Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 13 September 2018 [1]

Joined Cases C-266/17 and C-267/17

Rhein-Sieg-Kreis
v
Verkehrsbetrieb Hüttebräucker GmbH,
BVR Busverkehr Rheinland GmbH (C-266/17),
intervener:
Regionalverkehr Köln GmbH
and
Rhenus Veniro GmbH & Co. KG
v
Kreis Heinsberg (C-267/17),
intervener:
WestVerkehr GmbH

(Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany))

(Reference for a preliminary ruling — Transport — Public passenger transport services by road — Direct award of public service contracts: internal operator — Conditions for the application of Regulation (EC) No 1370/2007 — Similar control — Further direct award by the internal operator — Point at which the conditions for direct award must be assessed)

1. At the root of these two references for a preliminary ruling are two contracts for public passenger transport services by bus which were directly awarded (or are in the course of being directly awarded) by German local authorities to their respective 'internal operators'. The referring court emphasises that neither of those contracts takes the legal form of a transport services concession.

2. The proliferation of the aforementioned direct award mechanism, which dispenses with free competition and favours municipal transport undertakings, is a cause for concern to the other, privately-owned, undertakings in the sector concerned, whose market share is being eroded while that of publicly-capitalised undertakings is stable or growing.

3. The referring court wishes to ascertain, first and foremost, whether the direct award of those contracts to internal operators is governed by the *lex specialis*, which, in this case, would be Article 5 of Regulation No 1370/2007, [2] by the general public procurement directives or by the rules of the FEU Treaty. In addition to that principal point of uncertainty, it also raises questions concerning other aspects of the relationship between local authorities and their internal operators.

1 Original language: Spanish.

2 Regulation (EC) of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and road and repealing Council Regulations (EEC) No 1191/69 and 1107/70 (OJ 2007 L 315, p. 1) ('the Regulation').

I. EU legal framework. Regulation No 1370/2007

4. Article 2 reads:

'For the purposes of this Regulation:

…

(b) "competent authority" means any public authority or group of public authorities of a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or anybody vested with such authority;

(c) "competent local authority" means any competent authority whose geographical area of competence is not national;

…

(h) "direct award" means the award of a public service contract to a given public service operator without any prior competitive tendering procedure;

(i) "public service contract" means one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations; …

(j) "internal operator" means a legally distinct entity over which a competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments;

…'.

5. Pursuant to Article 4:

'…

7. ... If subcontracting takes place, the operator entrusted with the administration and performance of public passenger transport services in accordance with this Regulation shall be required to perform a major part of the public passenger transport services itself. ...'

6. Article 5 states:

'1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC [of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)] or 2004/18/EC [of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) ('together the procurement directives')] for public passenger transport services by bus or tram shall be awarded in accordance with the procedure provided for under those directives where such contracts do not take the form of service concessions contracts as defined in those directives. Where contracts are to be awarded in accordance with Directives [2004/17] or [2004/18], the provisions of paragraphs 2 to 6 of this Article shall not apply.

2. Unless prohibited by national law, any competent local authority, whether or not it is an individual authority or a group of authorities providing integrated public passenger transport services, may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments. Where a competent local authority takes such a decision, the following shall apply:

(a) for the purposes of determining whether the competent local authority exercises control, factors such as the degree of representation on administrative, management or supervisory bodies, specifications relating thereto in the articles of association, ownership, effective influence and control over strategic decisions and individual management decisions shall be taken into consideration. In accordance with Community law, 100% ownership by the competent public authority, in particular in the case of public-private partnerships, is not a mandatory requirement for establishing control within the meaning of this paragraph, provided that there is a dominant public influence and that control can be established on the basis of other criteria;

(b) the condition for applying this paragraph is that the internal operator and any entity over which this operator exerts even a minimal influence perform their public passenger transport activity within the territory of the competent local authority, notwithstanding any outgoing lines or other ancillary elements of that activity which enter the territory of neighbouring competent local authorities, and do not take part in competitive tenders concerning the provision of public passenger transport services organised outside the territory of the competent local authority;

(c) notwithstanding point (b), an internal operator may participate in fair competitive tenders as from two years before the end of its directly awarded public service contract under the condition that a final decision has been taken to submit the public passenger transport services covered by the internal operator contract to fair competitive tender and that the internal operator has not concluded any other directly awarded public service contract;

…

(e) if subcontracting under Article 4(7) is being considered, the internal operator shall be required to perform the major part of the public passenger transport service itself.

3. Any competent authority which has recourse to a third party other than an internal operator shall award public service contracts on the basis of a competitive tendering procedure, except in the cases specified in paragraphs 4, 5 and 6. The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination. Following the submission of tenders and any preselection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements.

