

SEA

JUDGMENT OF THE COURT (Third Chamber)

10 September 2009*

In Case C-573/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 11 October 2007, received at the Court on 28 December 2007, in the proceedings

Sea Srl

v

Comune di Ponte Nossa,

third party:

Servizi Tecnologici Comuni — Se.T.Co. SpA,

* Language of the case: Italian.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J.N. Cunha Rodrigues (Rapporteur), J. Klučka and A. Arabadjiev, Judges,

Advocate General: J. Mazák,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 April 2009,

after considering the observations submitted on behalf of:

- Sea Srl, by L. Nola, avvocatessa,

- the Comune di Ponte Nossa, by A. Di Lascio and S. Monzani, avvocati,

- Servizi Tecnologici Comuni — Se.T.Co. SpA, by M. Mazzarelli and S. Sonzogni, avvocati,

- the Italian Government, by R. Adam and subsequently by I. Bruni, acting as Agents, assisted by G. Fiengo, avvocato dello Stato,

- the Czech Government, by M. Smolek, acting as Agent,

- the Netherlands Government, by C. Wissels and C. ten Dam, acting as Agents,

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

- the Polish Government, by A. Ratajczak, acting as Agent,

- the Commission of the European Communities, by M. Konstantinidis and C. Zadra, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

¹ The reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 43 EC, 45 EC, 46 EC, 49 EC and 86 EC.

- 2 This reference was made in the course of proceedings between Sea Srl ('Sea') and the Comune di Ponte Nossa concerning the award by the latter of a contract for the service of collecting, transporting and disposing of urban waste to Servizi Tecnologici Comuni — Se.T.Co. SpA ('Setco').

Legal context

The relevant provisions of Community law

- 3 Article 1 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 ('the Directive') provides:

'...

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

...

- (d) “Public service contracts” are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

...

4. “Service concession” is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.’

4 Article 20 of the Directive states:

‘Contracts which have as their object services listed in Annex II A shall be awarded in accordance with Articles 23 to 55.’

5 Article 28 of the Directive provides that contracts are, without exception, to be awarded by applying the open procedure or the restricted procedure.

6 In accordance with Article 80 of the Directive, the Member States were to bring into force by 31 January 2006 at the latest the provisions necessary to comply with the Directive.

- 7 Annex II A to the Directive contains a Category 16, concerning ‘Sewage and refuse disposal services; sanitation and similar services’.

The relevant provisions of national law and the framework of the company’s statutes

- 8 Article 2341 of the Italian Civil Code provides:

‘Whatever form they take, pacts that with a view to rendering the company’s situation or management more stable:

- (a) have as their purpose to exercise voting rights in companies limited by shares or in their parent companies;

- (b) limit the transfer of shares or holdings in parent companies;

- (c) have the purpose or effect of exercising, even jointly, a controlling influence over those companies, may not have a duration of more than five years and shall be deemed to be stipulated for that term, even if the parties had agreed on a longer period; pacts shall on their expiry be renewable.

If the duration of the pact is not fixed, every contracting party shall have the right to withdraw from the pact on 180 days’ notice.

The provisions of this article shall not apply to measures consisting in agreements to cooperate in the production or exchange of goods or services concerning companies 100% owned by the parties to the agreement.’

9 Article 2355 *bis* of the Civil Code provides:

‘If shares are registered or unissued, the company’s statutes may make their transfer subject to special conditions and may prohibit it, for a period no longer than five years from the formation of the company or from the introduction of that prohibition.

Provisions of company statutes that purely and simply make the transfer of shares subject to the assent of the company’s responsible bodies or to that of other companies shall be null and void unless they provide for an obligation, imposed on the company or the other members, to buy them back, or unless they confer on the transferor a right to withdraw; the provisions of Article 2357 shall continue to apply. The sale price or the dividend on winding-up shall be fixed in accordance with the procedures laid down in and to the extent provided for by Article 2437 *ter*.

The provisions of the previous subparagraph shall apply in every case in which clauses make subject to special conditions transfers of shares because of death, except when the assent provided for has been granted.

Restrictions on the transfer of shares must be apparent from the document itself.’

