Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 27 February 2014 [1]

Case C-574/12

Centro Hospitalar de Setúbal, EPE
Serviço de Utilização Comum dos Hospitais (SUCH)
v
Eurest Portugal — Sociedade Europeia de Restaurantes Lda

(Request for a preliminary ruling from the Supremo Tribunal Administrativo (Portugal))

(Public procurement — Directive 2004/18/EC — No obligation to initiate a tendering procedure pursuant to EU law (so-called 'in-house award') — 'Similar control' requirement — Contractor which is legally distinct from the contracting authority and which is set up in the form of a non-profit organisation — Participation of private interests in the contractor — Requirement that the contractor must carry out the essential part of its activities with the contracting authorities which exercise 'similar control')

1. By the six questions for a preliminary ruling referred to it by the Supremo Tribunal Administrativo (Portugal) in the present case, the Court of Justice is again asked to clarify the scope of the conditions which must be satisfied if a contracting authority is to be able to make use of the exemption for so-called 'in-house' transactions. Pursuant to that exemption, first established by the Court in its judgment in *Teckal* [2] and now the subject of copious case-law, a contracting authority is exempted from initiating the procedure for the award of a public contract if two conditions are satisfied: (i) if the contracting authority exercises over the contractor 'control similar' to the control which it exercises over its own departments and (ii) if the contractor carries out the essential part of its activities with the controlling contracting authority or authorities. [3]

2. The present case raises a number of new issues which will allow the Court to clarify further the scope of the in-house exemption. First, the Court is asked to define the scope of its case-law, according to which the presence of private interests in the contractor precludes the possibility of the contracting authority exercising over that entity control similar to the control which it exercises over its own departments. [4] More specifically, the Court will need to clarify whether the strict approach taken in that case-law to private participation in the share capital of companies awarded contracts must also be applied in circumstances in which the contractor is a non-profit organisation whose partners include charitable organisations, in addition to the contracting authorities.

1 — Original language: Italian.

2 — Case C-107/98 [1999] ECR I-8121.

3 — See, inter alia, Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 49; Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 62; Case C-340/04 *Carbotermo and Consorio Alisei* [2006] ECR I-4137, paragraph 33; Case C-295/05 *Asociación Nacional de Empresas Forestales* [2007] ECR I-2999, paragraph 55; Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 27; Case C-573/07 *Sea* [2009] ECR I-8127, paragraph 40; Joined Cases C-182/11 and C-183/11 *Econord* [2012] ECR, paragraph 25; and Case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] ECR, paragraph 32. In that connection, see also my recent Opinion in Case C-15/13 *Datenlotsen Informationssysteme*.

4 — See points 25 and 28 below.

3. Second, the Court is asked to specify, in the present case, the parameters of the second '*Teckal* criterion', namely the condition that the contractor must carry out the essential part of its activities with the controlling contracting authority or authorities.

I – Legislative background

A – *EU law*

4. Article 1(2)(a) of Directive 2004/18/EC [5] provides that '"[p]ublic 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 – *National law*

5. According to Article 5(2) of the Portuguese Public Procurement Code [6] which transposed Directive 2004/18 into Portuguese law in the light of the Court's case-law, '[the rules on public contracts] shall also not apply to contracts, regardless of their purpose, concluded between contracting authorities and another entity, where:

(a) the contracting authority, on its own or in conjunction with other contracting authorities, exercises over the activity of that entity a control which is similar to that which it exercises over its own departments; and

(b) that entity carries on the essential part of its activities for the benefit of one or more contracting authorities which exercise control over the entity similar to that which is referred to in the preceding paragraph.'

II – Facts, national procedure and questions referred

6. The Centro Hospitalar de Setúbal ('CHS'), the first applicant in the proceedings pending before the national court, is a Portuguese public hospital.

7. The Serviço de Utilização Comum dos Hospitais ('SUCH'), the second applicant in the proceedings pending before the national court, is a non-profit organisation, set up by Legislative Decree No 46.668 of 24 November 1965, which has its own statutes. [7] Pursuant to Article 2 of its statutes, the aim of SUCH is to carry out a public service mission; it is an instrument for self-managing the needs of its partners and pursues the objective of helping them to function efficiently. It also contributes to the implementation of health policy by contributing significantly to the efficiency and financial sustainability of the Portuguese National Health Service.

8. Pursuant to Article 7(1) of the statutes of SUCH, its partners may only be entities from the public sector or from the social sector which provide health care or pursue activities related to the promotion and protection of health. Pursuant to Article 7(2), SUCH must, however, ensure that the majority of the voting rights in the General Meeting are held by entities subject to the management,

5 — 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 (OJ 2004 L 134, p. 114).

