Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 15 May 2014[1]

Case C-213/13

Impresa Pizzarotti & C. SpA
v
Comune di Bari

(Request for a preliminary ruling from the Consiglio di Stato (Italy))

(Public procurement — Directives 93/37/EEC and 2004/18/EC — Meaning of 'public works contract' — Contract to be entered into for lease of a building yet to be built — Scope of the principle of res judicata in circumstances incompatible with EU law)

1. The project to create a new judicial centre in Bari (Italy), intended to rationalise the use of resources available to the courts within that district by creating a single headquarters for them, has, in a manner which is to say the least paradoxical, been the focus of copious litigation. Evidence of this is the sequence of events leading up to the present request for a preliminary ruling in proceedings between Impresa Pizzarotti & C. SpA ('Pizzarotti') and the Italian local authorities which supervise the project, following a market investigation notice seeking the setting up of the new judicial centre. The request is concurrent with a complaint submitted to the European Commission by the Comune di Bari (Municipality of Bari), which gave rise to the initiation of a Treaty infringement procedure against the Italian Republic on the basis of Article 258 TFEU.

2. In the present case, the Court is called upon to clarify — following on from the guidance laid down in the *KölnMesse* case[2] — whether or not a contract for the leasing of a building yet to be completed, as is the case in the main proceedings, is caught by the rules governing the award of public works contracts. If so, and in the event of the conclusion being reached that such a classification conflicts with judicial decisions which have become *res judicata*, the Court is called upon to rule on the scope of the principle that such decisions are 'untouchable' in a situation regarded as incompatible with EU law.

I – **Legal background**

3. According to the tenth recital in the preamble to Directive 92/50/EEC,[3] 'contracts relating to the acquisition or rental of immovable property or to rights thereon have particular characteristics, which make the application of procurement rules inappropriate'.

1 — Original language: French.

2 — *Commission* v *Germany* (C-536/07, EU:C:2009:664) ('*KölnMesse*').

3 — Council Directive of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p.1).

4. Article 1(a) of Directive 92/50 defines 'public service contracts', for the purposes of the directive, as 'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of: … (iii) contracts for the acquisition or rental, by whatever financial means, of land, existing buildings, or other immovable property or concerning rights thereon …'.

5. Article 1(a) of Directive 93/37/EEC[4] defines 'public works contracts', for the purposes of the directive, as 'contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority'.

6. The professional activities mentioned in Annex II to that directive include, in Class 50, 'Building and civil engineering'. That class covers, in particular, 'General building and civil engineering work (without any particular specification)' (sub-group 500.1) and 'Construction of flats, office blocks, hospitals and other buildings, both residential and non-residential' (group 501).

7. Recital 24 in the preamble to Directive 2004/18/EC[5] states:

'In the context of services, contracts for the acquisition or rental of immovable property or rights to such property have particular characteristics which make the application of public procurement rules inappropriate.'

8. Article 1(2) of that directive provides:

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

(b) "Public works contracts" are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. …

…'

9. Article 16 of the directive, entitled 'Specific exclusions', provides:

'This directive shall not apply to public service contracts for:

(a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; …

…'

4 — Council Directive of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

5 — Directive 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).

II – **Facts, the questions referred and procedure before the Court**

10. The background to the dispute in the main proceedings, as set out in particular in the order for reference, is rather complex. For the purposes of this analysis, the following points are relevant.

11. The case before the referring court has its origin in the publication on 14 August 2003, by the Comune di Bari, of a public 'market investigation' notice with a view to providing the judicial administration, as soon as possible, with a new single headquarters which would be suitable and appropriate to host all the courts of Bari.[6]

12. The notice required tenderers to commit themselves to commencing construction work by 31 December 2003. It also required clear and exhaustive indications of the costs to be paid by the municipal administration and the Italian Ministry of Justice and of the arrangements for payment, having regard to the fact that the available public resources amounted to EUR 43.5 million, already allocated to the project, to which the sum of EUR 3 million was to be added corresponding to the annual rents paid at that time by the Comune di Bari to lease the premises housing the courts concerned. Lastly, that notice was accompanied by a document setting out a framework of requirements, drawn up by the Corte d'appello di Bari (Court of Appeal, Bari) (Italy).

13. Among the four proposals submitted, that of Pizzarotti was selected by the Comune di Bari, by Decision No 1045/2003 of 18 December 2003. That decision indicated that some of the buildings would be sold to the Comune di Bari for the sum of EUR 43 million and that the remainder would be leased to it for an annual rent of EUR 3 million.

14. By a letter of 4 February 2004, the Italian Ministry of Justice informed the Comune di Bari that the public resources available had been reduced to EUR 18.5 million and asked it to verify whether, having regard to the proposals received, it was possible to bring the project to fruition within the limits of that new financial framework. By a note dated 11 February 2004, the Comune di Bari asked Pizzarotti whether it was prepared to go ahead with the procedure already commenced. Pizzarotti replied favourably to that request, reformulating its tender to take account of the reduction of the public resources available.

15. Public financing was completely eliminated in September 2004. Pizzarotti submitted a new proposal to the Comune di Bari, setting out the possibility of carrying out the works intended for letting, as envisaged in its initial proposal.

