Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 19 July 2012 [1]

Case C-182/11

Econord Spa
v
Comune di Cagno,
Comune di Varese
(Reference for a preliminary ruling from the Consiglio di Stato, (Italy))
Case C-183/11
Econord Spa
v
Comune di Solbiate,
Comune di Varese

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

(Management of the municipal hygiene service by a municipal company in which the municipality has a minority shareholding — Award without call for tenders — In-house contracts — Exercise by the contracting entity over that company of control similar to that which it exercises over its own departments — Existence of a number of contracting entities — 'Asymmetry' between the different contracting entities)

I – Introduction

1. In these two present references for a preliminary ruling that have been joined in these proceedings, the Consiglio di Stato formulates its uncertainties concerning the compatibility with Union law of an arrangement for the provision of public services in which there was no public procurement procedure. More specifically, these proceedings concern a situation in which a number of Italian municipal councils have a token shareholding in a public company predominantly controlled by Varese Municipal Council that provides the public urban hygiene service in all those municipalities.

2. In those terms, the present case once again raises before the Court of Justice the issue of in-house providing. The difficulty that has specifically arisen on this occasion is, in short, that of the existence of a number of public entities that start to use a municipal company [a company set up in order to provide certain municipal services] created by another public entity, which has incomparably greater influence and which, as a consequence, retains a clearly dominant decision-making capacity within that municipal company compared with all the other entities together. In what circumstances is it

1 — Original language: Spanish.

lawful for each of those minor entities to resort to the in-house option? Further and more specifically, in what circumstances may such entities be regarded as exercising over the municipal company control similar to that which they exercise over their own departments, as required by the *Teckal* case-law? [2] That is, in summary, the issue confronting the Court of Justice on this occasion.

3. The case-law has already dealt in the past with a number of situations similar to this. In them all, the Court proceeded to examine on a case-by-case basis the position, according to the statutes, of the public entity concerned on the management bodies of the company set up to provide certain municipal services in order to determine whether the similar control over that contractor company was in fact exercised collectively. The case now referred by the Consiglio di Stato implicitly invites the Court to go beyond that case-by-case examination with a view to establishing a number of objective criteria which enable an assessment of the type of capacity to influence the running of the company which must be required of a public entity in order for it to be able to rely on the in-house exception.

II – Legal framework

A – *European Union law*

4. In accordance with Article 1 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [3] '"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' (paragraph 2(a)), while '"Service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment' (paragraph 4).

B – *National law*

5. Article 30 of Legislative Decree No 267 of 18 August 2000 (Consolidated Law on the rules governing local authorities) [4] grants local authorities the right to enter into agreements with each other 'in order to discharge certain functions and provide certain services in a coordinated manner'.

6. The version of Article 113 of Legislative Decree No 267 in force at the material time, entitled 'Management of networks and provision of financially significant local public services', provided as follows in paragraphs 4 and 5:

'4. Where the management of the networks, installations and other facilities is separated from the activity of providing the services, the local authorities, acting individually or in partnerships, shall have recourse to:

(a) entities created for the purpose, in the form of companies wholly publicly owned, on condition that the public authorities holding the share capital exercise over the company control comparable to that exercised over their own departments, and that the company carries out the essential part of its activities with the controlling public authority or authorities;

2 — Case C-107/98 *Teckal Srl* v *Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* [1999] ECR I-8121 ('*Teckal*').

3 — OJ 2004 L 134, p. 114.

4 — GURI No 227, 28 September 2000, ordinary supplement, p. 162.

…

5. Service contracts are to be awarded in accordance with the sectoral rules and the legislation of the European Union, with entitlement to provide the service being granted to:

…

(c) companies wholly publicly owned, on condition that the public authority or authorities holding the share capital exercise over the company control comparable to that exercised over their own departments and that the company carries out the essential part of its activities with the controlling public authority or authorities.'