10 Article 113(5) of Legislative Decree No 267 laying down the consolidated text of the laws on the organisation of local bodies (testo unico delle leggi sull'ordinamento degli enti locali) of 18 August 2000 (Ordinary Supplement to GURI No 227 of 28 September 2000), as amended by Decree-Law No 269 laying down urgent measures to promote development and correct the state of public finances (disposizioni urgenti per favorire lo sviluppo e per la correzione dell'andamento dei conti pubblici) of 30 September 2003 (Ordinary Supplement to GURI No 229 of 2 October 2003) converted into law, after amendment, by Law No 326 of 24 November 2003 (Ordinary Supplement to GURI No 274 of 25 November 2003) ('Legislative Decree No 267/2000'), provides:

'The service contract is to be awarded in accordance with the rules of the sector and in compliance with the legislation of the European Union, entitlement to provide the service being granted to:

- (a) companies with share capital selected by means of public and open tendering procedures;

- (b) companies with share capital with mixed public and private ownership in which the private partner has been selected by means of public and open tendering procedures that have ensured compliance with domestic and Community legislation on competition in accordance with the guidelines issued by the competent authorities in specific measures or circulars;

- (c) companies with share capital belonging entirely to the public sector on condition that the public authority or authorities holding the share capital exercise over the company control similar to that exercised over their own departments and that the company carry out the essential part of its activities with the controlling public authority or authorities.'

11 Article 1(3) of Setco's statutes is worded as follows:

'Having regard to the nature of the company, local public authorities as identified in Article 2(1) of Legislative Decree No 267/2000 may be members, as may other public authorities and undertakings possessing legal personality whose activities and experience may provide opportunities for the full attainment of the company's objects.'

12 Article 1(4) of those statutes states:

'Participation by private individuals or other bodies is not permitted or, in any event, participation by persons whose holding, even though qualitatively or quantitatively a minority holding, is capable of giving rise to a change in the mechanisms of "similar control" (as defined in the provisions set out below and by Community and domestic law) or to any incompatibility of management with the legislation in force.'

13 Article 3 of Setco's statutes provides:

'1. It is the object of this company to manage local public services and intermunicipal local public services concerning only local public authorities awarding those services pursuant to Article 113 et seq. of Legislative Decree No 267/2000 ..., and also by way of contract between local authorities.

...

3. The services and works mentioned above:

- may also be performed for private individuals, when that is not contrary to the company's objects or contributes to their better attainment;

...'

14 Article 6(4) of those statutes provides:

'The company may, in order to encourage the widest ownership of shares at local level (by citizens and/or economic operators) or [ownership of shares] by employees, also issue preferential shares ...'

15 Article 8 *bis* of those statutes states:

'1. Contracts for the provision of local public services may be awarded directly, in compliance with the national and Community legislation in force, by members representing local bodies (contracting members) in respect of any or all of the sectors referred to in Article 3 corresponding to the following divisions: Division No 1: Waste; Division No 2: Water; Division No 3: Gas; Division No 4: Tourism; Division No 5: Energy; Division No 6: Public Utility Services.

2. The company shall manage the services for contracting members exclusively and, in any event, within the areas for which those authorities are responsible.

3. The members shall jointly and/or severally exercise the most extensive powers of direction, coordination and supervision over the company's bodies and organs and, in particular: they may convene the company's bodies in order to clarify the way in which the local public services are operated; they shall call periodically, and in any event at least twice a year, for reports on service management and on economic and financial progress; they shall exercise forms of management control by means of procedures laid down in the internal regulations of the contracting authorities; they shall give their prior consent, which shall be a prerequisite, for any amendment to the statutes affecting the management of local public services.

4. The departments shall apply the mechanisms of similar control, exercised jointly or separately, in accordance with the rules laid down herein and in the relevant service contracts.

5. The contracting members shall exercise their powers in relation to the divisions to which they have decided to award service contracts directly. In order that those services may be managed effectively, the company bodies and employees shall also be answerable for the activities carried out to the organs identified herein.

6. Control shall be effected by the contracting members not only by means of the shareholders' privileges as laid down in company law but also by means of: a Joint Supervisory and Guidance Committee for Administrative Policy ("Joint Committee"); a Technical Control Committee ("Technical Committee") for each division.

7. Non-contracting members may participate, without any voting rights, at the meetings of the Joint Committee and of the Technical Committee for each division. The members of those committees, acting by absolute majority, may decide to exclude non-contracting members from individual meetings or parts of meetings and shall give reasons for so doing in the reports for each meeting.'

16 Article 8 *ter* of Setco's statutes is worded as follows:

'1. The Joint Committee ... shall be composed of: a representative for each contracting member, to be chosen from among the authority's legal representative, the delegated executive councillor or a director provisionally acting as such; an official whose task is to provide support and take minutes, who does not have any voting rights, to be appointed jointly by the contracting members at the first meeting and to be chosen from among the secretaries, general managers or managers (or persons responsible for services in bodies that do not have staff with managerial authority) employed by at least one of the contracting bodies.