6 — Approved by Decree-Law No 18/2008 of 29 January 2008.

7 — The statutes of SUCH have been amended on a number of occasions over time. The version in force at the time of the material facts was the version approved in October 2010.

supervision and guidance powers of the member of the government responsible for health. At the time of the material facts in the present case, SUCH had 88 partners, including CHS, as well as 23 non-governmental organisations, all of them non-profit organisations, including 20 charitable organisations (Misericórdias).

9. Pursuant to Article 3 of its statutes, SUCH is subject to the management, supervision and guidance powers of the member of the government responsible for the health sector, who is in charge of appointing the President and Vice-President of the Management Board, approving the resolutions of the General Meeting on taking out loans involving a net debt equal to or greater than 75% of the equity recorded in the previous financial year, on amendments to the statutes and on the dissolution of SUCH.

10. Pursuant to Article 5(3) of its statutes, SUCH is able to provide services under competitive market conditions to non-partner public entities or private entities, be they national or foreign, provided that there is no resulting loss or harm caused to its partners, and that it is beneficial to them and to SUCH, whether economically or in terms of enhancement or technical performance. According to Article 5(4), SUCH must ensure that at least 80% of its activity is carried out for the benefit of its partners.

11. On 27 July 2011, CHS concluded a contract with SUCH for the provision of catering services by SUCH to the patients and staff of CHS. The contract was concluded for a renewable five-year period and provided for the payment of an annual price of EUR 1 295 289, totalling EUR 6 476 455 over the five-year life of the contract. The provision of the services forming the subject-matter of the contract was awarded directly to SUCH by CHS without initiating the tendering procedures provided for by Directive 2004/18, since, in the view of the parties to it contract, the contract was caught by the in-house relationship existing between SUCH and its hospital partners, including CHS.

12. Taking the view that the direct award to SUCH of the provision of the services forming the subject-matter of the contract entered into with CHS was unlawful, since it was awarded without initiating the procedure for the award of a public contract and thus in breach of national and EU procurement legislation, Eurest (Portugal) — Sociedade Europeia de Restaurantes Lda ('Eurest') — a company which also provides the services covered by the contract at issue and which was party to a contract with CHS for the provision of catering services, a contract which was terminated following the conclusion of the contract between CHS and SUCH, brought an action before the Tribunal Administrativo e Fiscal de Almada (Administrative and Tax Court, Almada) seeking, first, the annulment of the decision of the CHS Management Board to terminate its contract with that hospital and, second, the annulment of the contract concluded between CHS and SUCH.

13. By judgment of 30 January 2012, the Tribunal Administrativo e Fiscal de Almada upheld the application and declared to be null and void the contract concluded between CHS and SUCH. The Tribunal found that the conditions laid down under Article 5(2) of the Public Procurement Code had not been shown to be satisfied and that, consequently, the award of the services covered by the contract should be subject to a public tendering procedure. CHS and SUCH appealed against the judgment of the lower court before the Tribunal Central Administrativo do Sul (Central Administrative Tribunal, South) which dismissed their appeals by judgment of 26 April 2012. Both SUCH and CHS lodged appeals against that judgment before the referring court, the Supremo Tribunal Administrativo.

14. The referring court points out, first, that it is undisputed that, being a legal person under public law, a hospital such as CHS constitutes a contractor. Nor is it disputed that the contract entered into between CHS and SUCH, a distinct entity, constitutes a public service contract. The referring court also points out that, in order for the contract to form the subject of a direct in-house award, the two conditions laid down by Article 5(2) of the Public Procurement Code, codifying the *Teckal* case-law and set out in point 5 above, must be satisfied.

15. As regards, in particular, the first condition, namely the existence of 'similar control', the referring court notes that the particular legal nature of SUCH, whose partners include private social solidarity institutions (Instituições Particulares de Solidariedade Social — IPSS), raises new questions in the light of the Court's case-law, according to which the participation, even as a minority participation, of a private undertaking in the capital of a company excludes in any event the existence of similar control,[8] particularly given that, under EU law, an entity does not have to be profit-making before it can constitute an undertaking. Moreover, referring to a decision by which the Portuguese Court of Auditors refused to approve the contract at issue, the statement of reasons for which was set out in the judgment under appeal before it, the referring court asks whether the similar control requirement may be satisfied in the present case, bearing in mind the number of SUCH's non-public partners, its broad autonomy and independence vis-à-vis public authorities, its particular working dynamics, especially its Management Board, and its considerable size and complexity.