III – The main proceedings and the question referred for a preliminary ruling

7. On a date that is not recorded in the case-file, Varese Municipal Council incorporated an in-house company limited by shares, ASPEM SpA, to manage, inter alia, the urban public hygiene service in its area. At the material time, that company was almost wholly owned by Varese Municipal Council.

8. In 2005, by a number of decisions adopted by their local assemblies, the municipal councils of Cagno and Solbiate resolved to select, as the preferred system for managing the urban hygiene service, the system managed in coordination with other municipalities in accordance with Articles 30 and 113(5)(c) of Legislative Decree No 267/2000, and they also approved for that purpose the agreement concluded with Varese Municipal Council for the management of the urban hygiene service by ASPEM. Finally, each of those municipal assemblies resolved to acquire one share in ASPEM. Parallel decisions were adopted in a number of other small municipalities in the province of Varese.

9. According to the data provided by the Italian Government, the share capital of ASPEM is EUR 173 785, which is represented by an equivalent number of shares each with a nominal value of EUR 1. At the material time, Varese Municipal Council held 173 467 shares while the remaining 318 shares were divided between 36 municipal councils in the province of Varese, each of which held individual shareholdings of between 1 and 19 shares.

10. In addition, both local authorities, inter alia, the other municipal councils concerned, concluded with ASPEM a shareholders' agreement under which they had the right to be consulted, to appoint a member of the supervisory council and to appoint a member of the management board, in agreement with the other municipal councils participating in the shareholders' agreement.

11. The municipal councils of Cagno and Solbiate took the view that, with all those precautions, the award of the service to ASPEM satisfied the conditions of the in-house exception.

12. However, ECONORD SpA submitted two extraordinary petitions to the Head of State, seeking the annulment of those resolutions of the municipal councils of Cagno (Case C-182/11) and Solbiate (Case C-183/11), claiming, inter alia, breach of the principle of similar control, since the shareholdings of those municipal councils in ASPEM are very small. In the context of those proceedings, an opinion was sought from the Consiglio di Stato, which has made the present reference for a preliminary ruling.

13. The Consiglio di Stato took the view that there are uncertainties concerning the interpretation of the case-law relating to the conditions of the so-called in-house exception and it therefore referred the following question to the Court of Justice for a preliminary ruling (the wording is identical in the two cases which have been joined in these proceedings):

'Must the principle that the position of an individual public authority holding shares in a municipal company [(a company set up to provide certain municipal services)] is irrelevant also apply where one of the partner municipalities holds a single share in the municipal company and the shareholders' agreements entered into by the partner public authorities are not such as to give the shareholding municipality any effective power of control over the company, with the result that the company shareholding may be regarded merely as formal cover for a contract for the provision of services?'

IV – The procedure before the Court of Justice

14. The references for preliminary rulings were lodged at the Registry of the Court of Justice on 27 July 2011.

15. Written observations were submitted by the municipal councils of Cagno and Solbiate (jointly), Italy, Austria, Poland and the Commission. No oral hearing was held in these proceedings.

V – Analysis of the question

A – *Preliminary remarks*

16. Before proposing a reply to the question, I must make a number of preliminary remarks. First of all, I believe that the pleas of inadmissibility raised by the municipal councils of Cagno and Solbiate and by the Italian Government must be rejected.

17. On the one hand, the defendant municipal councils claim that, in June 2011, after the events which gave rise to the present reference for a preliminary ruling and just one month before the reference was made, the disputed service was awarded to ASPEM, this time after a public call for tenders. The defendants submit that this fact renders the petitions pointless and the reference for a preliminary ruling inadmissible. However, I believe that that plea of inadmissibility cannot be accepted because it must be presumed that the main proceedings still need to be disposed of from the point of view of the interests of Econord.

18. Nor, in my opinion, must the Court accept the Italian Government's plea that the reference for a preliminary ruling is inadmissible on the grounds that it lacks a sufficient description of the legal and factual context of the case. The Italian Government asserts, in particular, that the Consiglio di Stato does not provide sufficient information concerning the composition of ASPEM's share capital or its company statutes. However, I believe that, using the information provided to it, the Court will be able to give a helpful reply to the Consiglio di Stato, without prejudice, of course, to a possible referral of the assessment of certain facts to the national court.