16. Because of inaction on the part of the municipal authorities, Pizzarotti commenced proceedings for a finding that the administration's silence was unlawful and for an order that the Comune di Bari should take action.

17. Following an unfavourable judgment of the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court, Puglia) of 8 February 2007, the Consiglio di Stato (Council of State), by judgment No 4267/2007, upheld Pizzarotti's appeal. Taking the view that the procedure had not been brought to an end by the approval of the outcome of the market investigation, it decided that the Comune di Bari, 'in compliance with the principles of reasonableness, good faith and the protection of legitimate expectations, must, lending cohesion to its actions, bring the procedure to a genuinely appropriate conclusion, examining, in the context of the proposals received, the possibility of the works being accomplished within the constraints of the amended financial framework'.

6 — That notice was published, in particular, in the *Official Journal of the European Communities* of 23 August 2003 (OJ S 161).

18. In response to an application to enforce its judgment No 4267/2007, the Consiglio di Stato, by judgment No 3817/2008, acknowledged that the Comune di Bari had failed to comply with the earlier judgment and ordered it to give full effect to the operative part of its judgment No 4267/2007 within 30 days. It appointed the Prefect of Bari as *Commissario ad acta*, so that, in the event of continued non-compliance, he would take, possibly through a delegate, all measures needed for enforcement of that judgment.

19. On 21 November 2008, the *Commissario ad acta* appointed by the Prefect of Bari determined that Pizzarotti's proposals were valid and, accordingly, made a finding that the market investigation procedure had achieved a positive outcome.

20. For its part, the Giunta Comunale di Bari (Bari Municipal Council) brought to an end the procedure commenced by the market investigation notice, placing on record that Pizzarotti's latest proposal was not in conformity with the requirements of that notice.

21. Pizzarotti and the Comune di Bari each appealed to the Consiglio di Stato. Pizzarotti claimed that, in the absence of any contractual commitment from the Comune di Bari to rent the property to be built, the latter had not correctly complied with the order contained in judgment No 3817/2008. The Comune di Bari complained of the lack of any finding that the conditions surrounding conduct of the procedure had worsened.

22. By Enforcement Decision No 2153/2010 of 15 April 2010, the Consiglio di Stato upheld Pizzarotti's appeal and dismissed that of the Comune di Bari. It considered that the action of the *Commissario ad acta*, although appropriate, was nevertheless incomplete, in the absence of a 'genuinely appropriate conclusion' within the meaning of judgment No 4267/2007. It therefore set a time-limit of 180 days for closure of the procedure by the adoption of the measures necessary for specific implementation of the Pizzarotti proposal.

23. By a document of 27 May 2010, the *Commissario ad acta* concluded that the 'market investigation notice of August 2003 … ha[d] not had a positive outcome'.

24. Pizzarotti appealed against that measure, and the Consiglio di Stato, by Enforcement Decision No 8420/2010 of 3 December 2010, upheld its appeal. Emphasising the inconsistent nature of the conclusions concerning the market investigation notice which were contained in the document of 21 November 2008 and in that of 27 May 2010, it took the view that the only valid conclusion was the one contained in the first of those measures. As regards the involvement of a third party purchaser and lessor of the premises to be used for the Bari judicial centre, and the commitment to rent, it observed that the appraisal made by the *Commissario ad acta* was not based on a detailed examination and thus infringed the order of the court, which required verification of the factual and legal preconditions for specific execution of the proposal. As regards the alleged lack of conformity of Pizzarotti's proposal with town planning requirements, it reaffirmed the need for the *Commissario ad acta* to initiate the procedures necessary for the adoption of that proposal after verification of the other regulatory requirements. Consequently, the document issued by the *Commissario ad acta* was annulled on the ground that it infringed the principle of *res judicata*.

25. Subsequently, the new *Commissario ad acta* appointed by the Prefect of Bari took all the requisite action for the adoption of his decision of 23 April 2012 effecting a 'town planning modification' in relation to the General Development Plan for the Comune di Bari, with regard to the land affected by construction of the judicial centre.

26. Pizzarotti contested that decision before the Consiglio di Stato on the ground that it sought to circumvent the principle of *res judicata*.

27. The referring court is uncertain, first, whether the lease of a property for future completion, to be concluded in the form of an undertaking to let, is equivalent, despite the presence of elements characteristic of a lease, to a works contract falling outside the scope of the specific exclusion provided for in Article 16(1)(a) of Directive 2004/18. It enquires, in particular, as to the scope of the term 'other immovable property' contained in that provision, and also as to the meaning of recital 24 in the preamble to that directive.

28. Second, if it is assumed that the contract in question constitutes a works contract, the referring court is uncertain whether it may hold that the decision having become *res judicata* in the present case by its judgment No 4267/2007 is ineffective in so far as the latter has led, by reason of subsequent enforcement decisions and measures by the *Commissario ad acta*, to a situation incompatible with EU law on public procurement. It emphasises in that regard that, by virtue of its own case-law, it can add to the original operative part of a decision adopted by it by means of an implementation decision, giving rise to 'progressively formed *res judicata*'. It adds that, by virtue of the case-law of the Court, the principle of *res judicata*, as recognised by Article 2909 of the Italian Civil Code, does not impede the correct application of EU law to a situation covered by that principle.

