

JUDGMENT OF THE COURT (Third Chamber)

13 November 2008^{*}

In Case C-324/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'État (Belgium), made by decision of 3 July 2007, received at the Court on 12 July 2007, in the proceedings

Coditel Brabant SA

v

Commune d'Uccle,

Région de Bruxelles-Capitale,

third party:

Société Intercommunale pour la Diffusion de la Télévision (Brutéle),

^{*} Language of the case: French.

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: V. Trstenjak,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 9 April 2008,

after considering the observations submitted on behalf of:

— Coditel Brabant SA, by F. Tulkens and V. Ost, avocats,

— the Commune d’Uccle, by P. Coenraets, avocat,

— Société Intercommunale pour la Diffusion de la Télévision (Brutélé), by N. Fortemps and J. Bourtembourg, avocats,

— the Belgian Government, by J.C. Halleux, acting as Agent, assisted by B. Staelens, avocat,

- the German Government, by M. Lumma and J. Möller, acting as Agents,

- the Netherlands Government, by C. Wissels and Y. de Vries, acting as Agents,

- the Commission of the European Communities, by B. Stromsky and D. Kukovec, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 June 2008,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Articles 43 EC and 49 EC and of the principles of equal treatment and non-discrimination on grounds of nationality, as well as of the concomitant obligation of transparency.

- 2 The reference was made in the course of proceedings brought by Coditel Brabant SA ('Coditel') against the Commune d'Uccle (Municipality of Uccle; 'the Municipality of Uccle'), the Région de Bruxelles-Capitale and the Société Intercommunale pour la Diffusion de la Télévision (Brutélé) ('Brutélé'), concerning the award by the Municipality of Uccle to an inter-municipal cooperative society of a concession for the management of the municipal cable television network.

Legal context

National law

- 3 Article 1 of the Law of 22 December 1986 on inter-municipal cooperatives (loi relative aux intercommunales) (*Moniteur belge* of 26 June 1987, p. 9909; 'the Law on inter-municipal cooperatives') provides:

'Two or more municipalities may, in accordance with the provisions of this Law, form associations with specific objects in the municipal interest. Those associations shall hereinafter be referred to as inter-municipal cooperatives.'

- 4 Article 3 of the Law provides:

'Inter-municipal cooperatives shall be legal persons governed by public law and shall not have a commercial character, irrespective of their form or object.'

5 Article 10 of the Law states:

‘Each inter-municipal cooperative shall comprise a general assembly, a governing council and a board of auditors.’

6 Under Article 11 of the Law:

‘Irrespective of the proportion of the contributions made by the various parties to the authorised capital, the municipalities shall always hold both the majority of votes and the chairmanship of the various inter-municipal management and control bodies.’

7 Article 12 of the Law on inter-communal municipal cooperatives provides:

‘The representatives of the associated municipalities at the general assembly shall be appointed by the municipal council of each municipality from among the municipal councillors, the mayor and the aldermen.

For each municipality, the voting rights at the general assembly shall correspond to the number of shares held.’

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

- 8 From 1969 to 1999, the Municipality of Uccle authorised Coditel to install and operate a cable television network in its territory. On 28 October 1999, the municipality decided to purchase the network with effect from 1 January 2000.
- 9 To that end, the Municipality of Uccle launched a call for tenders — also by decision of 28 October 1999 — with a view to granting the right to operate the network to a concessionaire. Four companies, including Coditel, submitted tenders.
- 10 On 25 May 2000, the Municipality of Uccle decided against awarding a concession for the operation of its cable television network, opting instead to sell it.
- 11 A notice of a call for purchase tenders was published in the *Bulletin des adjudications* on 15 September 2000. Five companies, including Coditel, submitted purchase bids. In addition, Brutélé, an inter-municipal cooperative society, submitted to the Municipality of Uccle an offer of affiliation as an associated member instead of a purchase bid.
- 12 Since it considered that four of the five bids were inadmissible and that the only admissible bid — Coditel's — was too low, the Municipality of Uccle decided, on 23 November 2000, not to sell the municipal cable television network.

13 Also by decision of 23 November 2000, the Municipality of Uccle decided to become a member of Brutélé, entrusting the latter with the management of its cable television network.

