Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 7 May 2019 [1]

**Case C-285/18**

**Kauno miesto savivaldybė**
**Kauno miesto savivaldybės administracija**
**joined parties:**
**UAB Irgita**
**UAB Kauno švara**

(Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania))

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Scope *ratione temporis* — Directive 2014/24/EU — 'In-house transactions' — Additional conditions for an 'in-house transaction' under national law)

## I. Introduction

1. This request for a preliminary ruling deals, in essence, with the question whether a Member State can impose additional requirements on a contracting authority for the conclusion of an 'in-house contract' [2] although this contract satisfies the criteria for an 'in-house transaction' under the case-law of the Court and, if applicable, Article 12 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. [3]

2. The referring court has also asked for clarification on the applicability *ratione temporis* 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 [4] and of Directive 2014/24.

1 Original language: English.

2 For a definition of the term see points 38 to 41 below.

3 OJ 2014 L 94, p. 65.

4 OJ 2004 L 134, p. 114, corrigenda OJ 2004 L 351, p. 44.

## II. Legal framework

### *A. EU law*

3. Recitals 1, 2, 4, 5 and 31 of Directive No 2014/24 state:

'(1) The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

(2) Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled "Europe 2020, a strategy for smart, sustainable and inclusive growth" …, as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. … There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

…

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

(5) It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive. …

…

(31) There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules.

Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union. The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.

It should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors.'

4. Article 1 of Directive No 2014/24, headed 'Subject matter and scope', provides, in paragraph 4:

'This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.'

5. Article 12 of Directive No 2014/24, headed 'Public contracts between entities within the public sector', provides, in paragraph 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.'

6. The first paragraph of Article 91 of Directive 2014/24 provides:

'Directive 2004/18/EC is repealed with effect from 18 April 2016.'

### *B. Lithuanian law*

#### *1. Viešųjų pirkimų įstatymas (Law on Public Procurement) of 13 August 1996, No I 1491*

7. Article 3 of the Law on Public Procurement of the Republic of Lithuania of 13 August 1996, No I-1491 ('the Law on Public Procurement'), provides as follows:

'1. The contracting authority shall ensure, in the course of performance of procurement procedures and the award of contracts, that there is compliance with the principles of equal rights, non-discrimination, mutual recognition, proportionality and transparency.

...'

8. Article 10(5) of the Law on Public Procurement (as applicable on 1 January 2016), provides as follows:

'The requirements of this Law shall not apply to procurement procedures where a contracting authority concludes a contract with an entity having separate legal personality, over which it exercises a control identical to that which it exercises over its own department or structural division and in which it is the sole member (or exercises the rights and obligations of the State or the municipality as the sole member) and where the controlled entity receives at least 80% of sales income in the last financial year (or in the period from the day of the establishment of the entity if the entity has carried out its activities for less than one financial year) from activities intended to meet the needs of the contracting authority or to perform the functions of the contracting authority. A procurement procedure in the manner specified in this paragraph may be commenced only upon receipt of the consent of the Viešųjų pirkimų tarnyba (Public Procurement Office). ...'

9. Article 10 of the Law on Public Procurement (as applicable on 1 July 2017) provides, inter alia, as follows:

'1. The requirements of this Law shall not apply to in-house transactions concluded by a contracting authority with another contracting authority in the case where all of the following conditions are present without exception:

(1) the contracting authority exercises control over the other contracting authority identical to that which it exercises over its own department or structural division, exercising decisive influence over its strategic goals and significant decisions ...;

(2) income received from contracts concluded with the controlling contracting authority or with legal entities controlled by that contracting authority and intended to meet its/their needs or to perform its/their functions accounts for more than 80% of the average income received by the controlled contracting authority from sales contracts during the previous three financial years. ...;

(3) there is no direct private capital participation in the controlled contracting authority.

2. An in-house transaction may be concluded only in an exceptional case, when the conditions set out in paragraph 1 of this article are satisfied and the continuity, good quality and availability of services cannot be ensured if they are purchased through public procurement procedures.

…

5. Public undertakings, public limited liability companies, and private limited liability companies in which State-owned shares grant more than half of the votes at the general meeting of shareholders may not conclude any in-house transactions.'