…’

7. Article 7 provides:

‘…

2. Each competent authority shall take the necessary measures to ensure that, at least one year before the launch of the invitation to tender procedure or one year before the direct award, the following information at least is published in the *Official Journal of the European Union*:

(a) the name and address of the competent authority;

(b) the type of award envisaged;

(c) the services and areas potentially covered by the award.

…'

8. Article 8 stipulates:

'…

2. Without prejudice to paragraph 3, the award of public service contracts by rail and by road shall comply with Article 5 as from 3 December 2019. During this transitional period Member States shall take measures to gradually comply with Article 5 in order to avoid serious structural problems in particular relating to transport capacity.

Within six months after the first half of the transitional period, Member States shall provide the Commission with a progress report, highlighting the implementation of any gradual award of public service contracts in line with Article 5. On the basis of the Member States' progress reports, the Commission may propose appropriate measures addressed to Member States.

3. In the application of paragraph 2, no account shall be taken of public service contracts awarded in accordance with Community and national law:

(a) before 26 July 2000 on the basis of a fair and competitive tendering procedure;

(b) before 26 July 2000 on the basis of a procedure other than a fair competitive tendering procedure;

(c) as from 26 July 2000 and before 3 December 2009 on the basis of a fair competitive tendering procedure;

(d) as from 26 July 2000 and before 3 December 2009 on the basis of a procedure other than a fair competitive tendering procedure.

The contracts referred to in (a) may continue until they expire. The contracts referred to in (b) and (c) may continue until they expire, but for no longer than 30 years. The contracts referred to in (d) may continue until they expire, provided they are of limited duration comparable to the durations specified in Article 4.

Public service contracts may continue until they expire where their termination would entail undue legal or economic consequences and provided that the Commission has given its approval.

…'

II. Facts of the dispute and questions referred for a preliminary ruling

A. Case C-266/17

9. Rhein-Sieg-Kreis (District of Rhein-Sieg) is a local authority in the *Land* of North Rhine-Westphalia which, under national law, has the status of a competent authority within its geographical area for the purposes of the Regulation.

10. Rhein-Sieg-Kreis has an internal operator (Regionalverkehr Köln GmbH, 'RV Köln') with its own legal personality. [3] According to the order for reference, Rhein-Sieg-Kreis exerts over RV Köln a control 'similar to that which it exercises over its own departments, in the form of shared control with the other shareholders'. [4]

11. In addition, Rhein-Sieg-Kreis, together with a number of other local authorities, established a management consortium (Verkehrsverbund Rhein-Sieg) which is responsible in particular for setting tariffs but does not engage in any transport activities.

12. Rhein-Sieg-Kreis announced that, [5] acting in accordance with Article 5(2) of the Regulation, it was going to make a direct award of the contract for providing public passenger transport services 'within its geographical area, including on routes running into neighbouring geographical areas'. [6]

13. RV Köln holds the contract for providing public passenger transport services in the territory of Rhein-Sieg-Kreis, as well as on outgoing lines and in connection with other ancillary elements of that activity which enter the territory of neighbouring local authorities. [7]

14. The announcement of that award was challenged by Verkehrsbetrieb Hüttebräucker GmbH and BVR Busverkehr Rheinland GmbH before the Vergabekammer Rheinland (Public Procurement Chamber for the Rhineland, Germany), which prohibited that contract from being directly awarded to the internal operator because the conditions for the application of Article 5(2) of the Regulation were not satisfied: the local authority did not exercise control over the operator and the public passenger transport services were provided in territories other than that administered by the contracting authority.

15. The decision of the Vergabekammer Rheinland was appealed to the referring court. That court highlights the fact that there are differences of opinion among the German courts as regards contracts for passenger transport by road that do not take the form of service concessions:

– For some courts, a concession alone justifies the application of the Regulation. In the absence of a concession, the general regime laid down in the procurement directives applies.

– For others, Article 5(2) of the Regulation establishes a special regime that takes precedence over the general rules. The reference in Article 5(1) to the procurement directives is devoid of purpose in cases such as this, since internal awards are not subject to those directives.

16. It was in those circumstances that the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 5(2) of Regulation (EC) No 1370/2007 apply to contracts which are not contracts which, within the meaning of the first sentence of Article 5(1) of Regulation (EC) No 1370/2007, take the form of service concession contracts as defined in Directives 2004/17/EC or 2004/18/EC?

3 RV Köln is a limited liability company whose shares are held by a number of public entities including Rhein-Sieg-Kreis (which has an indirect shareholding via a wholly-owned subsidiary).

4 Paragraph 20 of the order for reference.

5 Communication published in the Supplement to the *Official Journal of the European Union* of 30 September 2015.

6 Paragraph 10 of the order for reference.

7 *Ibidem*, paragraph 22.

