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Press and Information

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Judgment of the Court of Justice in Case C-231/03

Conorzio Aziende Metano (Coname) v. Comune di Cingia de' Botti

THE AWARD BY A MUNICIPALITY OF A PUBLIC SERVICE CONCESSION TO A COMPANY WITH PREDOMINANTLY PUBLIC SHARE CAPITAL MUST COMPLY WITH TRANSPARENCY CRITERIA

An undertaking located in another Member State must be able to have access to appropriate information regarding the concession before it is awarded, in order to be in a position to express its interest in obtaining that concession

The consortium Coname had concluded a contract with the municipality of Cingia de' Botti (province of Cremona) for the award of the service covering the maintenance, operation and monitoring of the methane gas network.

That service was subsequently entrusted by direct award to Padania, a company with predominantly public share capital held by the province of Cremona and by almost all the municipalities of that province. The municipality of Cingia de' Botti holds a 0.97% share in it.

Coname contested that award, claiming that it should have been made following an invitation to tender.

The court hearing the case, the Tribunale amministrativo regionale per la Lombardia (Lombardy Regional Administrative Court), asked the Court of Justice of the European Communities whether Community law precludes the direct award by a municipality of a concession for the management of the public gas-distribution service to a company with predominantly public share capital in which that municipality holds a 0.97% share.

The Court points out, first of all, that the directives on public contracts do not govern the award of such a concession and that it must therefore be examined in the light of the fundamental freedoms provided for by the Treaty.

In so far as the concession may also be of interest to an undertaking located in a Member State other than the Member State of the municipality of Cingia de' Botti (that is to say, other than Italy), the award, in the absence of any transparency, of that concession to an undertaking located in its Member State (Italy) amounts to a difference in treatment to the detriment of the undertaking located in the other Member State.

In the absence of any transparency, an undertaking located in another Member State has no real opportunity of expressing its interest in obtaining that concession.

Unless it is justified by objective circumstances, such a difference in treatment amounts to indirect discrimination on the basis of nationality, prohibited by Community law.

It is therefore for the referring court to satisfy itself that the award in question complies with transparency requirements which, without necessarily implying an obligation to hold an invitation to tender, are, in particular, such as to ensure that an undertaking located in the territory of a Member State other than that of the Italian Republic can have access to appropriate information regarding that concession before it is awarded, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession.

With regard to the objective circumstances that could justify such a difference in treatment, the Court adds that the fact that the municipality of Cingia de' Botti has a 0.97% holding in the share capital of Padania does not, by itself, constitute one of those objective circumstances. Since the 0.97% holding is very small, it is not such as to enable the municipality to exercise any control over Padania.

In addition, the Court observes that it is apparent from the file that Padania is a company open to private capital, which precludes it from being regarded as a structure for the 'in-house' management of a public service on behalf of the municipalities which form part of it.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: EN FR DE IT

The full text of the judgment may be found on the Court's internet site

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

It can usually be consulted after midday (CET) on the day judgment is delivered.

For further information, please contact Christopher Fretwell

Tel: (00352) 4303 3355 Fax: (00352) 4303 2731