



Press and Information

Court of Justice of the European Union  
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Judgment in Case C-159/11  
Azienda Sanitaria Locale di Lecce and Others v Ordine degli Ingegneri  
della Provincia di Lecce and Others

**EU public procurement law prohibits national legislation which authorises the conclusion between public entities, without an invitation to tender, of cooperation contracts which do not implement a common public task and are capable of creating a privileged position for a possible private service provider**

Italian legislation authorises public administrative authorities to enter into cooperation agreements among themselves with regard to activities of common interest. In addition, public universities are permitted to supply research and consultancy services to public or private entities provided that that activity does not impair their educational role.

In 2009, the Azienda Sanitaria Locale di Lecce (Local Health Authority of Lecce; 'ASL') approved the specification for the carrying out by the Università del Salento (University of Salento) of a study project on the seismic vulnerability of hospital structures in the province of Lecce, without an invitation to tender. That study was also to cover the drawing up of reports, the making of suggestions and the description of measures needed to meet standards. In return for all those services, the ASL was to transfer to the University the sum of €200,000, exclusive of VAT.

Various orders and professional associations and undertakings brought a number of appeals against the decision approving the specification, relying on the infringement of national and European public procurement legislation<sup>1</sup>. The Consiglio de Stato (Italian Council of State), before which the case was brought in last instance, seeks to ascertain from the Court of Justice, in essence, whether EU law precludes national legislation which permits the conclusion, without an invitation to tender, of a contract by which two public entities set up between them a form of cooperation such as that at issue.

In today's judgment, the Court notes first that a contract for pecuniary interest concluded in writing between an economic operator and a contracting authority is a public contract. It recalls its case-law according to which it is immaterial whether that operator is itself a contracting authority, whether it is primarily profit-making, whether it is structured as an undertaking or whether it has a continuous presence on the market<sup>2</sup>.

The Court then states that research and consultancy services such as those which are the subject-matter of the contract at issue, although capable of falling within academic research, constitute either research and development services or engineering services and related scientific and technical consulting services, that is to say services covered by Directive 2004/18. Furthermore, a contract may not fall outside the concept of public contract merely because the remuneration remains limited to reimbursement of the expenditure incurred to provide the agreed service.

However, the Court notes that two types of contracts concluded by public entities fall outside the scope of EU law. The contracts concerned are:

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<sup>1</sup> In particular, 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).

<sup>2</sup> Case [C-305/08](#) *CoNISMa*.

- contracts concluded by a public entity with a distinct entity where the first entity exercises over the second one a control which is similar to that which it exercises over its own departments and the second entity carries out the essential part of its activities with the entity or entities which control it<sup>3</sup>;
- contracts which establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out<sup>4</sup>.

In the present case, the first exception does not apply because ASL does not exercise control over the University.

The second exception is also not applicable. The cooperation contract at issue contains a series of substantive aspects a significant or even major part of which corresponds to activities usually carried out by engineers or architects and which, even though they have an academic foundation, do not constitute academic research. Consequently, the contract at issue does not appear to ensure the implementation of a public task which the ASL and the University both have to perform.

In addition, that contract may result in an advantage for private undertakings if the highly qualified external collaborators to whom it permits the University to have recourse for the carrying out of certain services include private service providers, which is a matter for the national court to establish.

Therefore, the Court replies that **EU public procurement law precludes national legislation which authorises the conclusion, without an invitation to tender, of a contract by which public entities establish cooperation among each other, where the purpose of such a contract is not to ensure that a public task that those entities all have to perform is carried out, where that contract is not governed solely by considerations and requirements relating to the pursuit of objectives in the public interest or where it is such as to place a private provider of services in a position of advantage vis-à-vis his competitors.**

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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<sup>3</sup> The so-called 'Teckal' case-law, drawn from Case [C-107/98](#) *Teckal v Comune de Viano*.

<sup>4</sup> Case [C-480/06](#) *Commission v Germany*.