2. The Joint Committee shall have advisory, supervisory and decision-making powers for the purposes of exercising similar control and, in particular: (a) in relation to the bodies and organs of the company, it shall exercise the powers and prerogatives exercised by the Council, the Executive and the Mayor/Chairman as regards the control of their offices and departments. Control shall be exercised over all aspects of the organisation and performance of the services in respect of which a contract is awarded; (b) it shall lay down guidelines for the divisional sub-committees for the coordinated and unified management of services, including in areas and covering aspects involving more than one division; (c) it shall appoint the representatives of local bodies to the company's board of directors; (d) it shall appoint the chairman of the board of directors and of the board of auditors and shall make provision for their removal from post in the cases set out in these statutes; (e) it shall lay down guidelines for the appointment of the company's directors and general manager; (f) it shall adopt the proposal for a multi-stage programme plan, the multi-annual financial budget, the annual financial budget and the annual activity report; (g) it shall hear the company's top-level management, interviewing at least once a year the chairman and/or the general manager; (h) it shall receive periodically, and at least every six months, reports on the performance of local public services from the company's top-level management; (i) it may delegate some of

its powers to one or more Technical Committees, which may vary according to the specific nature of the powers in question; (j) it shall give its prior opinion on the measures taken by directors which are subject to approval at shareholders' meetings in the cases set out in these statutes.

3. The Joint Committee shall meet ordinarily at least once a year and, in exceptional cases, at the request of: (a) one of the contracting members; (b) the company's legal representative.'

17 Article 8 *quater* of those statutes provides:

'1. A Technical ... Committee shall be established for each of the following divisions: Division No 1: Waste; Division No 2: Water; Division No 3: Gas; Division No 4: Tourism; Division No 5: Energy; Division No 6: Public Utility Services.

2. The Technical Committee shall be composed of: a representative of each contracting member, to be chosen from among the secretaries, general managers or managers (or persons responsible for services in bodies that do not have staff with managerial authority) employed by at least one of the contracting bodies ...

3. The same person may be a member of the Technical Committee of more than one division.

4. The Technical Committee shall, in particular: (a) in relation to the bodies and organs of the company, exercise the powers and prerogatives which are exercised by the technical bodies of the administration over its own departments. Control shall be effected over all aspects of the organisation and performance of the services in respect

of which a contract is awarded and shall be limited to the division's areas of competence and shall comply with the Joint Committee's guidelines; (b) support the Joint Committee in decisions relating to the organisation and performance of the services for which the division is responsible; (c) exercise the powers delegated by the Joint Committee; (d) coordinate the company's management control systems; (e) put forward proposals to the Joint Committee or to the bodies of the company for the adoption of measures required to enable the company's activities to be consistent with the objectives of the contracting authority as set out in the management implementation strategy and the objectives strategy; (f) provide technical and administrative support for the company's activities in accordance with the procedures laid down in the regulations of the contracting authority and/or the agreement governing relations between the company and that authority; (g) report any problems in the management of services and put forward the corrective measures to be taken with regard to municipal regulations and legislative measures governing local public services.'

18 Article 14 of those statutes provides that:

'1. Without prejudice to the prerogatives of the bodies exercising similar, joint and several supervision mentioned in Articles 8 *bis*, 8 *ter* and 8 *quater* above, the ordinary meeting shall decide on all the matters provided for by law and by these statutes, having regard to the directives, guidelines and any instructions given by those bodies in relation to the organisation and management of the public services directly entrusted to the company.

...

3. The following measures taken by directors shall be subject to prior authorisation by the ordinary meeting, on the favourable opinion of the Joint Committee referred to in Article 8 *ter* above with regard to the parts forming part of the organisation and of the operation of local public services:

- (a) programme planning, multi-annual and annual balance-sheet estimates and provisional balance-sheet for correction of balance-sheet estimates;

- (b) formation of companies whose object is activities supporting or complementary to those of the company; purchase of holdings, even minority holdings, in such companies, and withdrawal from them;

- (c) activation of new services provided for by the statutes or termination of those previously carried on;

- (d) purchase and transfer of real property and installations, mortgage loans and other such transactions, of whatever kind and nature, involving a financial commitment of more than 20% of the net assets in the last approved balance-sheet;

- (e) guidelines for formulating rates and prices for the services provided, when they are not subject to statutory restrictions or are not fixed by the competent bodies or authorities.

...

5. The meeting and the joint committee may give their assent to the performance of the acts referred to in the previous paragraphs, even subject to the condition that certain instructions, obligations or acts must be carried out by the directors. In that case, the administrators shall draw up a report on compliance with those instructions within the

period prescribed in the authorising act or, failing that, within 30 days running from the performance of the act in question.

6. Shareholding local authorities representing at least a 20th of the share capital, and every contracting shareholder, through the joint committee, may demand, if they consider that the company has not performed or is not in the process of performing the act in accordance with the authorisation given, the immediate calling of a meeting, pursuant to Article 2367(1) of the Civil Code, in order that the meeting may adopt the measures it considers expedient in the company's interest.

7. Carrying out acts subject to prior consent if the assent of the meeting or of the joint committee in the cases provided by the statutes has not been sought and obtained or failure to carry out the act in accordance with the authorisation given may constitute good cause for the dismissal of the directors.