*2. Konkurencijos įstatymas (Law on Competition) of 23 March 1999, No VIII 1099*

10. Article 4 of the Lietuvos Respublikos konkurencijos įstatymas (Law on Competition of the Republic of Lithuania) of 23 March 1999, No VIII-1099 ('the Law on Competition'), provides as follows:

'1. When carrying out the assigned tasks relating to the regulation of economic activities within the Republic of Lithuania, entities of public administration must ensure freedom of fair competition.

2. Entities of public administration shall be prohibited from adopting legal acts or other decisions which grant privileges to, or discriminate against, any individual economic entities or their groups and which give rise to, or may give rise to, differences in the conditions of competition for economic entities competing in a relevant market, except where the difference in the conditions of competition cannot be avoided when complying with the requirements of the laws of the Republic of Lithuania.'

## III. Background facts and main proceedings

11. The request for a preliminary ruling has been made in appeal proceedings before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) brought by Kauno miesto savivaldybė (Municipality of the City of Kaunas) and Kauno miesto savivaldybės administracija (Administration of the Municipality of the City of Kaunas) against a judgment of the private law division of the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania). The initial action was brought by UAB Irgita ('Irgita'), a limited liability company, against the Municipality of the City of Kaunas, the Administration of the Municipality of the City of Kaunas and UAB Kauno švara ('Kauno švara'), a limited liability company.

12. On 7 February 2014, the Administration of the Municipality of the City of Kaunas ('the contracting authority') launched a procurement procedure for services relating to the maintenance and management of plantations, forests and forest parks in the City of Kaunas.

13. On 18 March 2014, a contract for the provision of those services was concluded between the contracting authority and the successful bidder, Irgita. The contract's period of validity was three years. Payment was to be made on the basis of the services ordered and rendered. The contracting authority had no obligation to order all its relevant services or a specific minimum quantity of services from Irgita.

14. On 1 April 2016, the contracting authority requested the consent of the Viešųjų pirkimų tarnyba (Public Procurement Office) to conclude an 'in-house transaction' for services which were essentially similar to those provided under the existing contract between the contracting authority and Irgita. The request related to a possible contract with Kauno švara. The Municipality of the City of Kaunas was the sole owner of Kauno švara. In 2015, the year preceding the transaction, Kauno švara had received 90.07% of its income from activities performed for the benefit of the contracting authority.

15. On 20 April 2016, the Public Procurement Office gave its consent to the 'in-house transaction' described above. However, it stated, inter alia, that, prior to concluding the 'in-house transaction', the contracting authority should evaluate whether it was possible to procure the services in accordance with the Law on Public Procurement with a view to the rational use of financial resources and in order to ensure competition between suppliers. It noted that, in any event, the decision of the contracting authority would have to comply with Article 4(2) of the Law on Competition.

16. On 3 May 2016, the Council of the Municipality of the City of Kaunas adopted a decision approving the conclusion of the 'in-house transaction' with Kauno švara referred to above ('the disputed Council decision').

17. Accordingly, on 19 May 2016, the contracting authority and Kauno švara concluded a contract for services ('the disputed contract').

18. On 20 May 2016, Irgita brought proceedings before the court of first instance challenging the disputed Council decision and the disputed contract, claiming that the contracting authority was not entitled to enter into an 'in-house transaction' for the relevant services as its contract with Irgita was still in force. Further, it claimed that the disputed contract was contrary to the Law on Public Procurement and the Law on Competition, distorted free and fair competition and conferred privileges on Kauno švara that discriminated against other providers.

19. By decision of 13 March 2017, the court at first instance dismissed Irgita's action. However, in its judgment of 4 October 2017, the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) decided in favour of Irgita. Both courts agreed in their reasoning that the exercise of the right to conclude an 'in-house transaction' in accordance with Article 10(5) of the Law on Public Procurement must not infringe the mandatory requirement laid down in Article 4(2) of the Law on Competition that competition between economic operators must not be adversely affected. The courts differed in their assessment whether, in the circumstances, competition between suppliers had been adversely affected.

20. The Municipality of the City of Kaunas and the contracting authority lodged an appeal with the referring court, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), requesting a review of the judgment of the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania).

21. The Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) states that the disputed contract is clearly a transaction fulfilling the criteria for an 'in-house transaction' set out in EU law[5] and the case-law of the Court. This assessment is shared by all the parties to the dispute.