If Question 1 is answered in the affirmative:

(2) Where an individual competent authority awards a public service contract directly to an internal operator in accordance with Article 5(2) of Regulation (EC) No 1370/2007, is the joint exercise of control by that authority together with the other shareholders of the internal operator precluded if the power to intervene in public passenger transport in a given geographical area (Article 2(b) and (c) of Regulation (EC) No 1370/2007) is divided between the individual competent authority and a group of authorities which provides integrated public passenger transport services, for example where the power to award public service contracts to an internal operator remains with the individual competent authority but the responsibility for tariffs is transferred to a special purpose transport association to which, in addition to the individual authority, further authorities competent in their geographical areas belong?

(3) Where an individual competent authority awards a public service contract directly to an internal operator in accordance with Article 5(2) of Regulation (EC) No 1370/2007, is the joint exercise of control by that authority together with the other shareholders of the internal operator precluded if, according to that operator's articles of association, in the case of resolutions concerning the conclusion, amendment or termination of a public service contract referred to in Article 5(2) of Regulation (EC) No 1370/2007, the only shareholder entitled to vote is the one which itself or whose indirect or direct owner awards a public service contract to the internal operator in accordance with Article 5(2) of Regulation (EC) No 1370/2007?

(4) Does point (b) of the second sentence of Article 5(2) of Regulation (EC) No 1370/2007 permit the internal operator also to perform public passenger transport services for other competent local authorities within their territory (including outgoing lines and ancillary elements of that activity which enter the territory of neighbouring competent local authorities) if these are not awarded through organised competitive tender procedures?

(5) Does point (b) of the second sentence of Article 5(2) of Regulation (EC) No 1370/2007 permit the internal operator also to perform public passenger transport activity outside the territory of the commissioning authority for other authorities on the basis of public service contracts covered by the transitional provisions of Article 8(3) of Regulation (EC) No 1370/2007?

(6) On which date must the requirements of Article 5(2) of Regulation (EC) No 1370/2007 be satisfied?'

B. Case C-267/17

17. Kreis Heinsberg (District of Heinsberg) is a local authority in the *Land* of North Rhine-Westphalia. Together with the city of Aachen, the metropolitan area of Aachen and the Kreis Düren (District of Düren), it is a member of the Aachener Verkehrsverbund, a consortium of municipal authorities governed by public law, which was formed to promote and support local public passenger transport services for its members. [8]

8 Paragraph 10 of the consortium's articles of association, entitled 'Formation of a group of authorities', provides that 'the consortium members shall form a group of authorities within the meaning of the first sentence of Article 5(2) of [the Regulation]. Its members shall be entitled to make direct awards of public service contracts to internal operators. Internal operators may perform public passenger transport services in the territories of all the consortium members, including on outgoing lines. To that end, it shall be necessary in each individual case to obtain the consent of a consortium member not participating in the internal operator to provide the public passenger transport services by road envisaged for its territory. For the purposes of these articles of association, direct awards shall be considered to have been made by all consortium members'. It goes on to say that 'conduct of the procurement procedures as a contracting authority under Article 5(2) of [the Regulation] shall fall in principle to the member exercising control over the internal operator for the purposes of that provision'.

18. On 15 March 2016, Kreis Heinsberg announced [9] that it would be making a direct award, without call for competition, of the contract for public passenger transport services by bus and other vehicles under Article 5(2) of the Regulation.

19. The internal operator [10] to which Kreis Heinsberg intended to award the contract for those services, with effect from 1 January 2018 for a period of 120 months, was WestVerkehr GmbH, a company which had pursued its activities principally through its wholly-owned subsidiary, Kreisverkehrsgesellschaft Heinsberg mbH, and intended to carry on doing so after the direct award.

20. Rhenus Veniro GmbH challenged that award before the Vergabekammer Rheinland (Public Procurement Chamber for the Rhineland), which dismissed its application on 11 November 2016, whereupon that company brought an action before the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), claiming (a) that Article 5(2) of the Regulation is not applicable and (b) in the alternative, that Kreis Heinsberg, as a member of the Aachener Verkehrsverbund, is not competent to make a direct award of the contract in question, since competence to do so lies with an individual authority or a group of authorities, but not with an authority in its capacity as a member of the group.

21. It was in those circumstances that the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 5(2) of Regulation (EC) No 1370/2007 applicable to directly awarded public service contracts within the meaning of Article 2(i) of the regulation which do not, for the purposes of the second sentence of Article 5(1) of the regulation, take the form of service concessions contracts under Directives 2004/17/EC or 2004/18/EC?

(2) Do Article 2(b) and Article 5(2) of Regulation (EC) No 1370/2007 presume, as is conveyed by the word “or”, an exclusive competence either of an individual authority or of a group of authorities, or do those provisions also permit an individual authority to be a member of a group of authorities and to assign specific tasks to the group but at the same time to retain the power to intervene under Article 2(b) and to be the competent local authority within the meaning of Article 5(2) of the regulation?