19. Besides those two pleas of inadmissibility expressly raised by the parties, to my mind it is appropriate to state at this juncture that, although in the instant case the Consiglio di Stato is acting in the exercise of its consultative functions (giving an opinion in the context of an extraordinary petition to the President of the Republic), the case-law has clarified that, in such cases, the Consiglio di Stato may be regarded as a court or tribunal within the meaning and for the purposes of

Article 267 TFEU.[5]

20. Lastly, I should like to point out that it is not clear from the case-file whether the disputed service was covered by a management contract subject to Directive 2004/18 or a concession, a matter which essentially depends on the arrangements for the remuneration of ASPEM.[6] However, that factor is completely irrelevant as regards the question referred, since the Court has explained that its case-law on the in-house exception is relevant for the purposes of both the interpretation of Directive 2004/18, applicable to certain contracts, and the interpretation of Articles 25 TEU, 49 TFEU and 56 TFEU and the general principles of which they are the specific expression, which must be respected in the award of concessions.[7]

B – *The reference for a preliminary ruling*

21. The present case concerns, once again and in quite clear terms, the interpretation of the *Teckal* case-law, in other words, the statement of the conditions on which a public entity is permitted to entrust another legal entity with the provision of a service within its sphere of competence without the need first to issue a call for tenders, provided that 'the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments' (the first *Teckal* condition) and that 'that person carries out the essential part of its activities with the controlling local authority or authorities' (the second *Teckal* condition).[8] However, it should be stated now that the present reference for a preliminary ruling focuses on the assessment of the first *Teckal* condition, while the second condition is not in issue at all.

22. The starting point for the question referred by the Consiglio di Stato is an alleged 'principle that the position of an individual public authority holding shares in a municipal company ... is irrelevant', a principle which the Consiglio di Stato appears to deduce from the *Coditel* case-law.[9] However, that expression is rather unfortunate, particularly because it could suggest that the Court went much further in that case-law than, in my opinion, it actually intended. In order to give a helpful reply to the national court, therefore, it is necessary to establish whether, in fact, such a principle was formulated in the case-law on in-house contracts.

23. In short, I believe that the question referred by the Consiglio di Stato is essentially aimed at determining the circumstances in which it is possible to conclude that a public entity which has a minority shareholding, even minimal, in a municipal company, can be said to exercise over that company a control similar to that which it exercises over its own departments and, more specifically, whether that condition is satisfied in such a case as this, in which, in addition, 'the shareholders' agreements entered into by the partner public authorities are not such as to give the shareholding municipality any effective power of control over the company'.

24. On the basis of that reading of the question, I shall divide my analysis into two parts. First of all, in the case of shares in a municipal company being held by a public entity in a dominant position and another group of public entities in a weaker position, I shall endeavour to determine the particular conditions that must be satisfied in order for those entities to be regarded as exercising over the municipal company control similar to that which they exercise over their own departments. Second, based on the information provided by the national court, I shall analyse whether those conditions are satisfied in the present case.

5 — See Joined Cases C-69/96 to C-79/96 *Garofalo and others* [1997] ECR I-5603, paragraphs 25 to 27, and Case C-305/08 *CoNISMa* [2009] ECR I-12129, paragraph 25. See also, with regard to the Nederlandse Raad van State, Case 36/73 *Nederlandse Spoorwegen* [1973] ECR 1299.

6 — On the state of the case-law in relation to this point, see Case C-206/08 *Eurawasser* [2009] ECR I-8377, paragraph 53 et seq.

7 — Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 49; Case C-485/03 *Parking Brixen* [2005] ECR I-8585, paragraph 62; and Case C-573/07 *Sea* [2009] ECR 8127, paragraphs 35 to 37.