22. The Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) explains that the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) has consistently held since 2011 that contracts satisfying the *Teckal* criteria were to be considered lawful. From mid-2015 onwards, on the basis of two orders of the Lietuvos Respublikos Konstitucinis Teismas (Constitutional Court of the Republic of Lithuania), further criteria were taken into consideration, emanating from the Law on Competition, such as, for example, the continuity, the quality and accessibility of services as well as the effects on the equality of treatment of other economic operators and the possibility for them to compete for such services. The referring court points out that Article 4(2) of the Law on Competition, as applied by the courts, had in fact not changed since its original wording, which has remained the same since 23 March 1999, and that only the interpretation of the provision in the case-law had changed since 2015.

23. In this context, the referring court has doubts whether, taking into account the case-law of the Court of Justice, the criteria that have to be fulfilled for an 'in-house transaction' to be permissible are stipulated exhaustively by EU law or whether the Member States have a margin of discretion to establish additional rules regarding in-house transactions and, if such discretion exists, the manner in which it can be exercised.

## IV. Request for a preliminary ruling and the procedure before the Court

24. In those circumstances, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Given the circumstances in the case under consideration, does the in-house transaction come within the scope of application of Directive 2004/18 or of Directive 2014/24, when the procedures for the conclusion of the disputed in-house transaction, inter alia, the administrative procedures, were initiated at a time when Directive 2004/18 was still in force but the contract itself was concluded on 19 May 2016, when Directive 2004/18 was no longer in force?

5 The term is used neither by Directive 2004/18 nor by Directive 2014/24. See points 38 to 41 below.

(2) Assuming that the in-house transaction comes within the scope of application of Directive 2004/18:

(a) Must Article 1(2)(a) of the directive (but not limited thereto), taking into account the judgments of the Court of Justice in *Teckal* (C-107/98), *Jean Auroux and Others* (C-220/05), *ANAV* (C-410/04), and other cases, be understood and interpreted as meaning that the notion of an "in-house transaction" comes within the scope of EU law, and that the content and application of that notion are not affected by the national law of Member States, inter alia, by limitations on the conclusion of such transactions, for example, the condition that public procurement contracts cannot ensure the quality, availability and continuity of the services to be provided?

(b) If the answer to the previous question is in the negative, that is to say, the notion of an "in-house transaction" comes, either partially or fully, within the scope of the law of the Member States, should the abovementioned provision of Directive 2004/18 be interpreted as meaning that Member States have a discretion to establish limitations or additional conditions for the conclusion of in-house transactions (in comparison with EU law and the case-law of the Court of Justice interpreting that law) but can implement that discretion only by means of specific and clear positive legal provisions governing public procurement?

(3) On the assumption that the in-house transaction comes within the scope of application of Directive 2014/24:

(a) Must the provisions of Article 1(4) and Article 12 of the Directive and those of Article 36 of the Charter, either together or separately (but not limited thereto), taking into account the judgments of the Court of Justice in *Teckal* (C-107/98), *Jean Auroux and Others* (C-220/05), *ANAV* (C-410/04), and other cases, be understood and interpreted as meaning that the notion of an "in-house transaction" comes within the scope of EU law, and that the content and application of that notion are not affected by the national law of Member States, inter alia, by limitations on the conclusion of such transactions, for example, the condition that public procurement contracts cannot ensure the quality, availability and continuity of the services to be provided?

(b) If the answer to the previous question is in the negative, that is to say, the notion of an "in-house transaction", either partially or fully, comes within the scope of the law of the Member States, should the provisions of Article 12 of Directive 2014/24 be interpreted as meaning that Member States have a discretion to establish limitations or additional conditions for the conclusion of in-house transactions (in comparison with EU law and the case-law of the Court of Justice interpreting that law) but can implement that discretion only by means of specific and clear positive legal provisions governing public procurement?