16. As regards the second condition governing in-house transactions, the referring court asks whether that condition may be satisfied where, under the provisions of the statutes of SUCH, it may obtain 20% of its turnover by providing services to third-party entities other than its partners.

17. In the light of those considerations, by order of 6 November 2012, the referring court deemed it necessary to stay the proceedings pending before it and to refer to the Court of Justice the following questions for a preliminary ruling:

'(1) Is it compatible with Community doctrine on in-house procurements that a public hospital, having dispensed with the procedure provided for by law for concluding the relevant contract, should award to a non-profit organisation, which it is in partnership with, and whose aim is to carry out a public service mission in the area of health with a view to enhancing the effectiveness and efficiency of its partners, a contract for the provision of hospital catering services within its area of competence, thereby transferring to that organisation responsibility for its functions in that area, if, under the provisions of its statutes, partners of that organisation may be, not only entities from the public sector, but also those from the social sector, given that on the date of the award, out of a total of 88 partners, there were 23 non-governmental organisations (IPSS) from the social sector, all of which were non-profit making and included charitable associations?

(2) Can it be considered that the contractor is subordinate to the decisions of its public partners, in that the latter, on their own or as a whole, exercise a control which is similar to that which they exercise over their own departments, if, under the provisions of its statutes, the contractor must ensure that the majority of the voting rights are held by member partners and are subject to the management, supervision and guidance powers of the member of the Government responsible for health, given that the majority of the Management Board is also made up public partners?

(3) In the light of Community doctrine on in-house procurements, can it be considered that the requirement of "control which is similar" has been fulfilled, if, under the provisions of its statutes, the contractor is subject to the guidance powers of the member of the government responsible for health who is in charge of appointing the President and Vice-President of the Management Board, approving the resolutions of the General Meeting on taking out loans involving a net debt equal to or greater than 75% of the equity recorded in the previous financial year, approving resolutions on amendments to the statutes, approving resolutions of the General Meeting on the dissolution of the contractor and determining how the assets are to be distributed in the event of a dissolution?

8 — See *Stadt Halle and RPL Lochau*, cited in footnote 3, paragraphs 49 and 50.

(4) Does the fact that the contractor is a large and complex organisation, which operates throughout Portuguese territory, is in partnership with most departments and institutions of the SNS, including the majority of the country's hospitals, has an estimated turnover in the order of EUR 90 000 000, has a business that includes varied and complex areas of activity, with very impressive activity indicators, and more than 3 300 workers, and participates in two additional enterprise groupings and in two commercial companies, mean that its relations with its public partners may be described as merely internal or in-house?

(5) Does the fact that the contractor, under the provisions of its statutes, is able to provide services on a competitive basis to non-partner public entities or private entities, be they national or foreign (i) provided that there is no resulting loss or harm caused to the partners, and that it is beneficial to them and to the contractor, whether economically or in terms of enhancement or technical performance, and (ii) provided that the provision of those services does not represent a volume of invoicing that is greater than 20% of its overall annual turnover recorded in the previous financial period, mean that the requirement for in-house procurements, in particular the requirement for the "essential purpose of the activity" under Article 5(2)(b) of the CCP, has been fulfilled?

(6) If the response to any of the above questions is not in itself sufficient to conclude whether or not the requirements under Article 5(2) of the CCP have been fulfilled having regard to Community doctrine on in-house procurements, does an overall assessment of these responses imply the existence of that type of procurement?'

III – Procedure before the Court

18. The order for reference was received at the Court Registry on 7 December 2012. Written observations were submitted by CHS, SUCH, Eurest, the Portuguese and Spanish Governments and the European Commission, all of which made oral submissions at the hearing on 21 November 2013.

IV – Legal analysis

19. It should first be noted that it is clear from the order for reference that it is common ground that the contract entered into between CHS and SUCH constitutes a public contract and, as such, is in principle subject to EU public procurement law, and more specifically to the provisions of Directive 2004/18. [9]

20. However, the issue in the dispute before the national court, to which all of the questions for a preliminary ruling submitted to the Court of Justice by the national court relate, concerns the applicability to that procurement contract of the exemption for so-called in-house awards.

9 — It is in fact common ground that, as mentioned at point 11 above, the value of the procurement contract in dispute before the national court clearly exceeds the threshold laid down in Article 7(b) of the directive, as amended.

A – *The first question*

21. By its first question, the national court asks the Court of Justice, in essence, whether the exemption from the applicability of the provisions of Directive 2004/18, resulting from its case-law on in-house awards, may also take effect where the contractor is a non-profit organisation whose purpose is to perform a public-service mission and, under its statutes, its partners may be not only entities from the public sector but also those from the social sector, and where, at the time the contract was awarded, some, albeit a minority, of its partners did not belong to the public sector but were organisations from the social sector engaged in non-profit-making activities, in particular charitable activities.