8 — *Teckal*, paragraph 50.

9 — Case C-324/07 *Coditel Brabant* [2008] ECR I-8457; '*Coditel*'.

C – Similar control over a company in which shares are held by a number of public entities where there is a situation of clear asymmetry in the influence of one of those entities vis-à-vis the others

1. Preliminary points

25. At the outset, it must be observed that, in accordance with settled case-law, and as is perfectly logical, there is nothing to preclude the requirement of similar control from being satisfied where the shares in the contractor company belong not just to one but to a number of public entities.

26. In the clearest terms, the *Coditel* judgment stated, in these words, that '[t]he control exercised over the concessionaire must be effective, but it is not essential that it be exercised individually', for requiring 'the control exercised by a public authority in such a case to be individual would have the effect of requiring a call for competition in the majority of cases where a public authority seeks to join a grouping composed of other public authorities, such as an inter-municipal cooperative society'.[10] That case-law was confirmed in *Sea*, paragraph 63 of which states that 'if a public authority becomes a minority shareholder in a company limited by shares with wholly public capital for the purpose of awarding the management of a public service to that company, the control that the public authorities which are members of that company exercise over it may be classified as similar to the control they exercise over their own departments when it is exercised by those authorities jointly'.

27. Further, in the same vein, the fact that the contracting authority holds, alone or together with other public authorities, all the share capital in the municipal company tends to indicate that that contracting authority exercises over that company a control similar to that which it exercises over its own departments.[11] However, that assertion must be subject to two important qualifications.

a) The participation of a private shareholder means that it is impossible for public entities to exercise similar control over the company

28. First of all, 'the holding, even a minority holding, of a private undertaking in the capital of a company in which the contracting authority in question also has a holding too means that, on any view, it is impossible for that contracting authority to exercise over that company control similar to that which it exercises over its own departments'.[12] That statement could be relevant in the present case because, although it appears that, at the time when the disputed awards were made, the share capital of ASPEM was entirely in public hands, the Commission has pointed out that, on 15 June 2009, the A2A group, a company limited by shares which might be held by private shareholders, took control of the company.

29. In accordance with the *Sea* judgment, the fact that after the direct award of the service contract, 'but still during the period for which that contract was valid, private shareholders were permitted to hold capital in that company would constitute the alteration of a fundamental condition of the contract, which would require the contract to be put out for competitive tender'.[13] Accordingly, in the present case, if it is established that private capital has entered the company during the period of the contract or concession, that fact will be sufficient to make it impossible from the outset for the requirement of similar control to be satisfied. In any event, it is for the national court to confirm those points.

10 — *Coditel*, paragraphs 46 and 47.

11 — See, inter alia, Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 37; '*Carbotermo*'.

12 — *Sea*, paragraph 46 and case-law cited therein.

13 — *Sea*, paragraph 53.

b) The wholly public nature of a company is not a decisive indication

30. Second, it must be pointed out at this juncture that the wholly public nature of a company set up to provide certain municipal services is not regarded, in case-law, as being a decisive indication that each and every entity which participates in that company exercises over it a control similar to that which it exercises over its own departments. [14]

31. Therefore, in addition to the wholly public nature of the municipal company, the assessment of the first *Teckal* condition must, as the Court has observed, take account of 'all the legislative provisions and relevant circumstances', and '[i]t must follow from that examination that the successful tenderer is subject to a control enabling the contracting authority to influence that company's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions of that company'. [15]

2. The alleged 'principle of irrelevance'

32. Turning now to the substance of the question before the Court, it is appropriate to begin by considering the wording which the national court uses to summarise the case-law concerned, that is the so-called principle of the irrelevance of the position of an individual public authority holding shares in a municipal company.

33. As we have seen, according to the judgments in *Coditel* and *Sea*, even where a public authority has a very minor shareholding in the contractor company, the condition of similar control may be satisfied provided that that control, exercised jointly with the other proprietors of the contractor company, is effective.