8. If the board of directors does not intend to perform the act authorised by the meeting, it shall within 15 days of the meeting's decision adopt a reasoned ad hoc decision which must forthwith be sent to the shareholding local authorities and, as regards matters relating to the management of local public services, to the joint committee. The joint committee, so far as decisions relating to the organisation or management of local public services are concerned, may within 30 days of receipt of the communication from the board of directors adopt a decision confirming its opinion and/or its instructions. The act adopted shall be binding on the board of directors.

...'

19 Article 16 of those statutes states:

‘1. The company shall be directed by a board of directors with powers of ordinary and extraordinary administration, without prejudice to the powers which, by virtue of law or of these statutes:

(a) are reserved to the meeting,

(b) are conditional upon prior authorisation by the ordinary meeting,

(c) are reserved to the bodies exercising similar supervision mentioned in Article 8 *bis* et seq. of these statutes.

2. The board of directors shall consist of 3 (three) to 7 (seven) members, appointed by the meeting on the designation of the joint committee mentioned in Article 8 *ter*. In any case, it shall be for the contracting shareholders to appoint directly, to dismiss and replace a number of directors (including the chair of the board of directors) in proportion to the size of their holding and, in any event, more than half of them.

...

6. The board of directors shall adopt decisions relating to the organisation and management of local public services that are the subject of a direct award, in compliance with the guidelines adopted by the supervisory bodies mentioned in Article 8 bis et seq. in these statutes.

...'

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

- 20 Sea, which was after a tendering procedure awarded the contract for the service of collecting, transporting and disposing of solid urban and similar waste in the territory of the Comune di Ponte Nossa, provided that service for a period of three years, from 1 January 2004 to 31 December 2006.
- 21 Setco is a company limited by shares, owned by a number of municipalities in the Val Seriana, the majority shareholder being the Comune di Clusone.
- 22 By decision of 16 December 2006, the Comune di Ponte Nossa decided to become a minority shareholder in Setco with a view to the direct award to that company of the service in question from 1 January 2007.
- 23 On 23 December 2006 the municipalities holding shares in Setco, including the Comune di Ponte Nossa, adapted Setco's statutes so as to place that company under control similar to that exercised over their own departments, in accordance with Article 113(5)(c) of Legislative Decree No 267/2000.

- 24 By decision of 30 December 2006, the Comune di Ponte Nossa awarded the contract for the service of collecting, transporting and disposing of solid urban and similar waste in its territory to Setco directly, from 1 January 2007, without any previous tendering procedure.
- 25 On 2 January 2007 Sea brought an action before the Tribunale amministrativo regionale per la Lombardia (regional administrative court for the region of Lombardy) challenging the decisions of the Comune di Ponte Nossa of 16 and 30 December 2006.
- 26 Sea claimed, inter alia, that by awarding the service in question directly to Setco, the Comune di Ponte Nossa had infringed Article 113(5) of Legislative Decree No 267/2000 and Articles 43 EC, 49 EC and 86 EC, in so far as it does not exercise over Setco any control similar to that which it exercises over its own departments, as is required for the direct award of a service to an undertaking owned by the contracting authority.
- 27 The court making the reference considers that certain factors might give rise to doubts whether the Comune di Ponte Nossa exercises over Setco control similar to that which it exercises over its own departments.
- 28 First, it is possible that private persons might come to hold shares in Setco's capital, even though at present none does. The national court states in this respect that, despite the express exclusion in Article 1(4) of the statutes of any private holders of Setco's capital, such a holding does appear to be possible by virtue of Article 6(4) of the statutes and of Article 2355 *bis* of the Italian Civil Code.
- 29 Secondly, as regards the powers of control actually devolved on the Comune di Ponte Nossa in relation to Setco, the national court wonders whether control similar to that

which that authority exercises over its own departments can exist when it has only a minority holding in that company.

30 In those circumstances, the Tribunale amministrativo regionale per la Lombardia has decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is the direct award of a contract for the service of collecting, transporting and disposing of solid urban and similar waste to a wholly publicly owned company limited by shares, whose statutes have been amended as set out in the grounds of the decision, in order to comply with Article 113 of Legislative Decree No 267 of 18 August 2000, compatible with Community law and, in particular, with freedom of establishment or freedom to provide services, the prohibition of discrimination and the obligations relating to equal treatment, transparency and free competition, as referred to in Articles 12 EC, 43 EC, 45 EC, 46 EC, 49 EC and 86 EC?’

Concerning the question referred for a preliminary ruling

31 The first point to be noted is that the award of a service for collecting, transporting and disposing of urban waste, such as that at issue in the main proceedings, may, depending on the particular nature of the consideration for that service, fall within the definition of public service contracts or within that of a public service concession for the purpose of Article 1(2)(d) or Article 1(4) of Directive 2004/18.