29. It was in those circumstances that the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is a contract to be concluded for the lease of something in the future — even in the form, suggested most recently, of an undertaking to let — equivalent to a public works contract, albeit with certain elements characteristic of a lease, with the result that such a contract cannot be included among the contracts which are excluded, under Article 16 of Directive 2004/18/EC, from the scope of the rules on public procedures?

(2) If the answer to Question 1 is in the affirmative, may a national court — specifically, this referring court — hold that the ruling made regarding the events under consideration (as described [in the present request for a preliminary ruling]) is ineffective in that it has enabled a situation which is contrary to [EU] law on public procurement to persist and, therefore, is it possible to enforce a final judgment which is contrary to [EU] law?'

30. Written observations have been submitted by the parties to the main proceedings, by the Italian and German Governments, and by the Commission.

31. A hearing was held on 27 February 2014, in which the parties to the main proceedings, the Italian and German Governments and the Commission participated.

III – **Analysis**

A – *Admissibility*

32. Pizzarotti entertains doubts as to the admissibility of the present request for a preliminary ruling, for two reasons.

33. First, it submits that Directive 2004/18, the only measure referred to in the present request for a preliminary ruling, is not applicable *ratione temporis* to the case before the referring court.

34. Second, Pizzarotti contends that the answer given by the Court could have no effect on the outcome of the main proceedings, which are characterised by the existence of a number of judicial decisions [7] that have become *res judicata* under Italian national law.

35. I am not convinced by either of the grounds of inadmissibility put forward by Pizzarotti.

36. As regards, first, the alleged inapplicability to this case of Directive 2004/18, the only instrument mentioned by the referring court, this ground seems to me to be hardly sufficient to justify declaring the present request for a preliminary ruling inadmissible.

37. Admittedly, as pointed out in particular by Pizzarotti and the Commission, it is well-established case-law [8] that the relevant date for identifying the legislation applicable to a public contract is the date on which the contracting authority chooses the type of procedure to be followed and decides definitively whether or not it is necessary for a prior call for tenders to be issued for the award of a public contract. It follows, in this case, that it is the decision of 14 August 2003 which is relevant. [9] However, on that date, only Directive 93/37, read in conjunction with Directive 92/50, was applicable.

38. I am, however, of the opinion that this error in identifying the EU legislation applicable in this instance is of only relative importance and has no repercussions for this case. The relevant provisions, namely Article 1(a) of Directive 93/37 and Article 1(a)(iii) of Directive 92/50, were repeated in very similar terms in Directive 2004/18, the latter consisting essentially of a recasting and simplification of the rules in force until then.

39. In those circumstances, which clearly do not entail modification of the legal problem raised in the order for reference or examination of matters of law not discussed in the main proceedings, [10] I am of the opinion that a reformulation of the question as seeking in fact to obtain an interpretation of the provisions of Directive 93/37 is perfectly envisageable.

40. Nor, second, is it possible to uphold the ground of inadmissibility concerning the existence of judicial decisions which have become *res judicata*, thus depriving the answers from the Court of any useful purpose for the decision to be given in the main proceedings. Evaluation of the consequences of the authority or force of *res judicata* attaching to the decisions mentioned by the referring court is right at the core of the problem raised in the second question. Even if it is assumed that, by its argument, Pizzarotti seeks in reality also to challenge the relevance of the questions submitted, it need only be pointed out that, in proceedings before them, it is, in principle, a matter for the national courts alone to assess the relevance of the questions which they refer to the Court. The Court will proceed otherwise only where it is 'quite obvious' that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [11] That does not seem to me to be the case here.

7 — Pizzarotti refers to two decisions. The first is that of the Tribunale amministrativo regionale per la Puglia of 18 May 2004, which, deciding an appeal brought by an unsuccessful tenderer, held that the market investigation notice was of a purely exploratory nature, seeking appropriate solutions for the creation of the Bari judicial centre, and, consequently, did not involve any commitment by the municipal administration subsequently to award a works contract. The second is judgment No 4267/2007 of the Consiglio di Stato, which, it is said, required that administration to bring the procedure commenced to a satisfactory conclusion by entering into an off-plan lease with Pizzarotti.

8 — See, in particular, *Commission* v *Netherlands* (C-576/10, EU:C:2013:510, paragraph 52 and case-law cited).

9 — As the Consiglio di Stato indicated, the 'market investigation carried out by the Comune di Bari, the choice on completion thereof of the plan drawn up by Pizzarotti, submission of that plan to the Minister of Justice and Note No 249 of 4 February 2004 from that authority also constitute stages of a complex procedure designed to bring about the creation of a new judicial centre'.

10 — In that regard, the Court has consistently noted that it has a duty to interpret all provisions of EU law which national courts need to rely on in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts (see, in particular, *Fuß*, C-243/09, EU:C:2010:609, paragraph 39, and *Worten*, C-342/12, EU:C:2013:355, paragraph 30).

11 — See, to that effect, *Fish Legal and Shirley* (C-279/12, EU:C:2013:853, paragraph 30).