34. In my opinion, this means that the contracting public entity must be able to participate in the effective control of the contractor company, at least in proportion to the relative influence of that contracting public entity within the group of public entities which jointly control the company. For the purposes of evaluating that relative influence, use may be made of criteria such as the budget volume of the local authority, its population and its needs in relation to the service managed by the company.

35. Accordingly, using the terminology of the reference for a preliminary ruling, what is 'irrelevant' for the purposes of the first *Teckal* condition is not the position or participation of the public authority in the effective control of the contractor company but rather its position or participation in the capital of that company. Both (participation in the management and participation in the capital) may be minority but neither may be completely non-existent.

14 — *Carbotermo*, paragraph 37, and *Sea*, paragraph 45. To the same effect, see *Coditel*, paragraph 31.

15 — *Parking Brixen*, paragraph 65; *Carbotermo*, paragraph 26; Case C-371/05 *Commission* v *Italy* [2008] ECR I-110, paragraph 24; *Coditel*, paragraph 28; and *Sea*, paragraph 65.

36. Therefore, the classification as a 'principle of irrelevance' made by the reference for a preliminary ruling must be significantly qualified, and it must be stated that, where there is collective control of a municipal company, the condition of similar control will be satisfied only if each of the contracting public entities itself has the capacity to influence, to a greater or lesser extent, both the 'strategic objectives' and the 'significant decisions' of the municipal company.[16] If a small (even token) shareholding in the company were all that were required for establishing the in-house exception, the condition of similar control would be rendered completely meaningless.[17]

3. The criteria of lack of independence and lack of market orientation

37. Having said that, the conditions which must be satisfied for a finding that a public entity with a minority shareholding exercises a so-called 'decisive influence' over the decisions and objectives of a municipal company may be confined to two categories: lack of independence and lack of market orientation.

38. It should be recalled that in the judgment of 19 April 2007 in *Asociación Nacional de Empresas Forestales* (*Asemfo*),[18] the Court accepted that four Spanish Autonomous Communities exercised over the public undertaking Tragsa a 'control similar to that which they exercise over their own departments', even though all those Autonomous Communities together held only 1% of its capital (0.25% each), as opposed to the 99% which belonged to the Spanish State. That situation was not very different from the one dealt with in *Consorcio Aziende Metano* (*Coname*), in which, just two years earlier, the Court held that a shareholding of 0.97% in the contractor company was, in itself, too small to enable similar control.[19] However, the solution adopted in *Asemfo* was based on specific circumstances, such as the fact that the company concerned was required to carry out the orders given it by the Autonomous Communities, it was not free to fix the tariff for its actions and its relationships with the Autonomous Communities were not contractual.[20]

39. That could explain why more recent case-law stated explicitly that, while in *Asemfo* the Court recognised that the condition of similar control could be satisfied where the shareholding held was only 0.25%, that was only 'in certain circumstances'.[21]

40. The view which I have been developing was confirmed in *Coditel*. In its assessment of the first *Teckal* condition in that judgment, the Court pointed out that that the concessionaire was an inter-municipal cooperative society the governing council of which consisted of representatives of the affiliated municipalities, appointed by the general assembly, which was itself composed of representatives of those municipalities. In that way, all the affiliated municipalities jointly controlled the decision-making bodies of the society, especially the governing council, a body with wide powers

16 — *Parking Brixen*, paragraph 65, and *Coditel*, paragraph 28. Although the case-law talks in this regard of a 'decisive influence', I believe that the adjective refers to the control which the public authorities exercise collectively and that this requirement must be modified in such cases of collective control.

17 — In that regard, it is worth noting that the *Teckal* judgment talks about control similar to that exercised by a 'local authority', referring to the latter in the singular, whereas, when formulating the second condition, it requires the company in question to carry out the essential part of its activities with the controlling 'local authority or authorities'. In my opinion, that excludes the possibility of an analogous application to this case of the solution adopted in relation to the second *Teckal* condition in *Carbotermo*, at paragraph 70.