(3) Does point (e) of the second sentence of Article 5(2) of Regulation (EC) No 1370/2007, which lays down the requirement to perform the major part of the public passenger transport service itself, prevent the internal operator from having the major part of the services performed by a wholly-owned subsidiary?

(4) At what point in time must the conditions governing direct awards laid down in Article 5(2) of Regulation (EC) No 1370/2007 be met: at the time of publication of an intended direct award pursuant to Article 7 of Regulation (EC) No 1370/2007 or not until the time of the direct award itself?’

III. Procedure before the Court of Justice

22. The orders for reference were received at the Registry of the Court of Justice on 17 May 2017, after which the decision was made to join the two cases.

9 Announcement published in the supplement to the *Official Journal of the European Union* of 15 March 2016.

10 At the hearing, one of the parties expressed reservations about whether the undertaking awarded the contract could be classified as an internal operator. In the opinion of the referring court, however, its status as such is not a matter for debate.

23. Written observations have been submitted by Verkehrsbetrieb Hüttebräucker GmbH, Rhenus Veniro GmbH, Rhein-Sieg-Kreis, Kreis Heisenberg, the Austrian Government and the European Commission.

24. Verkehrsbetrieb Hüttebräucker GmbH, Rhenus Veniro GmbH, BVR Busverkher Rhineland GmbH, Rhein-Sieg-Kreis, Kreis Heisenberg and the European Commission attended the hearing on 31 May 2018.

IV. Analysis

A. Application of the Regulation (first question in Cases C-266/17 and C-267/17)

25. The premiss from which we must start is that, in these two disputes, the legal relationship between the contracting authority and the operator entrusted with the provision of public passenger transport services by road is not, according to the referring court, a public service concession but a public service contract.

26. If that is the case, the applicable provision is Article 5(1) of the Regulation. This means that the public service contract in question should in principle be awarded in accordance with Directives 2004/17/EC and 2004/18/EC. [11]

27. The problem is that those two directives, unlike the later 2014 directives, [12] do not make any provision for the direct award of such contracts to internal operators (also known as in-house operators). In those circumstances, the dilemma faced is whether to:

– rely on the case-law which, [13] under the legislation prior to the 2014 procurement directives, set out a framework for direct selection in cases where the supplier was simply an agency internal to the contracting authority department that exercised control over it. The *Teckal* case-law, which was specifically established as an exception to the application of Directives 2004/17 and 2004/18, provides a number of guidelines, derived from other case-law, whereby public authorities may entrust such tasks to their agencies; or

– apply the specific rules which the Regulation lays down with respect to awards made to internal operators in this way.

28. As is apparent from the difference of opinion among the German courts to which the orders for reference refer, there is no obvious solution to this problem and the disparity between legal regimes based on one or other of the aforementioned propositions is significant. It would be different if the 2014 Directives could be applied in the disputes giving rise to the present references for a preliminary ruling, inasmuch as those directives, barring a few minor exceptions, have, in essence, formally incorporated the *Teckal* case-law into their provisions. [14]

11 According to that provision, ‘service contracts or public service contracts as defined in Directives 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts *do not take the form of service concessions contracts* as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of this Article shall not apply’. Emphasis added.

12 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65) and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243) (‘the 2014 Directives’).

13 Judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562; ‘*Teckal* case-law’).

14 Thus, Article 12 of Directive 2014/24 regulates ‘public contracts between entities within the public sector’. Article 28 of Directive 2014/25 governs ‘contracts between contracting authorities’.

29. In that event, it could readily be accepted that the reference to the 2004 Directives in Article 5(1) of the Regulation should be understood as relating to the 2014 Directives once they are in force.[15] And since those directives already expressly lay down the rules governing the award of public contracts to in-house operators, it would fall to be determined whether those rules take precedence over the rules in Article 5(2) of the Regulation.[16] However, the application of the 2014 Directives is not feasible, *ratione temporis*, in this case.[17]

30. The Court of Justice has held that 'the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract (judgment [of 11 July 2013,] *Commission* v *Netherlands*, C-576/10, EU:C:2013:510, paragraph 52 and the case-law cited). Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (see, to that effect, the judgment [of 5 October 2000,] *Commission* v *France*, C-337/98, EU:C:2000:543, paragraphs 41 and 42)'.[18]

31. The two orders for reference show that the direct award announcements were made prior to the deadline for the transposition of the 2014 Directives.[19] There is, moreover, no objective evidence to support the inference that the option pursued by the contracting authority was any different from that which it had indicated in those announcements.

32. Consequently, we must turn our attention back to the dilemma I mentioned earlier without the option of using the rules laid down in the 2014 Directives on direct awards to internal operators.