41. In those circumstances, I consider that the request for a preliminary ruling must be considered admissible.

B – *The first question: the existence of a public works contract within the meaning of Directive 93/37*

1. Summary of the issues

42. By its first question, the referring court seeks clarification as to the legal classification, having regard to the EU legislation on public contracts, of a contract described by the referring court as a 'contract to be concluded for the lease of something in the future, even in the form suggested most recently of an undertaking to let'.

43. It is necessary, more specifically, to determine whether the proposal sent by the Comune di Bari to Pizzarotti, following removal of the public financing initially envisaged (see points 14 and 15 of the present Opinion), must be seen as calling for the conclusion of a lease transaction falling outside the scope of EU legislation on public contracts or whether, on the contrary, it is such as to bind the Comune di Bari to award a public works contract, and therefore to require the commencement of a new procedure.

44. In essence, there are two conflicting views.

45. Pizzarotti and the Italian Government, supported in certain respects by the German Government, contend that the contract envisaged in the main proceedings does not meet the criteria for a works contract, as set out in the applicable rules and clarified by the Court. That contract falls, in their view, within the exemption provided for in Article 1(a)(iii) of Directive 92/50 and Article 16(a) of Directive 2004/18.

46. They submit, firstly, that the main proceedings are not concerned with the carrying out of works but with the lease of real estate. That is clear, in particular, from the market investigation notice and the decision of the Comune di Bari of 18 December 2003 and also from the inherent characteristics of the contract, which are typical of a lease within the meaning of Article 1571 of the Italian Civil Code and are clearly distinct from those at issue in the case giving rise to the *KölnMesse* judgment.

47. They contend, secondly, that in the main proceedings the Comune di Bari is not required to give any financial consideration in return for a supply of construction works reflecting its direct economic interest, which means that the contract is not of a pecuniary nature.

48. Pizzarotti and the Italian Government maintain, thirdly, that the Comune di Bari has no power to compel Pizzarotti, by judicial means, to execute the works.

49. They claim, fourthly, that the Comune di Bari did not attach to the document prepared by the *Commissione di manutenzione* of the Corte d'appello di Bari any technical specifications, within the meaning of paragraph 1 of Annex III to Directive 93/97 or paragraph 1(a) of Annex VI to Directive 2004/18, nor any contract documents within the meaning of Article 10 of Directive 93/37 or Article 23 of Directive 2004/18, which confirms that its intention was not to enter into a public works contract but rather to have market investigation carried out, on a non-binding basis, in order to bring together private initiatives which it intended to evaluate entirely independently and without any obligation to take a decision. Pizzarotti and the Italian Government add that, in any event, the contract envisaged in the main proceedings is characterised by the absence of precise technical specifications concerning the type of works to be carried out like the specifications in *KölnMesse*.

50. The Comune di Bari and the Commission, for their part, consider that the contract envisaged in the main proceedings constitutes a public works contract, within the meaning of Article 1(a) of Directive 93/97, which should have been awarded in compliance with the rules concerning procedure and transparency laid down in that directive.

51. It must be pointed out that the arguments put forward by the parties to the main proceedings and by the other parties to the present procedure relate, essentially, to the question whether the conditions referred to and clarified by the Court, in particular in *KölnMesse*, for it to be concluded that there is a public works contract within the meaning of the rules of EU law are fulfilled in the main proceedings.

52. However, I would observe that *KölnMesse* related to an issue of the legal classification of the transaction at issue that is different from the issue raised in the first question in the present order for reference. In that case, the Court was called upon to determine whether the 'lease' aspect of the contract between the City of Cologne and Grundstücksgesellschaft Köln Messe 8-11 GbR prevailed over the objective of building works. The exemption contained in Article 1(a)(iii) of Directive 92/50 and Article 16(a) of Directive 2004/18 was certainly not at issue.

53. In the main proceedings, having regard to the wording used by the referring court, the primary question is whether transactions concerning works yet to be completed can come within the exception to the application of the public contract rules that is laid down in those provisions. This implies that the referring court takes as a given that the contract envisaged concerned the public procurement of services and was liable, by reason of its specific characteristics, not to be caught by the rules on public procurement.

54. I will therefore initially set out the reasons why it is appropriate, in my view, to take the view that the exception at issue cannot in any event cover works which have not yet been started.

55. Since it could be held that it is appropriate, even beyond the scope of the question raised by the referring court, also to give a decision on the question whether the conditions are fulfilled, in the present case, for taking the view that a 'public works contract' exists rather than a public services contract, I will indicate the manner in which, in my view, it is appropriate, following on from the guidance laid down in *KölnMesse*, to approach the draft contract at issue in the main proceedings.

2. The provisions of Article 1(a)(iii) of Directive 92/50 necessarily refer to transactions relating to existing immovable property

56. I consider it appropriate to refer to a key factor which must be taken into account in determining whether or not a transaction falls within the scope of the directives coordinating procedures for the award of public contracts: the EU rules on public contracts pursue the primary objective of eliminating restrictions on fundamental freedoms and promoting effective competition. [12]

57. That aim is undermined where a contracting authority entrusts an undertaking with execution of works or services without having first followed the procedures for the award of contracts that are laid down by the rules of EU law, irrespective of the reasons and context for the performance of the works or services or the purpose to which they are to be put. [13]

58. The effective pursuit of that aim necessarily implies that a broad construction must be adopted for the purpose of classifying a given transaction as a works contract and, at the same time, that exceptions must for their part be viewed restrictively.