18 — Case C-295/05 [2007] ECR I-2999.

19 — Case C-231/03 [2005] ECR I-7287, paragraph 24.

20 — *Asemfo*, paragraph 60. That is the qualitative element which differentiates the *Coname* case from the *Asemfo* case, although, as the Court pointed out in *Coditel*, in that passage of the *Coname* judgment, 'the Court was not concerned with the question whether such control could be exercised jointly' (*Coditel*, paragraph 52). In any event, it is necessary to keep reiterating that the contractor company in *Coname* was open, at least in part, to private capital (*Coname*, paragraph 26).

21 — *Coditel*, paragraph 53.

which, in particular, fixed the charges.[22] In addition, the Court found that the society pursued primarily a municipal interest objective and was not market-orientated, since it was not able to operate like any public limited company or company limited by shares and its objectives were set independently of its shareholders.[23]

41. That kind of analysis was also carried out in the *Sea* judgment. First, the Court took into account the fact that the company's statutes had been amended to superimpose on the general meeting and on the board of directors decision-making structures designed to reinforce control. More specifically, it was a case of a joint committee and a number of technical committees, all made up of representatives of the member entities. The general meeting was required to have regard to the guidelines laid down by those committees.[24] Lastly, it is important to note that the judgment stated that the company did not appear to be market orientated in view of the fact, first, that 'the geographical scope of the activities of the contracting company at issue in the main proceedings does not extend beyond the territory of the shareholder municipalities and, second, that that company's object is to manage public services for those municipalities alone'.[25]

42. Therefore, the central element of all that analysis in the case-law is the fact that the company set up to provide certain municipal services should not enjoy a degree of independence such as to preclude the local authorities from exercising over it control similar to that which they exercise over their own departments.[26]

43. Accordingly, a careful reading of the *Teckal* judgment, in which the conditions for the in-house exception were first formulated, leads now to the conclusion that the fundamental basis for that exception from the general requirement of a public call for tenders is that there must not exist between the contracting entity and the company set up to provide certain municipal services a contractual relationship in the strict sense, meaning that there is no 'concordance of two autonomous wills representing separate legal interests'.[27]

44. To put it another way, the in-house mechanism is possible only where the company set up to provide certain municipal services does not have the status of a third party vis-à-vis the contracting entity, and, for that purpose, it is necessary to confirm that the former has no independence at all from the latter, which, in such a case, is exercising its power to organise the way it functions.[28]

45. That was the line of analysis which was developed in *Asemfo*, in which, as I stated above, the Court found that there was similar control based on the fact that the company set up to provide certain municipal services lacked the independence to set its own charges and, it appeared, to determine which tasks it should deal with.

46. In my opinion, however, the more rigorous examination carried out in the *Coditel* and *Sea* judgments is much more complete and accurate. As we have seen, in those judgments two cumulative factors were taken into account: first, the position, according to the statutes, of the public entity on the management bodies of the company set up to provide certain municipal services and, second, the fact that that company was not market orientated.

22 — *Coditel*, paragraphs 33 to 35.

23 — *Coditel*, paragraphs 36 to 38.

24 — However, the Court found that there was uncertainty concerning the effectiveness of that control, stating that the interpretation of that point was a matter for the referring court. *Sea*, paragraphs 81 to 88.

25 — *Sea*, paragraphs 73 to 76.

26 — *Coditel*, paragraph 39.

27 — Opinion of Advocate General Cosmas in *Teckal*, paragraph 64.

28 — On that point, see Bernal Blay, M.A., 'Un paso en falso en la interpretación del criterio del control análogo al de los propios servicios en las relaciones *"in house"*', *Revista española de Derecho administrativo,* No 137, 2008.

47. Those two elements are certainly only indications of the lack of independence referred to above but I believe that there is a greater guarantee of similar control if both of them are present. In my opinion, there is small possibility of finding that there is similar control without the direct presence of the contracting authorities on the management bodies or without a position according to the statutes which guarantees the 'decisive influence' over the adoption of decisions required by the case-law, which amounts to the same thing.