33. The procedures provided for in Directives 2004/17/EC and 2004/18/EC are not applicable to this type of in-house award. As I have said in other Opinions, '[u]nder 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 the 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. [...] The absence of a real relationship between two distinct parties explains why a contracting authority is not required to comply with public procurement procedures where it is using its own resources to perform its tasks'.[20]

34. The award to internal operators will therefore have to be governed either by the *Teckal* case-law or by the special rules contained in Article 5(2) of the Regulation (for cases involving land transport services).

35. While I recognise the weight of the arguments to the contrary, I incline to the view that Article 5(2) of the Regulation should prevail. To my mind, there are various arguments to support that position.

15 The Communication from the Commission on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road (OJ 2014 C 92, p. 1) states that, 'since the directives referred to in Regulation (EC) No 1370/2007 (Directive 2004/17/EC and Directive 2004/18/EC) have been repealed and replaced by … [D]irectives [2014/24 and 2014/25], the references in Regulation (EC) No 1370/2007 should be understood as relating to the new directives' (paragraph 2.1.1).

16 At the hearing, it was debated whether one or other set of rules could be applied simultaneously or in parallel. To my mind, however, now is not the time to be having that debate, although the same will not be true of in-house awards made after 18 April 2016.

17 According to the Commission, Article 5(2) is not applicable in these circumstances, since it is confined to concessions. The Commission's position effectively brings forward the application of the in-house rules laid down in the 2014 Directives to facts subject to the 2004 Directives. Paradoxically, when the Commission analyses in detail the second and subsequent questions referred for a preliminary ruling in Case C-267/17, it relies on the content of Article 5(2) to support its arguments.

18 Judgment of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 31). See also the judgment of 27 October 2016, *Hörmann Reisen* (C-292/15, EU:C:2016:817, paragraph 32), which cites the judgment of 7 April 2016, *Partner Apelski Dariusz* (C-324/14, EU:C:2016:214, paragraph 83).

19 These were to be transposed by 18 April 2016 at the latest and the award announcements in the disputes in the main proceedings were made on 30 September 2015 and 16 March 2016.

20 Opinion in *LitSpecMet* (C-567/15, EU:C:2017:319, points 70 and 71).

36. The first is consistent with a literal interpretation of the third sentence of Article 5(1), read *a sensu contrario*. If paragraphs 2 to 5 of that article cede, exceptionally and to a limited extent,[21] only where service contracts 'are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC', they will become fully applicable again if those directives do not provide for direct awards to internal operators, as is the case here. I have already made the point that, for the Court of Justice, in-house commissions are excluded from those two directives.

37. That literal interpretation is corroborated by the wording of Article 5(1): public service contracts for passenger transport by bus 'shall be awarded in accordance with the procedures provided for under … Directives [2004/17/EC and 2004/18/EC]', where they do not take the form of service concessions contracts. If, as is the case, those directives do not provide for any *procedure* for awards to internal operators, which are more in the nature of mechanisms for self-provision by contracting authorities, the reference to such procedures is devoid of purpose and meaning.

38. The same would not be true of competitive awards (that is to say, awards not made to internal operators), in respect of which that reference is entirely valid. Where a public authority wishes to award to third parties a contract of this kind that does not take the form of a concession, it must do so by way of the competitive *procedures* for which Directives 2004/17/EC and 2004/18/EC do indeed provide.

39. The second argument is drawn from a systemic assessment of the applicable rules, combined with the rule of specialty. If in 2007 (that is to say, after the adoption of the 2004 Directives) the EU legislature sought to introduce a dedicated scheme for the in-house award of contracts for land transport services, it is my opinion that, in the event of doubt, that scheme, as set out in Article 5(2) of the Regulation, must be regarded as taking precedence over the (general) scheme arising from the *Teckal* case-law.

40. The third and final argument takes into account the purpose intended to be served by Article 5(2) of the Regulation. In the light of the particular features of passenger transport by road, the EU legislature sought to ensure that 'any local authority … [could] provide its own public passenger transport services in the area it administers or to entrust them to an internal operator without competitive tendering'. The conditions for using the latter mechanism are fairly precise and reflect the balance between that objective and the objective of 'ensur[ing] a level playing field'.[22]

41. It is more in keeping with that purpose to give priority to the dedicated rules contained in the Regulation, which are tailored to the features of passenger transport by bus, than to adhere to the principles laid down in the *Teckal* case-law, which apply to any other services sector. Prominent among those rules is that which allows (and, to some extent, encourages) local authorities to form groups for the purposes of awarding such contracts to an internal operator over which they exercise a control similar to that which they exercise over their own departments.

42. In short, a local authority planning to award directly to an internal operator a contract for public passenger transport services by bus must do so in accordance with the conditions laid down in Article 5(2) of the Regulation.