(4) Irrespective of which directive covers the disputed in-house transaction, should the principles of the equality and non-discrimination of public procurement suppliers and transparency (Article 2 of Directive 2004/18 and Article 18 of Directive 2014/24), the general prohibition of discrimination on grounds of nationality (Article 18 TFEU), the freedom of establishment (Article 49 TFEU), the freedom to provide services (Article 56 TFEU), the possibility of granting undertakings exclusive rights (Article 106 TFEU), and the case-law of the Court of Justice (judgments in *Teckal, ANAV, Sea, Undis Servizi*, and in other cases) be understood and interpreted as meaning that an in-house transaction being concluded by a contracting authority and by an entity legally separate from that contracting authority, where the contracting authority exercises control over that entity similar to that which it exercises over its own departments and the activity of that entity consists mainly of an activity carried out for the benefit of the

contracting authority, is in itself lawful, inter alia, does not infringe the right of other economic operators to fair competition, does not discriminate against those other operators, and no privileges are conferred on the controlled entity which concluded the in-house transaction?'

25. Written observations were submitted by Irgita, the contracting authority, Kauno švara, the Estonian, Lithuanian and Polish Governments (in the case of the Polish Government, however, these submissions were limited to Question 4, which will not be dealt with here) and the European Commission.

## V. Assessment

26. Without prejudice to any answer that the Court may give to Question 4, but, in line with the request by the Court, I propose to confine my observations to Question 1 and, depending on the answer to that question, Question 2 or 3 asked by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania).

### *A. Application ratione materiae of Directives 2004/18 and 2014/24*

27. It should be noted that the application of Directives 2004/18 and 2014/24 to the disputed contract is subject to the condition that the estimated value of that contract reaches the thresholds laid down in Article 7(b) of Directive 2004/18 or Article 4(c) of Directive 2014/24 respectively.

28. According to the estimations of the referring court, the value of the transaction at issue is nearly EUR 490 000 and may be considerably higher. Thus, irrespective of which directive covers the disputed contract, the value of that contract surpasses the minimum threshold amounts laid down in either Article 7(b) of Directive 2004/18 or Article 4(c) of Directive 2014/24 required for them to apply.

### *B. Application ratione temporis of Directives 2004/18 and 2014/24*

29. Since Directive 2014/24 has repealed Directive 2004/18 with effect from 18 April 2016, it is necessary to determine the relevant point in time that determines which directive is to apply.

30. According to the settled case-law of the Court, the relevant point in time for identifying the legislation applicable to a public contract is when the authority not only chooses the type of procedure to be followed but also decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract.[6] If such a decision was taken before the date on which the period for transposition of the later directive, here Directive 2014/24, was reached, it would be plainly contrary to the principle of legal certainty to determine the law applicable to the case in the main proceedings by reference to the date of the award of the contract.[7]

31. Several events which took place up to and including the time when the contract between the contracting authority and Kauna švara was concluded may have qualified as the moment when the final decision on the type of procedure — and thus the decision on whether a call for competition was necessary — was taken. These include the date on which the request for consent to conclude the disputed contract was submitted to the Public Procurement Office for consent to an 'in-house

6 Judgments of 5 October 2000, *Commission* v *France* (C-337/98, EU:C:2000:543, paragraphs 36 and 37); of 11 July 2013, *Commission* v *Netherlands* (C-576/10, EU:C:2013:510, paragraph 52); of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 31); and of 8 February 2018, *Lloyd's of London* (C-144/17, EU:C:2018:78, paragraph 25).

7 Judgments of 5 October 2000, *Commission* v *France* (C-337/98, EU:C:2000:543, paragraph 40); of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627, paragraph 29); and of 11 July 2013, *Commission* v *Netherlands* (C-576/10, EU:C:2013:510, paragraph 53).

transaction', the date of the Public Procurement Office's decision, the date of the disputed Council decision and the date of the disputed contract. Only the submission of the request to the Public Procurement Office took place before the repeal of Directive 2004/18; the three latter events took place thereafter.

32. It is thus pertinent to consider whether the request for consent submitted to the Public Procurement Office already constituted a final decision on whether a public procurement procedure had to be initiated. Article 10(5) of the Law on Public Procurement applicable until 1 July 2017 indeed stipulated that 'a procurement procedure in the manner specified in this paragraph may be commenced only upon receipt of the consent of the Viešųjų pirkimų tarnyba (Public Procurement Office)'. While it is for the referring court to interpret its national legislation, that court described the procedure to obtain the consent of the Public Procurement Office as an 'administrative filter'. Accordingly, it does not appear that even the consent of the Public Procurement Office of 20 April 2016 compelled the contracting authority to enter into the disputed contract.