32 So far as may be deduced from what is set out in the decision for reference and in the file sent to the Court of Justice by the court making that reference, the contract at issue in the main proceedings might constitute a public service contract, especially by reason of the fact that the contract concluded between Setco and the Comune di Ponte Nossa for the provision of the services in question provides for the Comune to pay Setco consideration for the services supplied by the latter.

- 33 It is possible for such a contract to fall within the ambit of Directive 2004/18, as being a service contract for the removal of waste belonging to Category 16 of Annex II A to that directive.
- 34 The decision for reference does not, however, contain the information needed in order to determine whether this is a public service contract or a public service concession or, in the latter case, whether all the conditions for the application of that directive have been satisfied. In particular, it does not make clear whether the amount of the contract at issue in the main proceedings crosses the threshold for application of that directive.
- 35 On any view, whether the case in the main proceedings concerns a service concession or a public service contract, and whether or not, in the latter case, such a service contract falls within the ambit of Directive 2004/18, are matters that do not influence the reply to be given by the Court of Justice to the question referred for a preliminary ruling.
- 36 Indeed, according to the Court's case-law, an invitation to tender is not mandatory when a contract for valuable consideration has been concluded with a body distinct from the local authority that is the contracting authority, in a situation in which that authority exercises control over that body, even if the cocontractor is a body legally distinct from the contracting authority, so long as the local body that is the contracting authority exercises over the legally distinct body in question control similar to that which it exercises over its own departments and so long as that body carries out the essential part of its activities with the controlling local authority or authorities (see, to that effect, Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50).
- 37 That case-law is relevant for the interpretation of both Directive 2004/18 and Articles 12 EC, 43 EC, and 49 EC, and also of the general principles of which the latter are the specific expression (see, to that effect, Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 49, and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 62).

- 38 It is to be borne in mind that, despite the fact that certain contracts do not fall within the ambit of the Community public procurement directives, the contracting authorities concluding them are bound to comply with the fundamental rules of the Treaty (see, to that effect, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60, and the order of 3 December 2001 in Case C-59/00 *Vestergaard* [2001] ECR I-9505, paragraph 20).
- 39 So far as the award of public service contracts is concerned, contracting authorities must, in particular, comply with Articles 43 EC and 49 EC, and also observe the principles of equal treatment and non-discrimination on grounds of nationality, and the duty of transparency stemming therefrom as well (see, to that effect, *Parking Brixen*, paragraphs 47 to 49, and Case C-410/04 *ANAV* [2006] ECR I-3303, paragraphs 19 to 21).
- 40 Application of the rules set out in Articles 12 EC, 43 EC and 49 EC, and also of the general principles of which they are the specific expression, is, however, excluded if the local body which is the contracting authority exercises over the contracting entity control similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority or authorities (see, to that effect, *Teckal*, paragraph 50; *Parking Brixen*, paragraph 62; and Case C-480/06 *Commission v Germany* [2009] ECR I-4747, paragraph 34).
- 41 That the contracting entity is a company in no way excludes the application of the exception permitted by the case-law referred to in the previous paragraph. In *ANAV* the Court of Justice accepted that the case-law was applicable to a company limited by shares.
- 42 The national court observes that, despite the fact that, pursuant to Article 1(3) and (4) of Setco's statutes, access to Setco's capital is reserved to public entities, Article 6(4) of

the statutes provides that Setco may issue preferential shares in order to encourage the widest ownership of shares at local level by citizens and economic operators or the ownership of shares by employees.

- 43 At the hearing, the Comune di Ponte Nossa stated that Article 6(4) ought to have been abrogated when Setco's statutes were amended on 23 December 2006, but that by mistake it had been retained. Again according to the Comune di Ponte Nossa, Article 6(4) has since been abrogated. It is for the national court to determine the truth of those particulars which might mean that it is excluded that Setco's capital could possibly be open to private investors.
- 44 The decision for reference raises the question whether a contracting authority can exercise over a company in which it holds shares, and with which it means to conclude a contract, control similar to that which it exercises over its own departments in a situation in which it is possible for private investors to enter the capital of the company concerned, even though that has not in fact happened.
- 45 In order to answer that question it is to be borne in mind that the fact of the contracting authority's holding, together with other public authorities, all the share capital in a contractor company, tends to indicate, but not conclusively, that that contracting authority exercises over that company control similar to that which it exercises over its own departments (see, to that effect, Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 37, and Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 31).
- 46 In contrast, the holding, even a minority holding, of a private undertaking in the capital of a company in which the contracting authority in question also has a holding too means that, on any view, it is impossible for that contracting authority to exercise over that company control similar to that which it exercises over its own departments (see, to that effect, *Stadt Halle and RPL Lochau*, paragraph 49, and *Coditel Brabant*, paragraph 30).