21 See the judgment of 27 October 2016, *Hörmann Reisen* (C-292/15, EU:C:2016:817, paragraph 39).

22 Recital 18 of the Regulation.

B. Intervention by the local authority in the award of the contract and in the control over the internal operator (second question in Cases C-266/17 and C-267/17 and third question in Case C-266/17)

43. The local authorities (Kreise (Districts)) which awarded (or intended to award) contracts to their internal operators in these two cases had joined together with other similar authorities to form management consortia (Verkehrsverbund) operating at a higher territorial level. The powers assigned to such consortia include setting common tariffs for passenger transport services in their respective territories. [23]

44. The referring court wishes to ascertain whether that fact precludes the two local authorities (Kreise (Districts)) comprising the consortia from awarding their respective contracts.

45. As I have already said, the first subparagraph of Article 5(2) of the Regulation allows local authorities, either independently or in conjunction with others, to award contracts directly to internal operators, provided that they 'exercise … control similar to that [exercised] over their own departments'.

46. In the abstract, I see no reason why giving the management consortium the power to adopt tariffs should undermine the 'similar control' exercised by the individual authorities over their own internal operators. I therefore concur with the opinion expressed by the referring court in that regard. The establishment of a common tariff decided upon by the consortium provides users with an integrated transport service by enabling them to buy a single ticket irrespective of the internal operator providing that service and irrespective of the local authority to which that internal operator is attached.

47. The material point here is whether or not the 'similar control' exercised by each local authority (or, as the case may be, the joint control exercised by the group) over the internal operator continues in being. Depending on how it is done, giving powers to the management consortium could reduce the local authority's powers to such an extent that the latter no longer exercises over the internal operator a control comparable with that which it exercises over its own departments.

48. If the question referred is confined to the transfer of tariff-setting powers to the consortium, I do not consider that this fact necessarily entails an abdication of control over the internal operator. Furthermore, the fact that each Kreis (District), as a local authority forming part of the management consortium, participates in the tariff-setting decisions adopted by the latter, shows that it retains — albeit on a shared basis — control even over that aspect of the services in question.

49. Of course, the ultimate assessment as to whether, in the specific circumstances of the two disputes, control over the internal operator continues to be exercised by the Kreise (Districts), whether individually or as part of a group, is a matter which falls to be determined by the national court, which alone has before it the evidence necessary to enable it to make that assessment. [24] The fact is that the orders for reference do not provide enough detail to be able to form a true and full picture of the relationships between the local authorities and the internal operator.

50. In that same context, the third question referred for a preliminary ruling in Case C-266/17 refers to an amendment to RV Köln's articles of association, adopted at the general shareholders' meeting on 21 August 2015, that would restrict the right to vote to shareholders that award a contract under Article 5(2) of the Regulation. The referring court wishes to ascertain whether that amendment to the articles of association might have an effect on the control exercised by the local contracting authority.

23 The orders for reference do not describe the scope of those powers in detail. The referring court refers only to the setting of tariffs.

24 The factors that must be taken into account 'for the purposes of determining whether [that] control [exists]' are spelled out in Article 5(2)(a) of the Regulation.

51. The wording of the order for reference makes for difficult reading in this regard. In any event, paragraph 21 thereof states that 'it is at present unclear whether the additional party's articles of association will continue in their existing version or whether the amended version of 21 August 2015 will take effect', the reason for this being, as explained previously (in paragraph 6 of the order), that the amendment decision of 21 August 2015 was challenged and 'suspended pursuant to a final judgment'.

52. That being the case,[25] this question might perhaps be said to be hypothetical, since it deals with an element of fact (the amendment to the articles of association) which the referring court itself does not consider relevant to the judgment it must give because that amendment is not in force.

53. In any event, the new wording of RV Köln's articles of association would, in this case, serve only to confirm that the Kreis (District), because it *was* the authority that awarded the contract to that operator, is entitled to vote at its general shareholders' meeting, which is to say that it is able to exercise the control vested in it over the operating company. As the referring court rightly points out, the amendment to the third sentence of Paragraph 17(1) of the articles of association 'strengthens the influence of the shareholder which awards the public service contract and on whose territory the passenger transport activities are intended to be performed'.

C. The territory in which the internal operator may provide transport services (fourth and fifth questions in Case C-266/17)

54. By its fourth question in Case C-266/17, the referring court seeks to ascertain whether an internal operator to which a contract has been directly awarded may provide passenger transport services by land not only in the territory of the local contracting authority but also in that of other local authorities within the group of which the contracting authority is a member.

55. Again, the order for reference is not very clear in this regard. Its wording might once again support the inference that this question is hypothetical, since:

– in the award announcement, the local authority stated that the service in question was going to be provided 'within its territory, including on routes running into neighbouring geographical areas' (paragraph 10 of the order); and

– the referring court itself confirms that information by stating that 'those services (apart from through routes or other part services which enter the territory of neighbouring competent local authorities) are provided within the territory of the contracting authority' (paragraph 22 of the order).