22. That question relates to the first of the two criteria established in *Teckal*, namely the criterion that the contracting authority must exercise over the contractor 'control similar' to the control which it exercises over its own departments. [10] It is therefore appropriate to set out in brief, as a preliminary point, the scope of the 'similar control' requirement, as defined in the case-law.

23. In that regard, the Court has determined that similar control exists when the contractor in question is subject to the kind of control which enables the contracting authority to influence its decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions of that entity. In other words, the contracting authority must be able to exercise structural and functional control over the entity. The Court also requires that the control must be effective. [11]

24. Moreover, according to the case-law, where use is made of an entity jointly owned by a number of public authorities, the 'similar control' may be exercised jointly by those authorities, without it being essential for such control to be exercised individually by each of them. [12]

25. However, in accordance with settled case-law, the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments. [13]

26. That said, turning specifically to the question referred to the Court, it should first be pointed out that the fact that the contracting authority is set up in a form which is of a private-law nature, such as an organisation, in no way excludes per se the application of the in-house exemption. [14] Indeed, the Court has on several occasions recognised that the exemption may apply to a contracting entity set up under private law, such as, a company limited by shares. [15]

27. The fact that the contractor to which the contract is directly awarded is non-profit-making is not significant for the purposes of applying the in-house exemption. In point of fact, the application of that exemption is based on the internal relationship which exists between the contracting authority and the contractor, as a result of which there is no concordance of two autonomous wills

10 — See point 1 above.

11 — See *Econord*, cited in footnote 3, paragraph 27 and the case-law cited.

12 — See *Econord*, paragraph 28 and the case-law cited.

13 — See the judgments in *Stadt Halle and RPL Lochau*, cited in footnote 3, paragraph 49; Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705, paragraph 46; Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 31; Case C-337/05 *Commission* v *Italy* [2008] ECR I-2173, paragraph 38; Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 30; Case C-573/07 *Sea* [2009] ECR I-8127, paragraph, 46; Case C-196/08 *Acoset* [2009] ECR I-9913, paragraph 53; and Case C-215/09 *Mehiläinen and Terveystalo Healthcare* [2010] ECR I-13749, paragraph 32.

14 — See, to that effect, the judgment in Case C-573/07 *Sea* [2009] ECR I-8127, paragraph 41. See also point 63 of the Opinion of Advocate General Stix-Hackl in *Stadt Halle and RPL Lochau*.

15 — As well as the judgment in *Sea*, cited in footnote 14, see, inter alia, the judgments in Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 33 and *Econord*, cited in footnote 3, paragraphs 29 and 32.

representing separate legal interests.[16] It is not therefore contingent on the legal nature of the contractor or on whether or not that entity is profit-making. It is, incidentally, clear from the case-law that the fact that an entity, and in particular an organisation, is non-profit making, does not in any way preclude it from engaging in economic activity and is not, consequently, of itself capable of exempting that entity from the application of EU procurement law.[17]

28. Moving on then to the inclusion among the contractor's partners of entities from not just the public but also from the social sector, it should be borne in mind that, as set out in points 2 and 25 above, the Court has established, in what is now settled case-law, that the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority, which is planning to make the in-house award, is also a participant in any event excludes the possibility of that contracting authority exercising the requisite similar control over the company in question.

29. As noted incidentally by the referring court itself, according to the case-law, it is not possible for the contracting authority to exercise similar control over the contractor, if private interests are present in the latter in the form of a shareholding by an *undertaking* in a *company's share capital*.

30. The situation of SUCH, however, differs from a case of that nature since, first, it is not established in the form of a company and does not therefore hold share capital, and, second, as the private social solidarity institutions which constitute its partners are not public in nature, they are not necessarily undertakings in the strict sense.

31. This, therefore, is the pivotal issue raised by the first question referred: is it necessary to apply to a situation such as that of SUCH the principle developed in the case-law, according to which the presence of private interests in the contractor precludes the possibility of the contracting authority exercising similar control over the contractor, thus ruling out the possibility of making direct awards to that contractor based on the in-house exemption?

