at issue in the main proceedings, and, consequently, the participation of a private partner in that company’s capital,

does not appear to stem from a legal obligation imposed on the city of Rome, but from that contracting authority's freedom to choose a public-private partnership procedure in order to manage services ancillary to school activities.

- 78 Third, it should be noted that Articles 74 to 77 of Directive 2014/24 lay down a simplified regime for the award of public contracts relating to the social and special services listed in Annex XIV to that directive. It is apparent from the answers given to the questions put by the Court that the contract at issue in the main proceedings appears to have had, in part, the object of awarding the services listed in that annex.
- 79 Under the second subparagraph of Article 3(2) of Directive 2014/24, the rules applicable to that type of mixed public contract are those governing the award of the main subject of the contract in question, that main subject being, in itself, determined on the basis of the highest of the respective values of the services concerned, as estimated.
- 80 In the light of the answers given to the questions put by the Court, it appears that the estimated value of the services at issue in the main proceedings, capable of falling within Annex XIV to Directive 2014/24, could be lower than the estimated value of the other services forming the subject matter of the contract at issue in the main proceedings. Therefore, it is necessary to start from the premiss that Articles 74 to 77 of that directive are not applicable in the present case, which is, however, a matter for the referring court to determine.
- 81 In the light of those observations, it is necessary to determine whether the general rules for the award of public contracts, as laid down in Directive 2014/24, preclude an economic operator from being excluded from the procedure for the award of a mixed contract, such as that at issue in the main proceedings, on the ground that, after having taken into account its indirect participation in that economic operator, the contracting authority considered that its contribution to the semi-public company to be formed, in practice, would go beyond what was provided for in the tender documents if it selected that economic operator as its partner.
- 82 In the first place, it should be noted that, in the context of a mixed contract such as that at issue in the main proceedings, a public service contract is awarded without that contract having been the subject, as such, of an award procedure in accordance with the requirements of Directive 2014/24.
- 83 That said, those requirements must be regarded as having been complied with when such a public contract is awarded where the economic operator with which the contracting authority is required to form the semi-public company to which that contract is awarded has been selected in accordance with a procedure which complies with those requirements. It follows that that procedure must make it possible, *inter alia*, to select the partner of the contracting authority to which the operational activity and the management of the service covered by the public contract is entrusted, in accordance with the principles of equal treatment and non-discrimination, free competition and transparency. The criteria for selecting that partner cannot, therefore, be based solely on the capital provided, but must enable candidates to establish, in addition to their ability to become a shareholder, primarily their technical capacity to provide the services which are the subject of the public contract and the economic and other advantages of their tender. (see, by analogy, judgment of 15 October 2009, *Acoset*, C-196/08, EU:C:2009:628, paragraphs 59 and 60).
- 84 In the second place, it is apparent from Article 58(1) and (3) of Directive 2014/24 that a contracting authority may use selection criteria which seek, *inter alia*, to exclude from the award procedure candidates or tenderers which do not offer sufficient guarantees as to their economic

and financial capacity to perform the public contract concerned, provided, first, that those criteria are appropriate for ensuring that a candidate or tenderer has such a capacity and, second, that they are related and proportionate to the subject matter of the contract.

- 85 In that regard, it should be noted, first, that it is in the very nature of a mixed contract, such as that at issue in the main proceedings, that the contracting authority determines the distribution, between itself and its partner, of the capital of the semi-public company to be formed.
- 86 It follows that, in the context of its application to such a mixed contract, Article 58(1) and (3) of Directive 2014/24 allows a contracting authority to require economic operators which have expressed an interest in becoming its partner and in assuming responsibility for the actual performance of the service contract awarded to the company thus formed, to demonstrate that they have the economic and financial capacity necessary both for the formation of that company and for the performance of that contract.
- 87 Second, in so far as the use of a semi-public company can be explained, in particular, by the contracting authority's concern to limit both its investment in that company and the ensuing financial uncertainties which follow from it, that contracting authority must still be allowed to take account of the participation which it holds, albeit indirectly, in the capital of economic operators which have expressed an interest in becoming its partner. Even where it is indirect, such participation exposes, in principle, the contracting authority to additional uncertainty to that which it would have incurred if it had not held, directly or indirectly, any share in the capital of its partner.
- 88 A contracting authority must therefore be able, in respect of the qualitative selection of the economic operator intended to become its partner, to exclude any candidate in which it holds shares, even indirectly, where that shareholding has the effect of in practice infringing the allocation of the capital of the semi-capital company between that contracting authority and its shareholder, as determined by the contract documents, and thereby calling into question the economic and financial capacity of its partner to bear, without the involvement of the contracting authority, the obligations arising from the contracting authority's contract.
- 89 Such a requirement therefore makes it possible to ensure, as required by Article 58(1) of Directive 2014/24, that economic operators have the economic and financial standing necessary to perform the obligations arising from the mixed contract concerned.
- 90 Furthermore, subject to verification by the referring court, it does not appear to go beyond what is necessary to guarantee the objective pursued by the contracting authority, which is not to make a financial commitment, even indirectly, in excess of the share in the semi-public company which that contracting authority has demonstrated its intention to purchase in the contract documents. Such a requirement could be regarded as disproportionate only in the event that the applicable national legislation or the relevant contractual provisions exclude the fact that, in the context of the activities of the semi-public company formed by a contracting authority and an economic operator in which that contracting authority owns, directly or indirectly, part of the capital, that contracting authority may be exposed to additional economic risk, even an indirect economic risk, on account of such a participation in the capital of its partner.
- 91 In the third place, it must be added that the principles of equal treatment, referred to in paragraph 83 of this judgment, also require that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract

documents, so that, first, all reasonably well-informed candidates and tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenderers' profile and bids submitted satisfy the criteria applying to the contract in question (see, to that effect, judgments of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice*, C-216/17, EU:C:2018:1034, paragraph 63, and of 17 June 2021, *Simonsen & Weel*, C-23/20, EU:C:2021:490, paragraph 61).

- 92 It is therefore for the referring court to ascertain whether, in the present case, it could be clearly, precisely and unequivocally inferred from the contract documents that the indirect participations of the city of Rome in the capital of economic operators who had applied to become its partner would be taken into account in order to determine whether they had sufficient economic and financial capacity.
- 93 It follows from all the foregoing considerations that Article 58 of Directive 2014/24 must be interpreted as meaning that a contracting authority may exclude an economic operator from the procedure seeking, first, to form a semi-public company and, second, to award that company a service contract, where that exclusion is justified by the fact that, on the basis of the indirect participation of that contracting authority in that economic operator, the maximum participation of that contracting authority in that company, as determined in the call-for-tenders documents would be, in practice, exceeded if that contracting authority selected that economic operator as its partner, in so far as that excess participation serves to increase the financial uncertainty borne by that contracting authority.

Directive 2014/23

- 94 In the event that the component of the contract at issue in the main proceedings relating to the award of services ancillary to school activities should be classified as a 'services concession' within the meaning of Article 5(1)(b) of Directive 2014/23, it should be noted, in the first place, that the estimated value of that component, and therefore of the contract at issue in the main proceedings, in its entirety, far exceeds the threshold above which, under Article 8, that directive is applicable.
- 95 In the second place, for reasons similar to those set out in paragraphs 73 to 77 above, Article 17(1) and (4) of that directive does not appear to be applicable to the procedure at issue in the main proceedings.
- 96 In the third place, for reasons similar to those set out in paragraphs 78 to 80 above, it is appropriate to start from the premiss, which it is, however, for the referring court to ascertain, according to which, under the second subparagraph of Article 20(1) of Directive 2014/23, the services concession at issue in the main proceedings is not subject to the simplified procurement regime laid down in Article 19 of that directive, since the estimated value of the services at issue in the main proceedings, which may fall within the scope of Annex IV to that directive, does not appear to be greater than the value of the other services covered by the concession.
- 97 In the fourth place, for reasons similar to those set out in paragraphs 82 to 93 of the present judgment, it must be held that Article 38 of Directive 2014/23 permits a contracting authority to take account of any indirect participation in the capital of economic operators which have expressed an interest in becoming its partner in order to determine whether the formation of the semi-public company with such operators would not, in practice, prevent it from complying with

the limit on its participation in that company which it imposed itself. Article 38 also permits it, in principle, to exclude from the procedure for the award of a services concession any economic operator which, because the contracting authority owns, albeit indirectly, part of its capital, cannot be a partner of that contracting authority without in practice breaching the maximum participation in that semi-public company which the contracting authority itself determined.

- 98 It follows from all the foregoing considerations that Article 38 of Directive 2014/23 must be interpreted as meaning that a contracting authority may exclude an economic operator from the procedure seeking, first, to form a semi-public company and, second, to award that company a services concession, where that exclusion is justified by the fact that, on the basis of the indirect participation of that contracting authority in that economic operator, the maximum participation of that contracting authority in that company, as determined in the call-for-tenders documents would be, in practice, exceeded if that contracting authority selected that economic operator as its partner, in so far as that excess participation serves to increase the financial uncertainty borne by that contracting authority.

Costs

- 99 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

- 1. Article 58 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 must be interpreted as meaning that a contracting authority may exclude an economic operator from the procedure seeking, first, to form a semi-public company and, second, to award that company a service contract, where that exclusion is justified by the fact that, on the basis of the indirect participation of that contracting authority in that economic operator, the maximum participation of that contracting authority in that company, as determined in the call-for-tenders documents would be, in practice, exceeded if that contracting authority selected that economic operator as its partner, in so far as the excess participation serves to increase the financial uncertainty borne by that contracting authority.**
- 2. Article 38 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, as amended by Commission Delegated Regulation (EU) 2017/2366 of 18 December 2017 must be interpreted as meaning that a contracting authority may exclude an economic operator from the procedure seeking, first, to form a semi-public company and, second, to award that company a services concession, where that exclusion is justified by the fact that, on the basis of the indirect participation of that contracting authority in that economic operator, the maximum participation of that contracting authority in that company, as determined in the call-for-tenders documents would be, in practice, exceeded if that contracting authority selected that economic operator as its partner, in so far as that excess participation serves to increase the financial uncertainty borne by that contracting authority.**

[Signatures]