33. This view is corroborated by the Lithuanian Government in its observations.[8] The assessment that the Public Procurement Office's decision of 20 April 2016 was not decisive is further supported by a statement made by the Public Procurement Office in that assessment. The Public Procurement Office prompted the contracting authority to evaluate whether it was possible to procure the services in accordance with the Law on Public Procurement prior to concluding the disputed contract. It further clarified that, in any event, the decision of the contracting authority would have to comply with Article 4(2) of the Law on Competition. Such guidance presupposes that (i) the decision on the procedure was still open at that point in time, (ii) the contracting authority could refrain from concluding the disputed contract and (iii) according to the Public Procurement Office, if the conditions set out in Article 4(2) of the Law on Competition were not fulfilled, the contracting authority was obliged to refrain from doing so, despite consent from the Public Procurement Office having been granted.

34. As the Public Procurement Office reached its decision on 20 April 2016, a date after Directive 2004/18 was repealed, it follows that the applicable directive must be Directive 2014/24.

### *C. Whether the criteria for an 'in-house transaction' under EU law are exhaustive*

35. As Directive 2014/24 is applicable, I propose to answer only Question 3.

36. Further, I propose to deal with Question 3(a) together with the first part of Question 3(b). The Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) wishes to know whether Member States can limit the possibility for public authorities to enter into 'in-house transactions' by stipulating further criteria, such as the criterion in the present case, which provides that 'in-house transactions' can be concluded only, inter alia, if 'public procurement contracts cannot ensure the quality, availability and continuity of the services to be provided'. This calls for an assessment whether the criteria for an 'in-house transaction' under EU law are exhaustive or whether Member States can supplement these criteria.

37. First, it is appropriate to define 'in-house transactions' and recall why they are treated differently from other contracts in the area of public procurement.

8 Paragraph 27 of the observations of the Lithuanian Government.

*1. Meaning of the term 'in-house transaction'*

38. Directive 2014/24 does not use the term 'in-house transaction' or 'in-house award', although, as will be seen later, Article 12(1) does, in fact, deal with those types of contracts. The terms 'in-house transaction', 'in-house contract', 'in-house operation',[9] 'in-house service'[10] and 'in-house award'[11] have, however, gradually come into use.[12] While, in some cases, the terms were used more loosely,[13] they are now generally used to describe contracts between a contracting authority and another public body (or a separate entity that is in some way linked to that contracting authority) that fulfil certain criteria. These criteria were initially established by the case-law of the Court and have meanwhile been enshrined in Article 12(1) of Directive 2014/24.[14]

39. First of all, when we are talking about 'in-house transactions', as the term is generally used, we are not dealing with cases in which a public authority simply carries out a task by using its own resources. While the activity is obviously carried out 'in-house' in those cases, there is no award, transaction or contract. These cases are generally outside the scope of public procurement law as they do not in fact constitute procurement at all.[15] Rather, for the concept of procurement to be relevant, the relationship between the contracting parties must be a contractual one.

40. For a transaction to be considered to be 'in-house', it must also fulfil certain criteria. Since the Court's landmark decision in *Teckal*, the basic criteria have been that (i) the contracting authority exercises over a separate legal person with which it enters into a contract a control which is similar to that which it exercises over its own departments and, at the same time, (ii) that separate legal person carries out the essential part of its activities with the controlling public authority or authorities which control it.[16] Contracts between entities that fulfil these criteria are generally referred to as 'in-house transactions'.

41. As mentioned above, the requirements for transactions to be considered in-house transactions and, thus, to be exempt from the public procurement regime are now set out in Article 12(1) of Directive 2014/24. Those requirements are that (i) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments, (ii) the controlled legal person exercises more than 80% of its activities in the performance of tasks for the controlling entity, and (iii) there is no direct private capital participation in the controlled entity (subject to some exceptions for certain private capital participations that do not give control). The first two requirements are derived from the case-law of the Court since the judgment in *Teckal*.[17] Only the exact figure of 80% was added. The third criterion has been applied since the judgment in *Stadt Halle and RPL Lochau*.[18]

9 Judgment of 19 June 2014, *Centro Hospitalar de Setúbal and SUCH* (C-574/12, EU:C:2014:2004, paragraph 32)

10 See Opinion of Advocate General Alber in *RI.SAN.* (C-108/98, EU:C:1999:161, paragraphs 21, 49 and 52).

11 Throughout I will be using the term 'in-house transaction' as used in the questions of the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania); however, all of the above terms were used in the context described.