14 The reasons for that decision include, in particular, the following considerations:

‘Whereas Brutélé proposes to the Municipality of Uccle that, upon taking up membership, it should constitute an independent operational subsection with autonomous power of decision;

Whereas that autonomy relates in particular to:

- the choice of programmes transmitted;
- the subscription and connection charges;
- the investment and works policy;
- the rebates or benefits to be granted to certain categories of person;
- the nature of and terms relating to other services to be provided via the network, and the possibility of entrusting the inter-communal cooperative with projects of interest to the municipality that accord with the objects defined in its statutes, such as the creation of a municipal intranet, a website and the training of staff for that purpose.

Whereas within that framework:

- Brutélé would draw up an income statement and balance sheet for activities on Uccle’s network;

- [the Municipality of] Uccle would have a director on the governing council of Brutélé and three directors on the board of the Brussels operating sector, one appointee on the board of auditors and one as a municipal expert.

Whereas Brutélé undertakes to cover the entire Uccle network and to increase the capacity of the network so that it can offer, within one year at most, if the municipality so wishes, all the following services:

- expansion of the TV range: additional programmes and “the bouquet”;

- pay-per-view programmes;

- Internet access;

- voice telephony;

- video surveillance;

— high-speed data transmission.

Whereas the proposed annual fee consists of the following:

- (a) fixed fee equal to 10% of the income from basic subscriptions for cable television (on the basis of 31 000 subscribers and an annual subscription fee of BEF 3 400 (before VAT and royalties): BEF 10 540 000 per year);
- (b) payment of 5% of the turnover of Canal+ and of the bouquet;
- (c) payment of the entire profit on all the services provided.'

15 It is clear from the order for reference that the Municipality of Uccle had to subscribe for 76 shares in Brutélé, in the amount of BEF 200 000 per share. Moreover, the municipality requested, and obtained, from Brutélé the option of withdrawing unilaterally from that inter-municipal cooperative at any time.

16 It is also apparent from the order for reference that Brutélé is an inter-municipal cooperative society whose members are municipalities and an inter-municipal association whose members in turn are solely municipalities. Brutélé is not open to private members. Its governing council consists of representatives of the municipalities (a maximum of three per municipality), who are appointed by the general assembly, which is itself composed of representatives of the municipalities. The governing council enjoys the widest powers.

- 17 The order for reference further makes clear that the municipalities are divided into two sections, one of which groups together the municipalities in the Brussels region, which may be divided into sub-sectors. Within each sector, there is a sector board consisting of directors appointed by the general assembly, sitting in separate groups representing the holders of shares for each of the sectors, from among candidates proposed by the municipalities. The governing council may delegate to the sector boards its powers with regard to matters affecting the sub-sectors, such as the conditions for the application of charges, the programme of works and investment, the financing thereof, advertising campaigns and problems common to the various sub-sectors within the operational sector. The constitutional bodies under Brutélé's statutes ('the statutory bodies') additionally comprise the general assembly, whose decisions are binding on all members; the Director General; the board of experts, who are municipal officials and equal in number to the directors whom they are tasked with assisting; and the board of auditors. The Director General, the experts and the auditors are appointed by the governing council or the general assembly, as the case may be.
- 18 Furthermore, according to the order for reference, Brutélé carries out the essential part of its activities with its members.
- 19 By application lodged on 22 January 2001, Coditel brought an appeal before the Conseil d'État (Council of State) (Belgium), inter alia, for annulment of the decision of 23 November 2000 whereby the Municipality of Uccle became a member of Brutélé. In that appeal, Coditel took issue with the municipality for joining Brutélé and entrusting it with the management of its cable television network, without comparing the advantages of that arrangement with the advantages of granting another operator a concession for running the network. Coditel claimed that, by proceeding in that manner, the Municipality of Uccle had infringed, inter alia, the principle of non-discrimination and the obligation of transparency enshrined in Community law.
- 20 Brutélé contested that claim, maintaining that it is 'purely' an inter-municipal co-operative whose activities are intended and reserved for the member municipalities

and that its statutes allow the Municipality of Uccle, as an operational sub-sector, to exercise immediate and precise control over Brutélé's activities in that sub-sector, identical to the control that that municipality would exercise over its own internal departments.