32. In that regard, I would first draw attention to the fact that the Court has reiterated, on several occasions, that the primary objective of EU rules on public procurement is the free movement of services and the widest possible opening-up to competition in all of the Member States.[18] That involves an obligation on all contracting authorities to apply EU procurement law where the conditions for its application are satisfied, with the result that any derogation from the application of that obligation must be interpreted *strictly*.[19]

33. From that perspective, I would point out that, according to the case-law, there are two reasons for precluding the existence of an in-house relationship justifying the direct award of a contract where private interests have a capital presence in the contractor. As the Court has in fact stated, first, the relationship between a public authority which is a contracting authority and its own departments is governed by considerations and requirements proper to the pursuit of objectives in the public interest. Any private capital investment in an undertaking, on the other hand, follows considerations proper to private interests and pursues objectives of a different kind.[20]

16 — In that connection, see in greater detail my recent Opinion in *Datenlotsen Informationssysteme*, cited in footnote 3, at point 41, where there are extensive references to case-law.

17 — See the judgments in Case C-119/06 *Commission* v *Italy* [2007] ECR I-168, paragraphs 37 and 41, and Case C-305/08 *CoNISMa* [2009] ECR I-12129, paragraph 45.

18 — See, to that effect, the judgments in *CoNISMa*, cited in footnote 17, paragraph 37 and the case-law cited, and in Case C-340/04 *Carbotermo and Consorio Alisei* [2006] ECR I-4137, paragraph 58.

19 — See, among others, the judgments in *Stadt Halle and RPL Lochau*, cited in footnote 3, paragraphs 44 and 46, and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 63, as well as *ANAV*, cited in footnote 13, paragraph 26. See also point 38 of my recent Opinion in *Datenlotsen Informationssysteme*.

20 — See *Stadt Halle and RPL Lochau*, cited in footnote 3, paragraph 50, and *Commission* v *Austria*, cited in footnote 13, paragraph 47.

34. Second, the Court has also stated that the award of a public contract to a semi-public company without calling for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment of the persons concerned, in particular in that such a procedure would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors. [21]

35. I consider that both of the considerations set out by the Court in relation to the participation of a private undertaking in a company's share capital apply to the kind of situation which, based on the information in the documents before the Court, is that of SUCH.

36. In point of fact, first, the conclusion that the pursuit of private interests is underpinned by considerations different from the considerations that inform the pursuit of public interests is not, in my view, solely confined to cases in which private investment is present in a company. There is no question that the participation in a contracting entity of entities such as private social solidarity institutions is driven by reasons and interests of a private nature, such as, for instance, charitable interests whose objectives, although commendable, do not necessarily tally with the public interest. Indeed, although it may in some cases be possible to describe them as being in the general interest, such objectives exhibit features characteristic of private interests, having, for instance, religious [22] or voluntary connotations, and, while they may complement the public interest, they actually fall outside it.

37. Second, since non-profit organisations, such as the charitable organisations which are partners of SUCH, are not barred from engaging in economic activity in competition with other operators and may take part in calls for tender, [23] the direct award of a public contract under the in-house exemption is likely to offer here also, as in the case of companies, an advantage for those operators over their competitors.

38. In my view, in the light of the foregoing considerations, and at least as the law stands, [24] it cannot be accepted that a contracting authority is able to exercise control similar to the control which it exercises over its own departments over a non-profit organisation whose partners include, albeit as a minority, non-public entities of a private-law nature which pursue private interests, such as non-profit organisations which pursue interests of a charitable and solidarity-based nature. It seems to me, consequently, that the direct award of a procurement contract by a contracting authority to an entity of that nature, on the basis of the in-house exemption, must be excluded. It will then, clearly, be for the national court to make, where appropriate, the necessary checks in that regard.

39. In those circumstances, it seems to me to be necessary to set out a number of additional considerations.

40. First, the fact that even the minority participation in a contractor of entities which pursue private interests, even if those entities are non-profit-making, precludes, as the law stands, the existence of an in-house relationship between one or more contracting authorities and that entity, in no way implies that the objectives of organisations promoting social solidarity, or of voluntary or charitable organisations, may not be taken into consideration in the context of procurement law also. In that

21 — See *Stadt Halle and RPL Lochau*, cited in footnote 3, paragraph 51.

22 — Which, subject to the necessary checks which it is for the national court to make, seems to apply to the 'Misericordiàs' associated with SUCH.

23 — *Commission* v *Italy*, cited in footnote 13, paragraphs 37 and 41, and CoNISMa, cited in footnote 17, paragraph 45.