12 Advocate General Stix-Hackl spoke about 'quasi-in-house procurement' as opposed to 'in-house procurement (self-supply)' in her opinion in *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2004:553, paragraph 49).

13 See for example judgment of 8 May 2014, *Datenlotsen Informationssysteme* (C-15/13, EU:C:2014:303, paragraph 8), where the Court uses the heading 'Award of a public contract without applying the procedures laid down by Directive 2004/18 — In-house award' or judgment of 8 December 2016, *Undis Servizi* (C-553/15, EU:C:2016:935, paragraph 5), where the Court speaks quite broadly about a 'possibility of a direct award of a public contract without the initiation of a tendering procedure'.

14 See for example judgments of 19 June 2014, *Centro Hospitalar de Setúbal and SUCH* (C-574/12, EU:C:2014:2004, paragraph 32), and of 8 December 2016, *Undis Servizi* (C-553/15, EU:C:2016:935, paragraph 24).

15 See also Article 1(2) of Directive 2014/24.

16 Judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562, paragraph 50).

17 Judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562, paragraph 50).

18 Judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraphs 49 to 52).

*2. Reason for the exemption of in-house transactions from the public procurement regime*

42. In-house transactions as described above are outside the scope of public procurement law because, as Advocate General Sánchez-Bordona stated: 'Under the in-house system, the contracting authority does not, from a functional point of view, contract with a separate body but, in effect, contracts with itself, given the nature of its connection with the formally separate body. Strictly speaking, there is no award of a contract, but simply an order or task, which the other "party" cannot refuse to undertake, whatever the name given to it. … Procurement procedures make sense only between two separate and autonomous bodies, since what those procedures seek to do is precisely to create between them the kind of bilateral legal relationship that is essential for concluding a contract for consideration on equal terms rather than those of dependence or subordination in a hierarchy. The term "in-house transaction" thus describes a contract that, due to its own particularities, is assimilated to a case in which a contracting authority uses its own resources, i.e., "in-house resources".'[19]

*3. Degree of harmonisation*

43. Whether the provisions of Article 12 of Directive 2014/24 are exhaustive depends on the degree of harmonisation of the area that the provision deals with. In the case of full harmonisation, it is not permissible for a Member State to introduce further measures in that area as this would amount, in essence, to undermining the harmonisation effected by the directive with regard to the issues that have been harmonised.[20] The question is whether Article 12(1) constitutes a complete harmonisation of the area of in-house transactions.

44. First, according to recital 4 of Directive 2014/24, it is not the directive's aim to harmonise the entire area of the disbursements of public funds, but only of those aimed at the acquisition of works, supplies or service for consideration by means of a public contract. While the disputed contract is a public contract, the situation of an in-house transaction is, according to the case-law, assimilated to cases in which the public authority acts using its own resources.[21] Thus, recital 4 cannot be considered as conclusive regarding the question whether the area of in-house transactions was meant to be fully harmonised.

45. While it is clear, given the purpose of the rules on public procurement in Directive 2014/24 and the inclusion of Article 12 in Section 3 thereof, headed 'Exclusions', that the exceptions contained in that directive may not be expanded,[22] so that Member States cannot apply them selectively or less strictly,[23] the purpose of that directive is not compromised if Member States are allowed to apply more stringent rules that further limit the right to enter into in-house transactions. These considerations, together with the fact that that directive does not contain a clear statement that full harmonisation is intended, constitute weighty arguments in favour of the right of Member States to provide for additional criteria for in-house transactions.

19 Opinion of Advocate General Campos Sánchez-Bordona in *LitSpecMet* (C-567/15, EU:C:2017:319, points 70 and 71).

20 Judgment of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325, paragraph 71).

21 According to recital 31 of Directive 2014/24, while the directive intends to provide clarification in respect of the cases in which contracts concluded within the public sector are not subject to the application of public procurement rules, such clarification should be guided by the principles set out in the relevant case-law of the Court. From this it can be inferred that the Union legislature simply sought to re-state — albeit with clarifications — the principles governing the identification of 'in-house transactions' to which the rules on public procurement do not apply. See also, in a similar vein, opinion of Advocate General Campos Sánchez-Bordona in Joined Cases *Rhein-Sieg-Kreis and Rhenus Veniro* (C-266/17 and C-267/17, EU:C:2018:723, point 28).