48. In summary, therefore, I believe that the contracting entities will exercise over the contractor company control similar to that which they exercise over their own departments if their position under the statutes is such that they are able to influence jointly the adoption of the significant decisions and strategic objectives of that company. On any view, the contractor company cannot be exclusively controlled by the public entity which has a majority shareholding.

49. In addition, it is necessary to confirm that the company is not market orientated and, in short, that, for decision-making purposes, it lacks independence from the public entities by which it is jointly controlled.

D – *Assessment of the conditions relating to similar control in the present case*

50. As regards the application to the present case of all the factors set out above, it is appropriate to begin by drawing attention to the paucity of information provided by the referring court for the relevant purposes.

51. Firstly, as regards the question of the participation of the municipal councils of Cagno and Solbiate on the management bodies of ASPEM, the reference for a preliminary ruling states that, in accordance with an agreement between the company and the municipal councils which have a minority shareholding in it, the latter have, in any event, the right to be consulted, to appoint a member of the supervisory council and to appoint a member of the management board, in agreement with all the other municipal councils participating in the shareholders' agreement.

52. Accordingly, in the instant case, in addition to the token nature of their participation in the capital, there is some participation by the minority shareholders in the company's management bodies. However, it must be acknowledged that the appointment of one member of the management board and one member of the supervisory council, in both cases in agreement with all the minority shareholders (36 municipal councils in total), and the existence of an abstract right to be consulted at half-yearly intervals, cannot be sufficient for a finding that those municipal councils have the capacity to influence effectively the strategic objectives and significant decisions of ASPEM.

53. Second, it seems reasonable to conclude that the legal effectiveness of the shareholders'' agreement providing for that participation could be called into question and that the right to be consulted about the performance of the service [29] does not guarantee that it extends to the significant decisions and strategic objectives of the company as a whole. [30]

54. At first sight, therefore, unless the national court makes a definitive finding to the contrary, control over the company appears to be exercised above all by the majority shareholder, which has a highly problematic role vis-à-vis the minority shareholders in the control *de facto* of the company.

29 — As the two municipal councils concerned stated in their written observations.

30 — On that point, I share the view expressed by Advocate General Geelhoed in his Opinion in *Asemfo*, to the effect that control 'over the design and execution of individual works and projects – which is inherent in any contract which a public authority awards to one of its own services or to an external entity – is not the control intended by the Court when it refers to "decisive influence over both the strategic objectives and significant decisions" of, in this case, the Autonomous Communities' "own" executive service' (point 98).

55. The Italian Government appears to take the same view when it states that 'even if they were continually to take concerted action, the 36 partner municipal councils would not have any real power of influence over the company, which belongs, in short (at least until 15 January 2009), to Varese Municipal Council, and which in no circumstances can be regarded as being an organisational structure of one of those 36 municipal councils'. The Commission ultimately expresses the same view.

56. On the other hand, for the purpose of evaluating whether or not ASPEM is market orientated, which would weaken control by the shareholder entities, it is also necessary to analyse, in accordance with paragraph 73 of the judgment in *Sea*, matters such as the geographical and material extent of the company's activities and the opportunity for the company to establish relations with undertakings in the private sector.

57. The order for reference provides, however, very little clear information in that regard. For its part, the Italian Government states that ASPEM appears to have 'particularly wide' objects (in addition to full management of the urban waste cycle, the Italian Government states that those objects also cover energy production, the supply of drinking water and heating services) and that is statutes permit it to operate in competition with other undertakings in the sector by participating in public tendering procedures.