- 47 As a general rule, whether there actually exists a private holding in the capital of the company to which the public contract at issue is awarded must be determined at the time of that award (see, to that effect, *Stadt Halle and RPL Lochau*, paragraphs 15 and 52). It may also be relevant to take account of the fact that, when a contracting authority awards a contract to a company whose entire capital it holds, the national legislation applicable provides for the compulsory opening of that company, in the short term, to other capital (see, to that effect, *Parking Brixen*, paragraphs 67 and 72).
- 48 Exceptionally, special circumstances may require events occurring after the date on which the contract in question was awarded to be taken into consideration. Such is the case, in particular, when shares in the contracting company, previously wholly owned by the contracting authority, are transferred to a private undertaking shortly after the contract at issue has been awarded to that company by means of an artificial device designed to circumvent the relevant Community rules (see, to that effect, Case C-29/04 *Commission v Austria* [2005] ECR I-9705, paragraphs 38 to 41).
- 49 It is not, admittedly, inconceivable that shares in a company should be sold at any time to third parties. Nevertheless, to allow that mere possibility to keep in indefinite suspense the determination whether or not the capital of a company awarded a public procurement contract is public would not be consistent with the principle of legal certainty.
- 50 If a company's capital is wholly owned by the contracting authority, alone or together with other public authorities, when the contract in question is awarded to that company, opening of the company's capital to private investors may not be taken into consideration unless there exists, at that time, a real prospect in the short term of such an opening.
- 51 It follows that, in a situation such as that in the main proceedings, in which the capital of the contracting company is wholly public and in which there is no actual sign of any impending opening of that company's capital to private shareholders, the mere fact that

private persons may hold capital in that company is not enough to support the conclusion that the condition relating to control by the public authority has not been satisfied.

52 That conclusion is not shaken by the considerations set out in paragraph 26 of Case C-231/03 *Coname* [2005] ECR I-7287, indicating that the fact that a company such as that concerned in the case giving rise to that judgment is open to private capital prevents it from being regarded as a structure for the 'in-house' management of a public service on behalf of the municipalities which form part of it. In that case, a public service was awarded to a company in which not all, but most, of the capital was public, and so mixed, at the time of that award (*Coname*, paragraphs 5 and 28).

53 It must, however, be made clear that if a contract were to be attributed, without being put out to competitive tender, to a public capital company in the circumstances indicated in paragraph 51 above, the fact that subsequently, but still during the period for which that contract was valid, private shareholders were permitted to hold capital in that company would constitute the alteration of a fundamental condition of the contract, which would require the contract to be put out for competitive tender.

54 Next, the question arises whether, when a public authority becomes a minority shareholder in a company limited by shares with wholly public capital for the purpose of awarding the management of a public service to that company, the control that public authorities which are members of that company exercise over it must, if it is to be classified as similar to the control they exercise over their own departments, be exercised by every one of those authorities individually or whether it may be exercised by them jointly.

55 The case-law does not require the control exercised over the contracting company in such a case to be individual (see, to that effect, *Coditel Brabant*, paragraph 46).

- 56 In a situation in which several public authorities choose to carry out certain of their public service tasks by having recourse to a company that they own in common, it is usually not possible for one of those authorities, having only a minority holding in that company, to exercise decisive control over the latter's decisions. In such a case, to require the control exercised by a public authority to be individual would have the effect of requiring a competitive tendering procedure in most cases in which such an authority seeks to become a member of a company owned by other public authorities for the purpose of awarding to that company the management of a public service (see, to that effect, *Coditel Brabant*, paragraph 47).
- 57 Such a result would not be in keeping with the system of Community rules on public procurement and concession contracts. It is accepted that it is open to a public authority to perform the public interest tasks entrusted to it by relying on its own administrative, technical and other resources, without being obliged to call on outside entities not belonging to its own departments (*Stadt Halle and RPL Lochau*, paragraph 48; *Coditel Brabant*, paragraph 48; and *Commission v Germany*, paragraph 45).
- 58 Public authorities may act in cooperation with other public authorities in making use of that opportunity to rely on their own resources in order to perform their public-service tasks (see, to that effect, Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 57, and *Coditel Brabant*, paragraph 49).
- 59 It must, therefore, be recognised that when several public authorities own a company to which they entrust the performance of one of their public service tasks, the control which those public authorities exercise over that entity may be exercised by them jointly (see, to that effect, *Coditel Brabant*, paragraph 50).
- 60 With regard to a body that takes its decisions collectively, the procedure used for the taking of those decisions, in particular recourse to a majority decision, is immaterial (see *Coditel Brabant*, paragraph 51).