22 See, by analogy, judgments of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562, paragraph 59), and of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31, paragraph 59).

23 Judgments of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 46); of 8 May 2014, *Datenlotsen Informationssysteme* (C-15/13, EU:C:2014:303, paragraphs 22 and 23); and of 8 December 2016, *Undis Servizi* (C-553/15, EU:C:2016:935, paragraph 29).

46. If Article 12(1) constituted full harmonisation, this would in fact mean that a contracting authority *must* enter into an in-house transaction (or carry out the service at issue by its own means) in cases in which the requirements of Article 12(1) can be fulfilled. In my opinion, this is not the case. I reach this conclusion for the following further reasons.

47. First, the wording of Article 12 of Directive 2014/24 does not seem to support this supposition. The wording of Article 12 is clear in that it states that a public contract that fulfils certain criteria is to fall outside of the scope of that directive. Accordingly, the application of that provision presupposes the existence of a contract. It does not purport to deal in general with situations in which an in-house transaction is possible. Thus, if a Member State decides, for whatever reason, not to allow public contracts in the form of an in-house transaction, that situation is not dealt with at all in the specific exception contained in Article 12(1).

48. Furthermore, Article 1(4) of Directive 2014/24 refers to the freedom of Member States to define, in conformity with EU law, not only what they consider to be services of general economic interest, but also how those services should be organised.[24] It also states that that directive does not affect the decision of public authorities whether, how and *to what extent* they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.[25] The word 'freedom' makes it clear that Member States are also free to provide for the application of public procurement procedures in cases in which EU law does not prohibit the use by a public authority of its own resources or indeed the conclusion of an in-house transaction. This is in line with the case-law of the Court.

49. It should also be observed that, as the Commission points out in its observations, the fact that a Member State decides to limit the possibilities for entering into in-house transactions and, thus, extends the area of application of the rules on public procurement is in line with the objectives of the public procurement directives.[26] The principle that public procurement is a means of ensuring the most efficient use of public funds, as stated in recital 2 of Directive 2014/24, also seems to have been at the centre of the Lithuanian legislative decision. The Lithuanian Government claims in its written observations that a market study of the Lietuvos Respublikos konkurencijos taryba (Competition Council of the Republic of Lithuania) in the area of public waste management came to the conclusion that the prices were highest in communities where services were carried out by companies controlled by those communities and that this had encouraged the Republic of Lithuania to give precedence to public procurement transactions over in-house transactions.[27] This is a policy decision by the Republic of Lithuania which it is, naturally, free to take.

50. Thus, in the current state of harmonisation provided for by Directive 2014/24, a Member State is not prevented from stipulating additional requirements limiting the opportunities for public authorities to enter into in-house transactions, despite the entry into that transaction being permissible under EU law.

24 See also recital 5 of Directive 2014/24 as well as the judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 49), where the Court states: 'In accordance with the Court's case-law, it is not excluded that there may be other circumstances in which a call for tenders is *not mandatory*. …' (emphasis added).

25 Emphasis added.

26 Paragraph 47 of the observations of the Commission; see also recital 2 of Directive 2014/24.

27 Paragraphs 61 and 62 of the observations of the Lithuanian Government.

51. It should be pointed out, however, that a Member State's freedom when implementing such additional requirements is naturally not unlimited. The settled case-law clearly provides that the fundamental rules of the TFEU generally apply to the economic activities of public bodies, even in cases which are outside the ambit of the directives on public procurement [28] provided that those public bodies do not carry them out themselves, including by means of in-house transactions. [29]

52. This principle is also contained in recital 1 of Directive 2014/24, which states as a general consideration that the award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the TFEU, and, in particular, the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. These rules are, of course, applicable to all transactions, regardless of their specific value. It is only once transactions surpass a certain value that the specific procurement procedures set out in Directive 2014/24 must be followed.

53. This means that the fundamental rules of the TFEU also apply to an exercise of a Member State's legislative power in the area of public bodies' economic activities in the context of public procurement.

54. The additional requirements stipulated by Lithuanian law to allow for in-house transactions — namely, that public procurement contracts cannot ensure the quality, availability and continuity of the services to be provided — do not give rise to any doubt that they might be contrary to any of the aforementioned principles.