12 — See the second and tenth recitals in the preamble to Directive 93/37 and recital 2 in the preamble to Directive 2004/18.

13 — See, to that effect, the Opinion of Advocate General Kokott in *Auroux and Others* (C-220/05, EU:C:2006:410, point 43).

59. That is particularly so in the case of the exemptions specific to certain public service contracts laid down in Article 1(a) of Directive 92/50 (which are, essentially, repeated by Article 16 of Directive 2004/18).[14] As indicated in recital 24 in the preamble to Directive 2004/18, it is the 'particular characteristics' of certain contracts which make the application of public procurement rules inappropriate.

60. As regards the exemption concerning the acquisition or rental of immovable property,[15] taken in the broad sense, it cannot in my view refer to anything other than existing property. Open competition resulting from the application of the rules on public procurement has indeed little meaning where it concerns the letting or sale of a particular existing property which, because of its uniqueness, does not lend itself to comparison with other properties. Moreover, it is apparent from certain *travaux préparatoires* that the exemption of contracts for the leasing or acquisition of immovable property was originally explained by the local and non-cross-border nature of such contracts.[16] On the other hand, in so far as the activities in question involve the future construction of buildings and, therefore, the execution of works, the public tendering and transparency required by those rules certainly do not appear inappropriate and those rules fall to be applied. Furthermore, the reference made in the provisions in question to 'other immovable property' must, in my view, be understood as referring to property of a kind other than land and buildings and not to property yet to be built.

61. It follows that, without there being any need to give a precise decision as to the stage at which immovable property comes into existence, the exception concerning the purchase or leasing of 'land, existing buildings, or other immovable property' cannot in any circumstances refer to property of which the construction has not yet started, as seems to be the case in the main proceedings. Where a public authority opts, when setting up certain services, for a formula of purchase or leasing of a building yet to be completed, it is necessary to subject the transaction to the procedures for the award of contracts laid down in the relevant regulations.

3. The conditions for the existence of a works contract are in any event fulfilled in circumstances such as those of the main proceedings

62. As the Court has consistently reiterated, classification as a public works contract is a matter of EU law and must be independent of the classification arrived at on the basis of national law.[17] Likewise, any classification of a contract given by the contracting parties is not decisive so far as concerns deciding whether an agreement or a transaction falls within the scope of a procurement directive.[18]

63. In the main proceedings, the formal classification of the contract at issue as a 'lease' is not therefore a decisive factor. Similarly, the fact that the envisaged contract displays, as contended by Pizzarotti and the Italian Government, certain characteristics of a lease, within the meaning of Article 1571 of the Italian Civil Code, of a property complex is entirely irrelevant.

64. In this context, a clarification is called for. It is not a question of contesting that the national public authorities have freedom in choosing the contractual procedure they consider appropriate for the execution of works or services or even of calling into question the legality of recourse to certain types of contracts; rather, it is a question of avoiding the risks of circumvention of the rules on public

14 — See also Article 10(a) of the recent Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65).

15 — Article 1(a)(iii) of Directive 92/50 and Article 16(a) of Directive 2004/18.

16 — See, in particular, the explanatory memorandum to the proposal for a Council Directive relating to the coordination of procedures on the award of public service contracts, submitted on 6 December 1990 (COM(90) 372 final — SYN 293).

17 — See *Auroux and Others* (C-220/05, EU:C:2007:31, paragraph 40 and case-law cited).

18 — *KölnMesse*, paragraph 54.

contracts by recourse to certain contractual terms. In other words, the EU rules on public contracts do not prejudge the legality of recourse to a lease, with a view to the construction of a building, provided that, prior to its conclusion, the rules on publicity and public tendering provided for by those rules have been complied with.

65. Moreover, the scope of the directive must be determined by reference only to the objective conditions expressly defined by the directives adopted in this area.

66. Clearly, that means that the actual or supposed aims that the public authorities seek to pursue are irrelevant in determining whether a contract must be classified as a works contract. Account cannot therefore be taken of the fact, assuming that it is recognised, that the Comune di Bari, from the outset, only intended to provide a single headquarters for the administration of justice in Bari, without this necessarily involving the execution of works.

67. The Court has thus emphasised that the definition of 'public works contract' contained in Article 1(a) of Directive 93/37 includes all transactions in which a contract for pecuniary interest is concluded between a contracting authority and a contractor and has as its object the execution by the latter of a 'work' within the meaning of Article 1(c) of the directive. The essential criterion in that respect is that the work should be executed in accordance with the requirements specified by the contracting authority, the means of that execution being immaterial. [19] In order for that to be possible, the contracting authority must have taken measures to define the characteristics of the work or, at the very least, have had a decisive influence on its design. [20]

68. Finally, according to case-law, where a contract contains elements relating to a public works contract and also elements relating to another type of public contract, it is the main purpose of the contract which determines the EU rules applicable. [21]

69. In this case, the information in the file prompts me to take the view that the transaction at issue in the main proceedings displays all the characteristics of a works contract, the latter certainly pursuing as its main object the execution in return for payment of a work meeting requirements specified by the contracting authority.