58. The fact that ASPEM might provide services to private economic operators is not sufficient, according to the case-law, for a finding that it is market orientated. As the Court explained in *Sea*, the second *Teckal* condition (the contractor company should carry out the essential part of its activities with the controlling authorities) would be rendered nugatory if the first condition were interpreted as prohibiting any ancillary activity, including the private sector. [31]

59. However, it must be borne in mind that the fact that ASPEM has particularly wide objects and could become involved in the provision of services in respect of which a public entity with a minority shareholding would have virtually no decision-making capacity could be an indication that this municipal company enjoys a degree of independence which would render precarious any control by the public entities with a minority shareholding in it.

60. In summary, it should be clear by now that the essential difficulty is not the fact that the municipal councils of Cagno and Solbiate so obviously hold minority shareholdings in ASPEM but the fact that, even when exercised jointly, the additional powers of control which have been granted to them are clearly not sufficient to suggest that they have an influence which could be described as decisive in relation to the adoption of decisions and the setting of the company's objectives, or, in short, that the company lacks independence from them.

61. At this point, it must be stressed that the information available to the Court is not sufficiently specific, since, for example, what the half-yearly right to be consulted consists of, what power of influence the member of the management board appointed by the minority shareholders has, or what the actual legal effect of the shareholders' agreement entered into is are all unknown.

62. Accordingly, the assessment of the circumstances of the case must be carried out by the national court. However, it must be borne in mind that, by its question, the referring court, the Consiglio di Stato, has given an idea, in expressive terms, of its view of the situation: 'the shareholders' agreements entered into by the partner public authorities are not such as to give the shareholding municipality any effective power of control over the company', to the extent that 'the company shareholding may be regarded merely as formal cover for a contract for the provision of services'.

31 — *Sea*, paragraphs 79 and 80.

63. Framed in those terms, and if all the foregoing matters are confirmed, I believe that the reply to the question referred for a preliminary ruling must be that the condition that the contracting entity must exercise over the contractor company control similar to that which it exercises over its own departments does not appear to be satisfied in a case like the present, in which the contracting entities (each) hold a single share in the municipal company and the shareholders' agreement concluded by the public entities does not grant those municipal councils effective control over the municipal company.

64. Finally, everything suggests that in this case the condition is not satisfied, that the public entities must participate in the company's management bodies and, in short, in the adoption of the company's significant decisions, at least in a manner proportional to the relative influence of the contracting public entity within the group of public entities that jointly control the municipal company, nor the condition that the municipal company be not market orientated, which would weaken the control that those public entities may exercise over it. In order to evaluate the relative influence referred to, recourse may be had to criteria such as the budget volume of the local authority, its population and its needs in relation to the service managed by the municipal company.

65. If all the matters which follow from the description of the facts are confirmed, a different assessment would lead to a high risk of fraudulent evasion of the law, since public entities would be offered the opportunity to circumvent the requirements of the rules on public tendering by taking a negligible shareholding with a strictly formal participation in the company's management and decision-making. Even where participation in the control of the company is collective, it must be effective and a shareholders' agreement which provides for merely cosmetic or token changes to the management bodies of the company does not appear sufficient to ensure such effectiveness.

66. In conclusion, I believe that there are many indications suggesting that the participation of the municipal councils of Cagno and Solbiate in ASPEM is not sufficient to enable a finding that the condition of similar control is satisfied. However, the specific assessment of the circumstances of the case must be carried out by the national court.

VI – Conclusion

67. Accordingly, I propose that the Court of Justice should reply as follows to the question referred for a preliminary ruling by the Consiglio di Stato:

For the purposes of the in-house exception, it is in principle irrelevant whether a public entity which seeks to award a service to a municipal company has the position of a minority or majority shareholder in that company. However, it is not possible to refer to a 'principle of irrelevance' as regards the position of such a public entity with regard to the effective control of the municipal company.

In particular, reliance on the in-house exception is not possible in a situation in which, first, each of the contracting entities involved holds a single share in the municipal company and, second, the shareholders' agreements entered into by the partner public authorities are not such as to give a shareholding municipality any effective and proportionate power of control over the company, these being matters which must be assessed definitively by the national court.