### *D. Whether such additional requirements must be enshrined in positive law*

55. Beyond the question whether such additional requirements can be stipulated as such, in the second part of Question 3(b) the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) specifically wishes to know whether these requirements can only be implemented by means of specific and clear positive provisions of the law on public procurement, rather than by case-law on the basis of provisions of competition law. The specific question posed by the referring court is whether the manner in which a Member State introduced such rules might amount in itself to an infringement of EU law.

56. As I have already observed, it is, generally, up to the Member States to determine whether they wish to provide for additional criteria limiting public authorities' choice as to whether they can enter into in-house transactions. If it is up to a Member State whether to provide for such additional criteria, which are not a requirement of EU law, it is generally also within their discretion how they are to be provided for. However, as set out above, the fundamental rules of the TFEU also apply if a Member State is acting outside its obligations under a directive.

28 See judgments of 18 November 2010, *Commission* v *Ireland* (C-226/09, EU:C:2010:697, paragraph 29), of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817, paragraph 23), and of 10 October 2013, *Manova* (C-336/12, EU:C:2013:647, paragraph 26), with regard to contracts relating to services falling within the ambit of Annex II B of Directive 2004/18; judgment of 25 October 2018, *Anodiki Services EPE* (C-260/17, EU:C:2018:864, paragraph 36), with regard to employment contracts; and judgments of 13 October 2005, *Parking Brixen* (C-458/03, EU:C:2005:605, paragraph 46), and of 6 April 2006, *ANAV* (C-410/04, EU:C:2006:237, paragraph 17), with regard to public service concessions.

29 Judgment of 13 October 2005, *Parking Brixen* (C-458/03, EU:C:2005:605, paragraph 62); judgment of 6 April 2006, *ANAV* (C-410/04, EU:C:2006:237, paragraph 24) and judgment of 25 October 2018, *Anodiki Services EPE* (C-260/17, EU:C:2018:864, paragraph 36).

57. In cases dealing with the implementation of Member States' obligations under EU law or the transposition of directives, the Court has consistently held that legislative action is not necessarily required.[30] It should be kept in mind that those decisions were taken in application of the EU law principle of legal certainty, as they must give to the persons concerned by such measures certainty as regards the extent of their rights in areas governed by EU law. Given that the present case deals with the implementation of national measures that are not required by EU law, the requirements cannot be more stringent.

58. It follows therefrom that there is no requirement under EU law obliging Member States that are establishing limitations or additional conditions for the conclusion of in-house transactions to do so only by means of specific and clear positive legal provisions governing public procurement.

## VI. Conclusion

59. Accordingly, I propose that the Court answer Questions 1 and 3 referred by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) as follows:

(1) As a rule, the directive applicable to an in-house transaction is the one in force when the contracting authority chooses the type of procedure to be followed and definitively decides against a prior call for competition to be issued for the award of a public contract. It is for the referring court to assess when this decision was finally taken by the contracting authority.

(3) (a) The provisions of Articles 1(4) and 12 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 must be understood and interpreted as listing the minimum requirements for an in-house transaction to be admissible under EU law. This does not, however, prevent a Member State from stipulating additional conditions limiting the possibility of public authorities to enter into in-house transactions as long as these additional conditions are not contrary to EU law, such as, for example, the condition that public procurement contracts cannot ensure the quality, availability and continuity of the services to be provided.

(b) There is no requirement under EU law that obliges Member States establishing limitations or additional conditions for the conclusion of in-house transactions to do so only by means of specific and clear positive legal provisions governing public procurement.

30 See judgment of 20 June 2002, *Mulligan and Others* (C-313/99, EU:C:2002:386, paragraph 50), with respect to a legislative instrument delegating power to adopt measures under an EU regulation to a minister and the publication of such measures in a national newspaper, and judgments of 15 March 1990, *Commission* v *Netherlands* (C-339/87, EU:C:1990:119, paragraph 6), and of 30 May 1991, *Commission* v *Germany* (C-361/88, EU:C:1991:224, paragraph 15), as well as Opinion of Advocate General Trstenjak in *Mediaprint Zeitungs- und Zeitschriftenverlag* (C-540/08, EU:C:2010:161, point 80), with respect to the importance of taking into account not only the wording of a provision, but also how it is interpreted by the national courts.