70. In the first place, that information demonstrates that the aim of the whole procedure at issue here, which commenced with publication of a market investigation notice on 14 August 2003, consisted in the construction, in accordance with the wishes expressed by the competent public authorities, of new premises which were intended to be used as a single headquarters for the courts in Bari.

71. That is apparent, first of all, from the public procurement notice ('Ricerca di mercato') of 14 August 2003, which states in particular that 'the tenderer, by drawing up its tender, undertakes to commence the construction works by 31 December this year'.

72. Next, it is clear from the document annexed to that market investigation notice, drawn up by the Corte d'appello di Bari and approved by the *Commissione di manutenzione* (document entitled 'Quadro esigenziale' (framework of requirements)), and the relevance of which for the purposes of examining the planned contract is not in question, [22] that the competent public authorities specified a number of structural, functional and organisational requirements to be met by the project for a single

19 — *KölnMesse*, paragraph 55.

20 — *Helmut Müller* (C-451/08, EU:C:2010:168, paragraph 67).

21 — See, in particular, *KölnMesse*, paragraph 57.

22 — The draft undertaking to let, dated May 2012, refers, in particular in recital 10 and Article 7, to that framework of requirements.

judicial centre, having regard to the applicable rules and to a set of statistical data relating to judicial activities in Bari. Those requirements, which are set out on several dozen pages, seem to me to far exceed the usual requirements of a tenant in relation to newly-constructed premises of a certain size.[23]

73. Finally, resolution No 1045/2003 of the municipal council of 18 December 2003, recording selection of the tender submitted by Pizzarotti, expressly refers to the 'construction of a single headquarters' for the courts.

74. More generally, I am of the opinion that, for the purposes of Directives 93/37 and 2004/18, the immediate — and therefore main — object of a contract for buildings whose construction has not yet begun cannot, in principle and on the basis of the guidance in *KölnMesse*, be seen as being the lease of a property, and that is so regardless of the contractual terms chosen under national law. The main purpose of such a contract can, logically, only be the construction of those buildings, which are subsequently required to be handed over to the contracting authority under the terms of a contractual relationship described as a 'lease'.[24]

75. Reverting to the main proceedings, it is clear that Pizzarotti could not in any case fulfil the obligation, envisaged in the draft undertaking to let, to make the specific buildings available in the specified area without first undertaking the construction work.

76. The numerous technical specifications contained in the reference documents show that the contracting authority took measures to determine the characteristics of the buildings or, at the very least, to exercise a decisive influence on their design. Those facts, together with the copious litigation deriving from the failure to conclude the contract envisaged in the main proceedings, clearly show, in my view, that Pizzarotti would not have been prepared to carry out the works in question in the absence of requirements specifically formulated by the Comune di Bari and the acceptance, by the latter, of the proposal for execution submitted in response to the public 'market investigation' notice.

77. In the second place, it seems fairly clear to me that, although it is to be distinguished on this point from the *KölnMesse* case,[25] the contract at issue in the main proceedings was concluded for a pecuniary interest.

78. Admittedly, it is true that the payment in the form of an annual rent which the Comune di Bari is supposed to pay over the 18 years of the contractual term falls far short of covering the costs of construction of the buildings.

79. That finding cannot, however, be relied on to negate the pecuniary nature of the contract in question.

80. In fact, in order to distinguish a public service contract from a public works contract[26] — and in contrast to what Pizzarotti and the Italian and German Governments appear to suggest[27] — no decisive importance can be attached to the amount of the financial consideration payable for the construction work. As the Court has held, the decisive element for the purposes of the classification of a public contract is the main object of that contract, not the amount paid to the contractor or the

23 — *KölnMesse*, paragraph 58.

24 — Ibid., paragraph 56.

25 — In that case, reference was made by the German Government to the fact that the total amount to be paid to Grundstücksgesellschaft Köln Messe 8-11 GbR by way of rent, which ultimately amounted to around EUR 600 million, was well in excess of the cost of construction of the buildings, which amounted to around EUR 235 million.

26 — This contrasts with the distinction between a public service contract and a public supply contract (see, in particular, Article 2 of Directive 92/50 and Article 1(2)(d), second subparagraph, of Directive 2004/18).

27 — They refer, in particular, to the Opinion of Advocate General Trstenjak in *KölnMesse* (EU:C:2009:340, point 105), who suggested that there should also be a comparison of the respective costs.

arrangements for payment.[28] The fact that payment of the annual rent for a period of 18 years, provided for in the envisaged contract, does not fully cover the costs of construction of the buildings cannot in any case change the fact that that there is a pecuniary interest underlying the contract and, therefore, rule out the existence of a public works contract. In that regard, the actual achievement of a profit by an economic operator cannot constitute a necessary precondition for classification of a contract as a public works contract.[29]

81. The condition linked to the existence of something that is of 'direct economic benefit to the contracting authority' does not necessarily mean that the latter should become the owner of the work and can be satisfied by a lease making the work available to the public authority concerned.[30]

82. In view of the foregoing considerations, I propose that the first question be answered to the effect that a lease for a work to be completed in the future, displaying the characteristics of the contract at issue in the main proceedings, must be classified as a public works contract within the meaning of Article 1(a) of Directive 93/37.