21 The Conseil d'État takes the view that the affiliation of the Municipality of Uccle to Brutélé does not constitute a public service contract but a public service concession for the purposes of Community law. Although the Community public procurement directives do not apply to public service concessions, the principle of non-discrimination on grounds of nationality implies an obligation of transparency in the award of concessions, in accordance with the case-law of the Court of Justice deriving from the judgment in *Case C-324/98 Telaustria and Telefonadress* [2000] ECR I-10745. In order to satisfy the requirements of Community law, the Municipality of Uccle ought, in principle, to have issued a call for competition in order to examine whether the award of the concession for its cable television service to economic operators other than Brutélé constituted a more attractive course of action than that chosen. The Conseil d'État asks whether those requirements of Community law are to be set aside in the light of the judgment in *Case C-107/98 Teckal* [1999] ECR I-8121, according to which those requirements do not apply where the concession-granting public authority exercises control over the concessionaire and where the concessionaire carries out the essential part of its activities with that authority.

22 In those circumstances, the Conseil d'État decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) May a municipality, without calling for competition, join a cooperative society grouping together exclusively other municipalities and associations of municipalities (a so-called "pure" inter-municipal cooperative) in order to transfer to that cooperative society the management of its cable television network, in the knowledge that the cooperative society carries out the essential part of its activities for and with its own members and that decisions regarding those activities are taken by the governing council and the sector boards within the limits of the delegated powers granted to them by the governing council, those statutory bodies being composed of representatives of the public authorities and the decisions of those bodies being taken in accordance with the vote expressed by the majority of those representatives?

- (2) Can the control thus exercised over the decisions of the cooperative society, via the statutory bodies, by all the members of the cooperative society — or, in the case of operational sectors or sub-sectors, by some of those members — be regarded as enabling them to exercise over the cooperative society control similar to that exercised over their own departments?
- (3) For that control to be regarded as similar, must it be exercised individually by each member, or is it sufficient that it be exercised by the majority of the members?

The questions referred

Questions 1 and 2

²³ In the light of the connection between them, Questions 1 and 2 should be examined together.

²⁴ It is apparent from the referral decision that, by becoming a member of Brutélé, the Municipality of Uccle entrusted it with the management of its cable television network. It is also apparent that Brutélé's remuneration comes not from the municipality but from payments made by the users of that network. That method of remuneration is characteristic of a public service concession (Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 40).

25 Public service concession contracts do not fall within the scope of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), which was applicable at the material time. Notwithstanding the fact that such contracts fall outside the scope of that directive, the authorities concluding them are bound to comply with the fundamental rules of the EC Treaty, the principles of equal treatment and non-discrimination on grounds of nationality, and the concomitant obligation of transparency (see, to that effect, *Telaustria and Telefonadress*, paragraphs 60 to 62, and Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16 to 19). Without necessarily implying an obligation to launch an invitation to tender, that obligation of transparency requires the concession-granting authority to ensure, for the benefit of any potential concessionaire, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of the procurement procedures to be reviewed (see, to that effect, *Telaustria and Telefonadress*, paragraph 62, and *Coname*, paragraph 21).

26 The application of the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as of the general principles of which they are the specific expression, is precluded if the control exercised over the concessionaire by the concession-granting public authority is 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, and *Parking Brixen*, paragraph 62).

27 As regards the second of those conditions, the national court stated in the order for reference that Brutélé carries out the essential part of its activities with its members. Accordingly, the scope of the first condition — that the control exercised over the concessionaire by the concession-granting public authority or authorities must be similar to that which the authority exercises over its own departments — remains to be examined.