24 — In that regard, it is in fact necessary to point out that the latest version of the Proposal for a Directive of the European Parliament and of the Council on public procurement, currently under discussion within the Council (Council document No 11745/13) and cited by the Commission at the hearing, lays down as a condition for in-house awards the absence of direct private participation in the capital of the legal person over which the contracting authority exercises similar control, with the exception, however, of participation that is non-controlling and non-blocking and does not confer a decisive influence on the decisions of the controlled person. It is entirely possible that, if that provision is retained in the final version of the new directive, it may, in certain specific cases, result in an interpretation different from the interpretation based on the current state of legislation.

connection, I must point out, first, that solidarity is specifically recognised in Article 2 of the Treaty on European Union as one of the values underpinning the model of European society and that, consequently, entities actively promoting that value contribute to the construction of a European society in keeping with the spirit of the Treaties.[25] Second, and in line with that observation, it must be noted that social and solidarity-related considerations do not fall outside procurement law, as may be inferred, for example, from Article 26 of Directive 2004/18 which provides that the conditions governing the performance of a contract may concern social considerations.[26]

41. Second, it should be pointed out that the mere fact that the status of the non-profit organisation awarded the contract means that its partners may include entities from not only the public but also from the social sector is not of itself capable of precluding the existence of an in-house relationship, in circumstances in which, at the time when the contract was awarded, that organisation's partners were public authorities exclusively. Indeed, it would not be consistent with the principle of legal certainty to allow the mere possibility that private parties may participate in an organisation, which is provided for under its statutes, to keep in indefinite suspense the determination of whether or not that organisation is entirely public in character. It follows that, in a situation in which public authorities only are members of the organisation in question at the time when the contract at issue is awarded, opening of participation in that organisation to private entities may be not taken into consideration unless there is, at that time, a real prospect, in the short term, of such an opening. The mere possibility that private persons may hold capital in an organisation is not, therefore, enough to support the conclusion that the condition relating to similar control by the public authority has not been satisfied.[27]

42. However, if a contract were to be attributed, without being put out to competitive tender, to an organisation all of whose members were public authorities and, during the period for which that contract was valid, private entities were admitted as members of that organisation, this would constitute the alteration of a fundamental condition of the contract, which would require the contract to be put out for competitive tender.[28]

43. In the light of all of the foregoing considerations, it is, in my view, necessary to answer the first question referred by the national court to the effect that the exemption from the applicability of EU procurement law provided for in relation to in-house awards may not take effect if the contractor to which the contracting authority plans directly to award the contract, without a competitive tender, is an entity governed by private law whose partners include, albeit as a minority, entities pursuing private interests.

B – *The second and third questions*

44. By its second and third questions, which I consider may be analysed together, the national court asks whether 'similar control' may be exercised over a contractor in circumstances in which certain provisions of its statutes confer particular powers, within the bodies established under its statutes, on its partners governed by public law or on the member of the government responsible for the sector.

25 — In that regard, it may, for example, be pointed out that the Court has accorded the Member States a power of discretion specifically in relation to the organisation of their social welfare systems, by recognising that they have the right to admit private operators to that system subject only to the condition that such operators are non-profit-making. See Case C-70/95 *Sodemare and Others* v *Regione Lombardia* [1997] ECR I-3395, paragraph 32.

26 — See also, in that regard, recital 46 in the preamble to the directive.

27 — See, to that effect, *Sea*, cited in footnote 13, paragraphs 49, 50 and 51.

28 — See, to that effect, *Sea*, paragraph 53.

45. More specifically, by its second question, the national court asks the Court of Justice, in essence, whether 'similar control' is exercised, on a contractor by its public-sector partners, on their own or as a whole, in a situation in which, under the provisions of its statutes, the contractor must ensure that the majority of the voting rights are held by the partners which answer to and are subject to the management, supervision and guidance powers of the member of the government responsible for health, and in which the majority of the Management Board is also made up public partners.

46. By its third question, the national court asks, in essence, whether 'similar control' is exercised in a situation in which, under the provisions of its statutes, the contractor is subject to the guidance powers of the member of the government responsible for health who is in charge of appointing the President and Vice-President of the Management Board, and for approving certain resolutions of the General Meeting, such as those provided for by Article 3 of the statutes of SUCH. [29]

47. It is, however, clear from the answer to the first question referred that it is not possible for a contracting authority to exercise over a contractor control similar to the control which it exercises over its own departments, if entities that pursue private interests have even a minority participation in that contractor. It seems to me to follow logically from that finding, which reflects a strict interpretation of the exemption, in accordance with the case-law cited in point 32 above, that the participation of private interests in the contractor cannot be offset on the basis of provisions in that contractor's statutes which confer particular powers of supervision and guidance on its remaining public partners or on the member of the government responsible for the sector. Consequently, in my view, both the second and third questions must be answered in the negative.