C – *The second question: requirements deriving from the principles of sincere cooperation and of respect for the status of res judicata in a situation presumed to be incompatible with EU law*

83. By its second question, the referring court asks whether it can set aside a decision that possibly has become *res judicata* in the case in question, in so far as it would have allowed a legal situation to arise which is incompatible with EU law regarding the award of public works contracts, and whether it is therefore possible to give effect to a decision having become *res judicata* which is incompatible with EU law.

84. I must, at the outset, express my puzzlement regarding the exact identification of what, in the eyes of the referring court, is covered by the principle of '*res judicata*', as regards both the *thema decidendum* (matter to be decided) and the *ratio decidendi*, and is seen as problematic from the standpoint of compliance with EU law.

85. Whilst fully aware that, ultimately, it is the responsibility of the national court alone to determine what in fact constitutes the judicial decision or decisions which would impede the full application of EU law, the need to give an answer that is as useful as possible to the referring court prompts me to make the following observations.

86. In this case, the only *res judicata* decision which the referring court mentions[31] is its judgment No 4267/2007, and more precisely the ruling in that judgment to the effect that the Comune di Bari, 'in compliance with the principles of reasonableness, good faith and the protection of legitimate expectations, must, lending cohesion to its actions, bring the procedure to a genuinely appropriate conclusion, examining, in the context of the proposals received, the possibility of the works being carried out within the constraints of the amended financial framework'.

87. If, as the Consiglio di Stato observes, that decision is 'open to numerous different possibilities of implementation', it is *a priori* difficult to understand the reasons why the implementation of that judgment should necessarily be considered contrary to EU law and, more specifically, to the application of the relevant rules on public works contracts.

28 — See *KölnMesse*, paragraph 61.

29 — *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817).

30 — See, to that effect, *Helmut Müller* (EU:C:2010:168, paragraphs 50 and 51).

31 — And that is so even though the parties seem to have demanded compliance with judgment No 8420/2010.

88. In line with the views of the Comune di Bari, it appears that the only decision having become *res judicata* emanating from the Consiglio di Stato in judgment No 4267/2007 relates to the obligation incumbent upon it (and on the *Commissario ad acta*) to terminate the procedure commenced by the public market-investigation notice. There is no reason automatically to rule out the possibility that that procedure might be concluded, within the meaning of that judgment, by the launch of a new award procedure complying with the EU rules on public contracts.

89. However, it seems that the referring court has, in part at least,[32] associated itself with the interpretation advocated by Pizzarotti to the effect that that judgment and the judicial decisions subsequent to it should be interpreted as requiring the envisaged 'lease' with Pizzarotti to be entered into, and that is liable to engender a situation contrary to EU law. It would also seem that a degree of authority has been lent to the implementing decisions taken by the *Commissario ad acta* (see Decision No 8420/2010). However, according to my understanding of the Italian Code of Administrative Procedure, the court has jurisdiction over all matters relating to proper compliance, including those deriving from measures adopted by the *Commissario ad acta*, the latter acting as an auxiliary officer of the court.

90. Furthermore, if, as seems to follow from the provisions of the Code of Administrative Procedure,[33] as interpreted by the referring court, that court is empowered to amend the operative part of judgment No 4267/2007, giving rise to what it describes as 'progressively formed *res judicata*', I find it difficult to conclude that the principle that decisions having become *res judicata* are untouchable is called into question. So long as the judicial authority is empowered to clarify or revisit a decision taken earlier, that possibility must be available under the same conditions with a view to ensuring the full application of EU law.

91. In such a situation, it is ultimately necessary for the national court, in implementing judicial decisions which lend themselves to several interpretations, to give preference to the one ensuring that the administrative authorities act in accordance with EU law.

92. On the other hand, if the referring court feels it necessary to conclude that the proper application of EU law on public works contracts necessarily conflicts with its decision that has become *res judicata* in its judgment No 4267/2007 or subsequent decisions,[34] which it alone is empowered to review, the arrangements for giving effect to *res judicata* fall within the procedural autonomy of the Member States, subject to compliance with the principles of equivalence and effectiveness.

93. In that regard, the Court has repeatedly referred to the importance attaching to the principle of *res judicata*, both in the legal order of the European Union and in national legal systems. Indeed, in order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question.[35] Therefore, EU law does not require a national court to leave unapplied domestic rules of procedure rendering a decision *res judicata*, even if that would make it possible to remedy an infringement of EU law by the decision at issue.[36]

32 — See in that regard the details of the decisions taken by the Consiglio di Stato in response, in particular, to action taken by the *Commissario ad acta* of 27 May 2010 (points 23 to 25 of the present Opinion).

33 — Legislative Decree No 104 of 2 July 2010 (GURI No 156 of 7 July 2010).

34 — The Consiglio di Stato in fact gives the impression that it is its implementing decisions (of 15 April and 3 December 2010), relating to the activities of the *Commissario ad acta*, which led to a situation potentially conflicting with EU law, in so far as they ordered the adoption of the measures necessary for conclusion of a lease for a future development which that undertaking had submitted to the administration as purporting to be the last proposal after the economic framework was completely changed in 2004.

35 — See, in particular, *Köbler* (C-224/01, EU:C:2003:513, paragraph 38); *Kapferer* (C-234/04, EU:C:2006:178, paragraph 20); and *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506, paragraph 22).