- 28 In order to determine whether a concession-granting public authority exercises a control similar to that which it exercises over its own departments, it is necessary to take account of all the legislative provisions and relevant circumstances. It must follow from that examination that the concessionaire in question is subject to a control which enables the concession-granting public authority to influence that entity's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions of that entity (see, to that effect, *Parking Brixen*, paragraph 65, and Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 36).
- 29 Of the relevant facts which can be identified from the order for reference, it is appropriate to consider, first, the holding of capital by the concessionaire, secondly, the composition of its decision-making bodies, and thirdly, the extent of the powers conferred on its governing council.
- 30 As regards the first of those facts, it should be borne in mind that, where a private undertaking holds a share of the capital of a concessionaire, this precludes the possibility for a concession-granting public authority to exercise over that concessionaire a control similar to that which it exercises over its own departments (see, to that effect, Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 49).
- 31 On the other hand, the fact that the concession-granting public authority holds, alone or together with other public authorities, all of the share capital in a concessionaire, tends to indicate — generally, but not conclusively — that that contracting authority exercises over that company a control similar to that which it exercises over its own departments (*Carbotermo and Consorzio Alisei*, paragraph 37, and Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 57).

32 It is clear from the order for reference that, in the case before the referring court, the concessionaire is an inter-municipal cooperative society whose members are municipalities and an inter-municipal association whose members in turn are solely municipalities, and is not open to private members.

33 Secondly, it is clear from the file that Brutélé's governing council consists of representatives of the affiliated municipalities, appointed by the general assembly, which is itself composed of representatives of the affiliated municipalities. In accordance with Article 12 of the Law on inter-municipal cooperatives, the representatives at the general assembly are appointed by the municipal council of each municipality from among the municipal councillors, the mayor and the aldermen.

34 The fact that Brutélé's decision-making bodies are composed of representatives of the public authorities which are affiliated to Brutélé shows that those bodies are under the control of the public authorities, which are thus able to exert decisive influence over both Brutélé's strategic objectives and significant decisions.

35 Thirdly, it is evident from the file that Brutélé's governing council enjoys the widest powers. In particular, it fixes the charges. It also has the power — but is under no obligation — to delegate to the sector or sub-sector boards the resolution of certain matters particular to those sectors or sub-sectors.

36 The question arises as to whether Brutélé has thus become market-oriented and gained a degree of independence which would render tenuous the control exercised by the public authorities affiliated to it.

- 37 In this regard, it should be pointed out that Brutélé does not take the form of a *société par actions*, or a *société anonyme*, either of which is capable of pursuing objectives independently of its shareholders, but of an inter-municipal cooperative society governed by the Law on inter-municipal cooperatives. Moreover, in accordance with Article 3 of that Law, inter-municipal cooperatives are not to have a commercial character.
- 38 It seems to be apparent from that Law, which is supplemented by Brutélé's statutes, that Brutélé's object under its statutes is the pursuit of the municipal interest — that being the *raison d'être* for its creation — and that it does not pursue any interest which is distinct from that of the public authorities affiliated to it.
- 39 Subject to verification of the facts by the referring court, it follows that, despite the extent of the powers conferred on its governing council, Brutélé does not enjoy a degree of independence sufficient to preclude the municipalities which are affiliated to it from exercising over it control similar to that exercised over their own departments.
- 40 Those considerations are all the more applicable where decisions relating to the activities of the inter-municipal cooperative society are taken by the sector or sub-sector boards, within the limits of the delegated powers granted to them by the governing council. Where one or more affiliated municipalities are recognised as constituting a sector or sub-sector of that society's activities, the control which those municipalities may exercise over the matters delegated to the sector or sub-sector boards is even stricter than that which they exercise in conjunction with all the members within the plenary bodies of that society.
- 41 It follows from the foregoing that, subject to verification of the facts by the referring court as regards the degree of independence enjoyed by the inter-municipal cooperative society in question, in circumstances such as those of the case before the referring court, the control exercised, via the statutory bodies, by the public authorities

belonging to such an inter-municipal cooperative society over that society's decisions may be regarded as enabling those authorities to exercise over that cooperative society control similar to that exercised over their own departments.

42 Accordingly, the answer to Questions 1 and 2 must be that:

- Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality, and the concomitant obligation of transparency, do not preclude a public authority from awarding, without calling for competition, a public service concession to an inter-municipal cooperative society of which all the members are public authorities, where those public authorities exercise over that cooperative society control similar to that exercised over their own departments and where that society carries out the essential part of its activities with those public authorities;

- Subject to verification of the facts by the referring court as regards the degree of independence enjoyed by the inter-municipal cooperative society in question, in circumstances such as those of the case before the referring court, where decisions regarding the activities of an inter-municipal cooperative society owned exclusively by public authorities are taken by bodies, created under the statutes of that society, which are composed of representatives of the affiliated public authorities, the control exercised over those decisions by the public authorities may be regarded as enabling those authorities to exercise over the cooperative society control similar to that exercised over their own departments.