56. The fact remains, however, that the purpose of the question could be to determine — regardless of whether the award of the contract in question to RV Köln complied with that rule — whether that company is prevented from providing its services to other local authorities, that is to say from carrying out its activities in the territories of those authorities.

57. According to Article 5(2)(b) of the Regulation, the internal operator may pursue its public passenger transport services only within the territory of the competent local authority. That authority may, however, be both an individual local authority and a group of local authorities.[26] There is, therefore, nothing to stop one or more members of a group of local authorities from entrusting those

25 In its written observations, the Rhein-Sieg-Kreis states that, 'contrary to what the referring court states, the new version of the articles of association of 21 August 2015 … is intended to apply in full' (paragraph 29).

26 See expressly to this effect the first subparagraph of Article 5(2).

services to a single operator, common to all of them, over which they exercise a control similar to that which they exercise over their own departments. In that event, the internal operator may carry out its activities in each of the territories administered by the (group of) local authorities which have entrusted the aforementioned services to it.

58. What is more, that possibility is not a new development confined to the Regulation. In building on its *Teckal* case-law, the Court of Justice has allowed some public authorities to discharge their public service functions in collaboration with others by availing themselves of a common entity over which they exercise a control similar (but not identical) to that which they exercise over their own departments. [27]

59. In the judgment in *Coditel Brabant*, [28] the Court considered the case of a local authority which 'sought to join a grouping composed of other public authorities, such as an inter-municipal cooperative society', for the purposes of performing its tasks. The Court recognised the joint control exercised by those local authorities, and that such control did not have to be individual. [29]

60. In short, if the internal operator is an entity common to a number of local authorities, which exercise over it a (joint) control similar to that which they exercise over their own departments, the territory referred to in Article 5(2)(b) of the Regulation must be construed as being the territory administered by each of those authorities.

61. In the fifth question, the national court seems to be referring now not to the territory of the group of local authorities but to that of any other 'commissioning authorities' which might hypothetically have concluded with RV Köln transport services contracts which predate 3 December 2003, that is to say which are subject to transitional arrangements under Article 8 of the Regulation.

62. That article provided for a series of measures gradually introducing the contract award rules laid down in the Regulation itself. Since there is no need to examine that article in detail, it is sufficient to note that public service contracts awarded in accordance with Community or national law, on the basis of the procedures and in the periods specified in Article 8(3), could continue until they expired, subject to certain limits.

63. As the order for reference provides no further details, I am of the view that any contracts predating those referred to are in force, pursuant to the transitional rules laid down in Article 8 that are mentioned in the question. Consequently, since the Regulation makes explicit provision for the continued existence of those contracts, the territorial restriction imposed in Article 5(2)(b) of that regulation must be interpreted as not encompassing them.

27 Judgment of 19 April 2007, *Asemfo* (C-295/05, EU:C:2007:227, paragraph 62): 'it follows from the case-law that, where several authorities control an undertaking, that condition [that the essential part of the undertaking's activities must be carried out with the authority or authorities which own it] may be met if that undertaking carries out the essential part of its activities not necessarily with any one of those authorities but with all of those authorities together ([judgment of 11 May 2006,] *Carbotermo and Consorzio Alisei* [C-340/04, EU:C:2006:308], paragraph 70)'.

28 Judgment of 13 November 2008 (C-324/07, EU:C:2008:621).

29 *Ibidem*, paragraph 54 and the operative part of the judgment: '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'.

D. Point at which the conditions laid down in Article 5(2) of the Regulation must be fulfilled (sixth question in Case C-266/17 and fourth question in Case C-267/17)

64. The referring court is uncertain whether the conditions applicable under Article 5(2) of the Regulation must be fulfilled (a) at the time of the direct award or (b) at the time when it falls to the competent authority, in accordance with Article 7(2) of that regulation, to publish in the *Official Journal of the European Union* the information relating to the direct award which it is planning to make.

65. When setting out the information which the competent authority must include in its announcement (at least one year before the direct award), Article 7(2) of the Regulation does not require that authority to specify the identity of the future recipient of the award. There is nothing to stop the local authority, in the interval between the announcement and the award itself, from structuring its agencies one way or another: what matters is that the internal operator finally selected should satisfy the conditions laid down by law (in particular the condition that it must be under the control of the authority that entrusts the services to it).

66. In my estimation, on a combined reading of Article 5(2) and Article 7(2) of the Regulation, the point at which the conditions laid down in the first of those provisions must be fulfilled is indeed the point at which the direct award is made. Only then will the identity of the operator selected be known, and it is this piece of information which is crucial to determining whether, in the circumstances, the competent authority exercises over that operator a control similar to that which it exercises over its own departments, and whether or not that operator is in one of the situations referred to in Article 5(2)(b) and (c) of the Regulation.