48. I would also point out, incidentally, that the fact that the contractor is subject to powers of guidance of a direct [30] or indirect [31] nature, which are exercised by the member of the government responsible for the sector, does not necessarily mean that the contracting authorities exercise over the contractor, on their own or as a whole, control which is similar to the control which they exercise over their own departments.

49. It is in fact true that, depending on the specific circumstances of the individual case, the power of control over the decision-making bodies established under the company's statutes may be regarded as one of the factors enabling the contracting authorities which wield that control to exercise over the contractor control similar to that which they exercise over their own departments. [32] It is also in theory true that it may be possible that, in certain specific circumstances of a particular case, [33] supervision and guidance powers conferred on public authorities which control the contracting authorities, which in turn exercise control over the contractor, may contribute to curtailing the contractor's freedom of choice in a way that makes it possible to confirm the exercise of similar control by the contracting authorities over that contractor.

50. However, notwithstanding those considerations, the existence of similar control must be determined specifically by reference to the contracting authorities, which must exercise that control over the entity to which they intend directly awarding the contract, and not by reference to the State as such through the intermediary of the member of the government responsible for the sector.

29 — See point 9 above.

30 — As in the case of the provision of the statutes at issue in the third question, namely Article 3 of the statutes of SUCH.

31 — As in the case of the provision of the statutes at issue in the second question, namely Article 7(2) of the statutes of SUCH.

32 — See the judgment in *Sea*, cited in footnote 13, paragraph 89; to that effect, see also the judgment in *Coditel Brabant*, cited in footnote 13, paragraph 34; however, see also the judgment in *Parking Brixen*, cited in footnote 3, paragraph 69.

33 — But a case in which there is no private participation in the contractor.

51. In the light of the foregoing considerations, I consider that it is necessary to answer the second and third questions to the effect that, where there is even minority private participation in a contractor by entities which pursue private interests, provisions in that contractor's statutes which confer particular supervision or guidance powers on its remaining public partners, or the member of the government responsible for the sector, do not make it possible to confirm the exercise of similar control over that contractor, which is capable of justifying the application of the in-house exemption.

C – *The fourth question*

52. By the fourth question, the national court asks the Court of Justice, in essence, whether the fact that the contractor is a large and complex organisation, which operates throughout the national territory means that its relations with its public partners may be described as in-house, such as to justify directly awarding a contract to it.

53. That question, like the first three questions referred, concerns the first '*Teckal* criterion', namely the existence of 'similar control'. In point 23 above, I described the scope of that criterion, as defined in the case-law, namely that it is a form of control which is structural, functional and effective. In point 27 above, I set out, however, that according to the case-law, the basis for the in-house exemption is the contractor's lack of autonomy.

54. It is then clear from those considerations that the size and complex nature of an entity do not of themselves constitute factors which make it possible positively to confirm that an authority exercises structural and functional control effectively over an entity and, therefore, to describe the relationship which exists between them as 'similar control' within the meaning of the case-law.

55. That does not, however, mean that such factors are totally irrelevant to an analysis of whether similar control exists. The size and complex nature of an entity may, it seems to me, provide indicators and, as part of an overall assessment of all of the circumstances of the specific case, may be contributory factors in reaching the conclusion that the entity in question possesses a degree of autonomy which precludes the existence of similar control. I therefore consider that the answer to the fourth question must be to that effect.

D – *The fifth question*

56. By its fifth question, the national court asks the Court of Justice, in essence, whether the in-house exemption can apply if, under the provisions of its statutes, a contractor is able to provide services on a competitive basis to non-partner public entities or private entities, provided, first, that there is no resulting loss or harm caused to the partners, and that it is beneficial to them and to the contractor, and, second, that the provision of those services does not represent a volume of invoicing that is greater than 20% of its overall annual turnover recorded in the previous financial period.

57. While the first four questions all concerned the first *Teckal* criterion, namely the existence of 'similar control', the fifth question concerns the second criterion which must be satisfied in order for the in-house exemption to apply, namely the condition that the contractor must carry out the essential part of its activities with the controlling contracting authority or authorities.