Question 3

- 43 By Question 3, the national court is essentially asking whether, where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is necessary, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for that control to be exercised individually by each of those public authorities or whether it can be exercised jointly by them, decisions being taken by a majority, as the case may be.
- 44 First, it should be pointed out that, according to the case-law of the Court, where several public authorities control a concessionaire, the condition relating to the essential part of that entity's activities may be met if account is taken of the activities which that entity carries out with all those authorities (see, to that effect, *Carbotermo and Consorzio Alisei*, paragraphs 70 and 71, and *Asemfo*, paragraph 62).
- 45 It would be consistent with the reasoning underlying that case-law to consider that the condition as to the control exercised by the public authorities may also be satisfied if account is taken of the control exercised jointly over the concessionaire by the controlling public authorities.
- 46 According to the case-law, the control exercised over the concessionaire by a concession-granting public authority must be similar to that which the authority exercises over its own departments, but not identical in every respect (see, to that effect, *Parking Brixen*, paragraph 62). The control exercised over the concessionaire must be effective, but it is not essential that it be exercised individually.

47 Secondly, where a number of public authorities elect to carry out their public service tasks by having recourse to a municipal concessionaire, it is usually not possible for one of those authorities, unless it has a majority interest in that entity, to exercise decisive control over the decisions of the latter. To require the control exercised by a public authority in such a case to be individual would have the effect of requiring a call for competition in the majority of cases where a public authority seeks to join a grouping composed of other public authorities, such as an inter-municipal cooperative society.

48 Such a result, however, would not be consistent with Community rules on public procurement and concession contracts. Indeed, a public authority has the possibility of performing the public interest tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments (*Stadt Halle and RPL Lochau*, paragraph 48).

49 That possibility for public authorities to use their own resources to perform the public interest tasks conferred on them may be exercised in cooperation with other public authorities (see, to that effect, *Asemfo*, paragraph 65).

50 It must therefore be recognised that, where a number of public authorities own a concessionaire 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 jointly.

51 As regards collective decision-making bodies, the procedure which is used for adopting decisions — such as, inter alia, adoption by majority — is of no importance.

52 That conclusion is not undermined by *Coname*. Admittedly, the Court considered in that judgment that a 0.97% interest is so small as to preclude a municipality from exercising control over the concessionaire managing a public service (see *Coname*, paragraph 24). However, in that passage of the judgment, the Court was not concerned with the question whether such control could be exercised jointly.

53 Furthermore, in a later judgment — namely, *Asemfo*, paragraphs 56 to 61 — the Court recognised that in certain circumstances the condition relating to the control exercised by the public authority could be satisfied where such an authority held only 0.25% of the capital in a public undertaking.

54 Consequently, the answer to Question 3 must be that, where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is possible, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for it to be exercised jointly by those authorities, decisions being taken by a majority, as the case may be.

Costs

55 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:

- 1. Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality and the concomitant obligation of transparency do not preclude a public authority from awarding, without calling for competition, a public service concession to an inter-municipal cooperative society of which all the members are public authorities, where those public authorities exercise over that cooperative society control similar to that exercised over their own departments and where that society carries out the essential part of its activities with those public authorities.**

- 2. Subject to verification of the facts by the referring court as regards the degree of independence enjoyed by the inter-municipal cooperative society in question, in circumstances such as those of the case before the referring court, where decisions regarding the activities of an inter-municipal cooperative society owned exclusively by public authorities are taken by bodies, created under the statutes of that society, which are composed of representatives of the affiliated public authorities, the control exercised over those decisions by the public authorities may be regarded as enabling those authorities to exercise over the cooperative society control similar to that exercised over their own departments.**

- 3. Where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is possible, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for it to be exercised jointly by those authorities, decisions being taken by a majority, as the case may be.**

[Signatures]