E. Provision of the service by the internal operator via a subsidiary (third question in Case C-267/17)

67. In practice, the internal operator WestVerkehr GmbH provides the public transport services entrusted to it via a wholly-owned subsidiary. In the light of that fact, and the wording of Article 5(2)(e) of the Regulation ('if subcontracting … is being considered, the internal operator shall be required to perform the major part of the public passenger transport itself'), the referring court asks whether that provision allows the services to be entrusted to the subsidiary.

68. The Regulation provides for subcontracting as a means to open up the provision of services to undertakings other than the recipient of the award which are linked to that recipient by contract. Subcontractors may not, however, carry out more than a limited percentage of the service in question, thus:

– if the supplier awarded the contract is an autonomous undertaking, that is to say not an internal operator, it 'shall be required to perform *a major part* of the public passenger transport services itself' (Article 4(7));[30]

– if, on the other hand, the supplier awarded the contract is an internal operator, 'it shall be required to perform *the major part* of the service itself' (Article 5(2)(e)).

30 In the judgment of 27 October 2016, *Hörmann Reisen* (C-292/15, EU:C:2016:817), the Court considered the application of that article to a tendering procedure subject to Directive 2004/18 and held that the setting of 70% as the proportion of the service that must be provided by the operator was not at odds with Article 7(4) of the Regulation.

69. To my mind, however, a situation such as that here cannot properly be described as subcontracting. I concur with the proposition put forward by Kreis Heinsberg in its written observations to the effect that the relationship between a subsidiary which is wholly owned by the internal operator that controls it and that internal operator is not one established by a subcontract. Subcontracting requires two autonomous undertakings [31] which, 'from a position of equality rather than dependence or hierarchical subordination', [32] agree between them the conditions that will govern their contractual relationship.

70. The subcontracting provided for by the aforementioned articles of the Regulation will take place in circumstances where the internal operator decides to use a third party external to its corporate structure to provide the services in question. [33] If, however, the entity which the internal operator uses to that end is a wholly-owned subsidiary company over which it exercises full control, to the extent of dictating its business decisions, then, from a functional point of view, those services are effectively being provided by the same economic and operational unit. There is, therefore, no real *third party* with which to subcontract.

71. In those circumstances, the in-house link between Kreis Heinsberg and its internal operator (WestVerkehr GmbH) extends to the latter's wholly-owned subsidiary, over which the local authority also exercises a (secondary) control equivalent to that which it exercises over its (other) departments.

72. Consequently, point (e) of the second sentence of Article 5(2) of the Regulation does not preclude an internal operator from entrusting to a subsidiary in which it has a 100% shareholding and over which it exercises full control the provision of the major part of the services awarded to it.

V. Conclusion

73. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) as follows:

(1) Article 5(2) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and 1107/70:

– is applicable to a direct award made by the competent local authorities to an internal operator over which they exercise a control similar to that which they exercise over their own departments, where that award relates to contracts for public passenger transport services which do not take the form of service concessions contracts within the meaning of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, or 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;

31 When referring to subcontracting, recital 19 of the Regulation has in mind the participation of undertakings '*other than* the public service operator'. Emphasis added.

32 I refer to my Opinion in *LitSpecMet* (C-567/15, EU:C:2017:319, point 71 et seq.).

33 I put forward the same argument in my Opinion in *LitSpec Met* (C-567/15, EU:C:2017:319, point 79): 'the contracting authority can make use of proxy entities, within the limits already mentioned, by entrusting them with particular tasks which should, in principle, be the subject of public procurement procedures but which are exempted. … However, where such proxy entities do not have the resources needed to carry out themselves the tasks assigned by the contracting authority and are obliged to have recourse to *third parties* in order to do so, the reasons for relying on the *in-house* exemption disappear and what emerges is actually a hidden public (sub-) procurement where the contracting authority, through an intermediary (the proxy entity) obtains goods and services from third parties without being subject to the directives which should govern the award'.

– does not preclude local authorities from conferring on a consortium of local authorities of which they form part the power to set common tariffs for the services in question, provided that such empowerment does not prevent those authorities from exercising over the internal operator a control similar to that which they exercise over their own departments, which it is for the referring court to determine;

– does not preclude the internal operator to which a competent local authority has awarded the contract for providing the services in question from providing those services via a subsidiary over which the internal operator exercises full control, on which it can impose its decisions and in which it has a 100% shareholding;

– allows the internal operator, in its capacity as an entity acting on behalf of all members of the group of local authorities, to provide public passenger transport services in each of the territories administered by those authorities; and

– also authorises the internal operator to continue to provide its services outside the territorial competence of the contracting local authority, provided that it does so under contracts subject to the transitional arrangements provided for in Article 8(3) of Regulation No 1370/2007.

(2) The conditions governing the direct award of contracts to an internal operator under Article 5(2) of Regulation No 1370/2007 must be satisfied at the time when the direct award is actually made.