36 — *Eco Swiss* (C-126/97, EU:C:1999:269, paragraph 48); *Kapferer* (EU:C:2006:178, paragraph 21); and *Fallimento Olimpiclub* (EU:C:2009:506, paragraph 23).

94. In the absence of EU legislation in this area, the rules for giving effect to the principle of *res judicata* are a matter for the domestic legal order of the Member States by virtue of the principle whereby the Member States enjoy procedural autonomy. However, such procedural rules must not be less favourable than those governing similar domestic situations (principle of equivalence) and must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness). [37]

95. The apparent disregard of the principle of *res judicata* that occurred in *Lucchini* was, [38] as stated by the Court itself, confined to the very particular area of State aid.

96. The Court made it clear in that judgment that since appraisal of the compatibility of aid measures or an aid scheme with the common market falls within the exclusive competence of the Commission acting subject to review by the EU judicature, EU law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of EU law which has been found to be incompatible with the common market in a decision of the Commission which has become final. [39]

97. The particular features of the *Lucchini* case were also emphasised in *Fallimento Olimpiclub*, [40] in which the Court made it clear that that case had concerned a clearly defined situation involving principles governing the division of powers between the Member States and the then Community in the area of State aid, the Commission having exclusive competence to assess the compatibility of a national State aid measure with the common market.

98. As regards the analogy drawn between the obligations — as referred to in particular in *Kühne & Heitz* [41] — of the administrative authorities by virtue of their duty of sincere cooperation and those incumbent, by virtue of that same duty, upon the national courts, I am far from persuaded by it.

99. Admittedly, observance both of the definitive nature of an administrative decision and of the authority attaching to a judicial decision is based on the need, having regard to the principle of legal certainty, to preserve the stability of legal situations. Also, the main proceedings are concerned with a special situation in which, according to the information provided by it, the Consiglio di Stato could supplement the operative part of one of those decisions which had become definitive and, if appropriate, revisit decisions adopted in pursuance of those decisions by the *Commissario ad acta*.

100. However, even if that possibility may be regarded as allowing the intangibility of a decision having become *res judicata* to be tempered somewhat — a matter that has not been clearly established (see point 90 of the present Opinion) — there is an important difference between the possibility of re-examining an administrative decision which has become final and the possibility of going back on a judicial decision which has become *res judicata*. The obligation incumbent, in certain circumstances, on the administrative authority to revisit an administrative decision which has become final, as determined by the *Kühne & Heitz* judgment, is based on the premiss that such a re-examination is not liable to cause harm to third parties. That condition does not appear to me to be fulfilled where judicial decisions with the status of *res judicata* are being reviewed. Moreover, I am of the opinion that that judgment may, in fact, be seen as an application of the principles of effectiveness and equivalence in the light of the possibility, recognised, in domestic law, of reversing, in certain conditions, administrative decisions that have become final.

37 — *Kapferer* (EU:C:2006:178, paragraph 22), and *Fallimento Olimpiclub* (EU:C:2009:506, paragraph 24).

38 — C-119/05, EU:C:2007:434.

39 — Ibid., paragraphs 62 and 63.

40 — *Fallimento Olimpiclub* (EU:C:2009:506, paragraph 25).

41 — *Kühne & Heitz* (C-453/00, EU:C:2004:17, paragraph 28). See also *i-21 Germany and Arcor* (C-392/04 and C-422/04, EU:C:2006:586, paragraphs 51 to 55) and *Kempter* (C-2/06, EU:C:2008:78).

101. It follows from the foregoing considerations that, where a judicial decision, in some instances by virtue of the effects of subsequent judicial enforcement decisions, has created a situation incompatible with EU law, it is not in principle open to the national court to overturn that decision.

102. Moreover, it is possible to remedy infringements of EU law. In circumstances where the force of *res judicata* makes it impossible to apply EU law, the possibility remains of an action to redress damage caused to individuals. [42]

103. Consequently, I propose that the second question be answered to the effect that it is for the national court alone to determine the exact terms of a judicial decision which has become *res judicata*. The arrangements for giving effect to a final judicial decision are a matter for the domestic law of the Member States, subject to compliance with the principles of equivalence and effectiveness. Where the national court is empowered, by virtue of national rules, to add to or indeed replace the terms of the judicial decision, it is incumbent upon that court to exercise its power in order to ensure due implementation of EU law.

IV – **Conclusion**

104. Having regard to the foregoing considerations, I propose that the Court give the following answers to the questions referred for a preliminary ruling by the Consiglio di Stato:

(1) A lease for a work to be completed in the future, displaying the characteristics of the contract envisaged in the main proceedings, must be classified as a 'works contract' within the meaning of Article 1(a) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts.

(2) It is for the national court alone to determine the exact terms of a judicial decision which has become *res judicata*. The arrangements for giving effect to a final judicial decision are a matter for the domestic law of the Member States, subject to compliance with the principles of equivalence and effectiveness. Where the national court is empowered, by virtue of national rules, to add to or indeed replace the terms of the judicial decision, it is incumbent upon that court to exercise its power in order to ensure due implementation of EU law.

42 — See, to that effect, *Köbler* (C-224/01, EU:C:2003:513, paragraph 51 et seq.).