58. I must draw attention here to the fact that the Court has made clear that the second *Teckal* criterion is aimed precisely at ensuring that the rules on procurement remain applicable in the event that an undertaking controlled by one or more authorities is active in the market and therefore likely to be in competition with other undertakings. The Court has in fact pointed out that an undertaking is not necessarily deprived of freedom of action merely because the decisions concerning it are controlled by the controlling authority, if it can still carry out a large part of its economic activities

with other operators.[34]

59. The Court has also made clear that the undertaking in question carries out the essential part of its activities with the controlling authority, within the meaning of *Teckal*, only if that undertaking's activities are intended *mostly* and *principally* for that authority alone, and any other activities are of only *marginal* significance.[35] Where several contracting authorities control an undertaking, the activities to be taken into account are those which that undertaking carries out with all of those contracting authorities together.[36]

60. Moreover, in its judgment in *Asociación Nacional de Empresas Forestales*,[37] the Court held that, subject to the necessary findings of fact by the national court, that condition was satisfied in a case in which the contractor carried out some 90% of its activities with the public authorities and bodies which controlled it.[38]

61. In those circumstances, as regards, first, the provision under its statutes according to which the contractor at issue is able to provide services on a competitive basis to third parties only provided that there is no resulting loss or harm caused to its partners and that it is beneficial to them, I consider that, since it acts as a brake on that contractor's pursuit of activities in the free market, that provision cannot constitute an obstacle to the application of the second *Teckal* criterion.

62. The question whether that condition is satisfied if the contractor obtains 20% of its overall annual turnover from non-partner public entities or private entities, that is to say from, third parties, appears, however, to be of greater significance. In that regard, it seems to me that it is necessary to adopt a strict approach to interpreting the exemption in question, as required by the case-law cited in point 32 above. From that point of view, in a situation in which the contractor carries out 20% of its activity in the free market, and not with the controlling authorities, it does not seem to me to be possible to consider that, as required by the case-law cited in point 59 above, it is carrying out its activity *mostly* and *principally* for the controlling authorities alone, and that, consequently, any other activity is of only *marginal* significance. In effect, an activity which accounts for a fifth of an entity's total activity cannot, as far as I am concerned, be defined, purely in quantitative terms, as a *marginal* activity.

63. I therefore consider that, as the law stands,[39] it will be necessary to answer the fifth question to the effect that the in-house exemption cannot apply if, under the provisions of its statutes, a contractor is able to provide services on a competitive basis to non-partner public entities or private entities, up to the level of 20% of its overall annual turnover recorded in the previous financial period.

34 — See the judgment in *Carbotermo and Consorio Alisei*, cited in footnote 3, paragraphs 60 and 61.

35 — Ibid., paragraphs 62 and 63 (emphasis added).

36 — Ibid., paragraphs 70 and 71.

37 — Cited in footnote 3.

38 — Ibid., paragraph 63.

39 — It should be pointed out that, in the latest version of the Proposal for a Directive of the European Parliament and of the Council on public procurement, cited in footnote 24, it is explicitly provided that the in-house exemption may apply provided that more than 80% of the contractor's activities are carried out for the contracting authority or authorities which control it (see Article 11(1)(b)). It is clear that, if that threshold is confirmed in the directive, the legislature will have made a choice which will change the state of the law in the future. In my view, that does not, however, have any part to play in the interpretation of the law as it stands.

E – *The sixth question*

64. It will be necessary to answer the sixth question referred, as requested by the national court itself, only if the response to any of the first five questions is not in itself sufficient to conclude whether or not the requirements for the application of the in-house exemption have been fulfilled. In those circumstances, the national court asks whether an overall assessment of those responses implies that the in-house exemption applies in a case such as that pending before it.

65. In the light of the answers given to the first five questions, I consider that, should the Court adopt the approach which I have suggested, it need not answer that question. It is clear from those answers, and in particular the answers to the first and fifth questions, that in a case such as that pending before the national court, as the law stands,[40] that exemption may not apply, without there being any need to make an overall assessment of the responses. I therefore propose that the Court refrain from answering that question.

V – Conclusion

66. In the light of the above considerations I therefore propose that the Court should answer the questions referred by the Supremo Tribunal Administrativo in the following terms:

The exemption from the applicability of EU procurement law provided for in relation to in-house awards may not take effect if the contractor to which the contracting authority plans directly to award the contract, without a competitive tender, is an entity governed by private law whose partners include, albeit as a minority, entities pursuing private interests. In such a case, the existence of provisions in that contractor's statutes which confer particular supervision or guidance powers on its remaining public partners, or the member of the government responsible for the sector, do not make it possible to confirm the exercise of similar control over that contractor, which is capable of justifying the application of the in-house exemption.

The size and complex nature of an entity may provide indicators and, as part of an overall assessment of all of the circumstances of the specific case, may be contributory factors in reaching the conclusion that the entity in question possesses a degree of autonomy which precludes the existence of similar control.

The in-house exemption cannot apply if, under the provisions of its statutes, a contractor is able to provide services on a competitive basis to non-partner public entities or private entities, up to the level of 20% of its overall annual turnover recorded in the previous financial period.

40 — See footnotes 24 and 38.