- 61 Nor is that conclusion shaken by *Coname*. It is true that the Court considered, in paragraph 24 of that judgment, that a 0.97% interest is so small that it cannot enable a municipality to exercise control over a concessionaire running a public service. However, in that passage of the judgment, the Court was not concerned with the question whether such control could be exercised jointly (*Coditel Brabant*, paragraph 52).
- 62 Furthermore, the Court has subsequently recognised, in *Asemfo* (paragraphs 56 to 61), that in certain circumstances the condition relating to the control exercised by the public contracting authority could be satisfied where such an authority held only 0.25% of the capital in a public undertaking (*Coditel Brabant*, paragraph 53).
- 63 It follows that, if a public authority becomes a minority shareholder in a company limited by shares with wholly public capital for the purpose of awarding the management of a public service to that company, the control that the public authorities which are members of that company exercise over it may be classified as similar to the control they exercise over their own departments when it is exercised by those authorities jointly.
- 64 The question asked by the national court seeks to ascertain also whether decision-making structures such as those provided for by Setco's statutes can enable the shareholder municipalities actually to exercise over the company they own control similar to that which they exercise over their own departments.
- 65 In order to determine whether the contracting authority exercises over the contracting company control similar to that which it exercises over its own departments, account has to be taken of all the legislative provisions and relevant circumstances. It must follow from that examination that the contracting company is subject to control enabling the contracting authority to influence that company's decisions. It must be a case of a power of decisive influence over both the strategic objectives and the significant decisions of that company (see, to that effect, *Carbotermo and Consorzio Alisei*, paragraph 36, and *Coditel Brabant*, paragraph 28).

66 Of the relevant matters identifiable in the decision for reference, it is appropriate to consider, first, the legislation applicable, next, whether the company concerned is market orientated and, last, the control mechanisms provided by Setco's statutes.

67 So far as the legislation applicable is concerned, Article 113(5)(c) of Legislative Decree No 267/2000 provides that the operation of the service may be awarded, in compliance with the legislation of the European Union, to companies with wholly public share capital on condition that the public authority or authorities holding the share capital 'exercise over the company control similar to that exercised over their own departments and that the company carry out the essential part of its activities with the controlling public authority or authorities'.

68 By using those words, the Italian legislature has reproduced word for word the conditions set out in paragraph 50 of the judgment in *Teckal*, and upheld in several later judgments of the Court. That national legislation is, in principle, compatible with Community law, on the understanding that the interpretation of that legislation also must comply with the requirements of Community law (see, to that effect, *ANAV*, paragraph 25).

69 Moreover, the decision for reference makes it clear that the municipalities that hold Setco's shares amended that company's statutes on 23 December 2006 for the purpose of making Setco subject to control similar to that which they exercise over their own departments, in accordance with Article 113(5)(c) of Legislative Decree No 267/2000.

70 It is also evident from Article 8 *bis* (1) of those statutes that that amendment of Setco's statutes is intended to ensure compliance with the relevant Community legislation.

- 71 Furthermore, nothing in the file tends to show that those statutes were amended for the purpose of circumventing the Community rules on public procurement.
- 72 Lastly, as is apparent from the decision for reference, neither the relevant legislation nor the relevant company statutes allow secondary local authorities to entrust the management of local public services presenting an economic interest to a company with wholly public capital unless those authorities exercise over the company control similar to that exercised over their own departments for the purpose of Community law. According to the national court, the expression 'similar control' has not, however, been defined.
- 73 With regard to the question whether the company concerned is market orientated, which would render precarious all control by the shareholder authorities, the geographical and material extent of the company's activities must be examined, as must the opportunity for the company to establish relations with undertakings in the private sector.
- 74 Article 3 of Setco's statutes, headed 'Company object', provides that Setco is to manage local public services concerning only local public authorities awarding those services.
- 75 In addition, Article 8 *bis* (2) of the statutes states that Setco is to manage the services for contracting members exclusively and within the areas for which those members are responsible.
- 76 Such provisions would tend to indicate, first, that the geographical scope of the activities of the contracting company at issue in the main proceedings does not extend

beyond the territory of the shareholder municipalities and, second, that that company's object is to manage public services for those municipalities alone.

77 Article 3(3) of those statutes provides, however, that Setco may also perform services for private individuals, when to do so is not contrary to the company's objects or contributes to their better attainment.

78 At the hearing Setco stated that its power to deal with undertakings in the private sector is essential to the performance of its public service duties. By way of illustration, it mentioned the selective sorting of waste, which could make it necessary to sell some categories of recovered waste to specialist bodies in order to have it recycled. According to Setco, the activities concerned are ancillary to waste collection, and are not extraneous to the main activity.

79 It has to be considered that, if the power given to the contracting company concerned in the main proceedings to supply services to private economic operators is merely incidental to its core activity, which is a matter for the national court to ascertain, the existence of that power does not prevent the company's main object from still being the management of public services. Accordingly, the fact that such a power exists is not sufficient to permit the inference that that company is market orientated, which would render precarious all control by the authorities owning it.

80 That conclusion is borne out by the fact that the second condition laid down in paragraph 50 of *Teckal*, namely, that the contracting company should carry out the essential part of its activities with the controlling authorities, allows that company to carry on activity of a marginal kind with operators other than local authorities (see, to that effect, *Carbotermo and Consorzio Alisei*, paragraph 63). That condition would be rendered nugatory if the first condition laid down in paragraph 50 of *Teckal* were interpreted as prohibiting any ancillary activity, including the private sector.

81 So far as the control mechanisms provided by Setco's statutes are concerned, it is clear from the documents before the Court that, by the amendments made to those statutes on 23 December 2006, the members intended to superimpose on the general meeting and on the board of directors, as provided for by Italian company law, decision-making structures not expressly provided for by that law, designed to exercise over Setco control similar to that which they exercise over their own departments. The purpose is, in particular, to reinforce control by means, first, of the joint committee and, secondly, of a technical committee for every division responsible for Setco's various activities.

82 As is made plain in Articles 8 *ter* and 8 *quater* of those statutes, the joint committee and the technical committees are made up of representatives of the member local authorities. Each of those authorities has one vote in the committees, whatever the size of the authority concerned or the number of shares it holds.

83 Moreover, Articles 8 *bis* to 8 *quater* of Setco's statutes confers on the joint committee and the technical committees wide-ranging supervisory and decision-making powers.

84 As a corollary, Article 14 of the statutes restricts the powers of the general meeting by requiring the latter to have regard to the guidelines and instructions laid down by those committees and by requiring the assent of the joint committee before the general meeting may authorise the company's directors to perform certain acts.

85 Similarly, Article 16 of the statutes limits the autonomous decision making of the board of directors by requiring it to observe the powers reserved to those committees and by making its decisions subject to compliance with instructions issued by those committees.

86 In view of the extent of the supervisory and decision-making powers they confer on the committees they set up, and also of the fact that those committees are made up of representatives of the shareholder authorities, provisions laid down in statutes such as

those of the contracting company involved in the main proceedings must be regarded as putting the shareholder authorities in a position to exercise, through those committees, conclusive influence on both the strategic objectives of the company and on its significant decisions.

87 The court making the reference is, however, of the view that Articles 8 *bis* to 8 *quater* of Setco's statutes, inasmuch as they refer to the joint and technical committees, are comparable to shareholders' pacts falling within Article 2341 of the Italian Civil Code. It infers therefrom that the control similar to that which the shareholder authorities exercise over their own departments which the machinery of those committees is intended to attain might be ineffective.

88 That is a matter of the interpretation of rules of domestic law which it is for the court making the reference to settle.

89 Without prejudice to the determination by that court of the effectiveness of the relevant provisions of the statutes, it follows that, in circumstances such as those of the case in the main proceedings, the control exercised, through the bodies established under the company's statutes, by the shareholder authorities may be regarded as enabling those authorities to exercise over that company control similar to that which they exercise over their own departments.

90 In the light of the foregoing, the question referred is to be answered as follows:

It is not contrary to Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality or the obligation of transparency arising therefrom for a public service contract to be awarded directly to a company limited by shares with wholly public capital so long as the public authority which is the contracting

authority exercises over that company control similar to that which it exercises over its own departments and so long as the company carries out the essential part of its activities with the authority or authorities controlling it.

Without prejudice to the determination by the court making the reference of the effectiveness of the relevant provisions of the statutes, the control exercised over that company by the shareholder authorities may be regarded as similar to that which they exercise over their own departments in circumstances such as those of the case in the main proceedings, when:

- that company's activity is limited to the territory of those authorities and is carried on essentially for their benefit, and

- through the bodies established under the company's statutes made up of representatives of those authorities, the latter exercise conclusive influence on both the strategic objectives of the company and on its significant decisions.

Costs

- ⁹¹ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

It is not contrary to Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality or the obligation of transparency arising therefrom for a public service contract to be awarded directly to a company limited by shares with wholly public capital so long as the public authority which is the contracting authority exercises over that company control similar to that which it exercises over its own departments and so long as the company carries out the essential part of its activities with the authority or authorities controlling it.

Without prejudice to the determination by the court making the reference of the effectiveness of the relevant provisions of the statutes, the control exercised over that company by the shareholder authorities may be regarded as similar to that which they exercise over their own departments in circumstances such as those of the case in the main proceedings, when:

- that company's activity is limited to the territory of those authorities and is carried on essentially for their benefit, and**
- through the bodies established under the company's statutes made up of representatives of those authorities, the latter exercise conclusive influence on both the strategic objectives of the company and on its significant decisions.**

[Signatures]