Case C-89/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

5 February 2019

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

8 November 2018

Appellant:

Rieco SpA

Respondents:

Comune di Lanciano

Ecolan SpA

Subject-matter of the action in the main proceedings

Appeal before the Consiglio di Stato (Council of State, Italy) against the judgment of the Tribunale amministrativo regionale per l'Abruzzo (Regional Administrative Court, Abruzzo, Italy; 'the TAR Abruzzo') by which it dismissed an action for annulment of the acts by which the Comune di Lanciano (Municipality of Lanciano, Italy) awarded a contract for the management of urban hygiene services to an in-house company under similar control, exercised jointly.

Subject-matter and legal basis of the reference

This reference for a preliminary ruling, made pursuant to Article 267 TFEU, concerns the interpretation of the principle of free administration by public authorities set out in Article 2 of Directive 2014/23/EU, and of Article 12(3) of Directive 2014/24/EU, as well as the possible infringement of those provisions by Italian legislation concerning the direct award of contracts to in-house companies.

Questions referred

1. Does EU law (in particular the principle of free administration by public authorities and the principle that the different rules governing the award of service contracts and the management of services relevant to public authorities must be essentially equivalent) preclude a national law (such as that set out in Article 192(2) of the Italian Public Procurement Code, Legislative Decree No 50 of 2016), which places the in-house award of contracts on a subordinate level to award by means of public tender procedure and establishes it as an exception to the latter, by: (i) permitting contracts to be awarded in house only when there is clear evidence of failure in the relevant market, and (ii) requiring authorities intending to make an award by inter-organisational delegation to provide specific reasons with regard to the benefits for society at large accruing from that form of award?

2. Does EU law (in particular Article 12(3) of Directive 2014/24/EU concerning the in-house award of contracts where similar control is exercised jointly with other authorities) preclude a provision of national law (such as that set out in Article 4(1) of the Consolidated Law concerning companies in which all or a majority of the share capital is in public ownership — Legislative Decree No 175 of 2016) which prevents a public authority from acquiring a shareholding (in any event one that can guarantee control or power of veto) in a body in which a number of other public authorities have shareholdings, where that authority intends in any event to acquire subsequently a position of joint control and therefore the possibility of making direct awards to that body in which a number of other public authorities have shareholdings?

Provisions of EU law relied on

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65; 'Directive 2014/24/EU'). In particular:

– Recital 5, according to which 'nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than procurement within the meaning of this Directive';

– Article 12(3), which sets out the conditions that must be satisfied in order to award a public contract where similar control is exercised jointly with other public authorities.

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1; 'Directive 2014/23/EU'). In particular, Article 2(1), which establishes the principle of free administration by public authorities.

Provisions of national law relied on

Decreto legislativo 18 aprile, n. 50 — Codice dei contratti pubblici (Legislative Decree No 50 of 18 April establishing the Public Procurement Code; 'the Public Procurement Code'). In particular:

– Article 5, which transposes Article 12 of Directive 2014/24/EU and establishes the conditions to be fulfilled in order for in-house awards to be permitted under national law in the case of joint similar control;

– Article 192(2), which provides as follows: 'For the purpose of making an in-house award of a contract for the supply of services that are available on the competitive market, the contracting authorities shall carry out a prior assessment of the financial merits of the offers of the in-house tenderers in the light of the subject matter and the value of the services, stating in the grounds for the decision of the award the reasons for not having recourse to the market, as well as the benefits for society at large of the form of management chosen, with reference also to the objectives of universality and social behaviour, efficiency, economy and quality of services, as well as optimal use of public resources.'

Decreto legislativo 19 agosto 2016, n. 175 — Testo unico in materia di società a partecipazione pubblica (Legislative Decree No 175 of 19 August 2016 establishing the Consolidated Law concerning companies in which all or a majority of the share capital is in public ownership). In particular:

– Article 4, entitled 'Aims that may be pursued by means of the acquisition and management of public shareholdings', which, in paragraph 1 thereof, provides as follows: 'Public authorities may not, directly or indirectly, set up companies the object of which is to produce goods and provide services not strictly necessary for the pursuit of their own institutional objectives, or acquire or hold shareholdings, including minority shareholdings, in such companies'; and

– Article 16, entitled 'In-house companies', which sets out the rules and conditions for awarding contracts directly to in-house companies.

Succinct presentation of the facts and the main proceedings

1 Rieco SpA ('the appellant') is a company operating in the urban waste disposal sector that is interested in acquiring, by means of a tender procedure, a contract for the management of the urban hygiene services in the Comune di Lanciano (Municipality of Lanciano, Italy).

2 That municipality awarded a contract for those services to an in-house company without issuing a call for tenders. The company awarded that contract is Ecolan SpA, a wholly publicly-owned company, 21.69% of which is owned by the

Comune di Lanciano together with another 52 municipalities of the Provincia di Chieti (Chieti Province, Italy).

3 The appellant brought an action before the TAR Abruzzo, seeking annulment of the decisions with which, in 2017, the Comune di Lanciano, a minority shareholder in Ecolan SpA, approved the amendment of the statute of that company and the related shareholder agreements, so as to make it possible to directly award the contract for the services in question.

4 The TAR Abruzzo, by judgment No 33 of 2018, dismissed the action as unfounded.

5 The appellant then appealed against that judgment before the Consiglio di Stato (Council of State; 'the referring court'), contending that it was flawed and asking for it to be revised.

The essential arguments of the parties to the main proceedings

6 Among the grounds of appeal put forward by the appellant, those relevant to the present reference for a preliminary ruling are the following:

(a) the third ground of appeal, to which the first question referred is connected, alleging failure by the first instance court to take account of the fact that the direct award of the contract was not preceded by an assessment of its financial merits, as required by the relevant national legislation, in particular, by Article 192(2) of the Public Procurement Code;

(b) the sixth ground of appeal, to which the second question referred is connected, alleging failure by the first instance court to take account of the constraints imposed by national legislation on share capital ownership by public entities which do not exercise similar control over the in-house company.

Succinct presentation of the reasons for the request for a preliminary ruling

The first question referred for a preliminary ruling

7 The referring court states that, prima facie, the decisions contested by the appellant do not seem to comply with the provisions of Article 192(2) of the Public Procurement Code, in so far as they do not state the reasons why the public authorities chose to make a direct in-house award and not to issue a call for tenders.

8 However, the referring court is uncertain whether the strict conditions laid down in national legislation for in-house awards are compatible with the relevant provisions and principles of EU law. In that regard, the court notes that Article 192(2) of the Public Procurement Code makes the in-house award of

contracts for services that are available on the market subject to two conditions, which are not, by contrast, required for the other forms of award:

(i) the first condition concerns the obligation to state the reasons for not having 'recourse to the market'. In other words, it is possible directly to award a contract for the provision of services in house only when there is evidence of substantial 'market failure' on the relevant market;

(ii) the second condition imposes an obligation to indicate the 'benefits for society at large' of choosing to make a direct in-house award of a contract for services that are available on the market.

9 The imposition of such conditions places in-house award, under Italian law, in a subordinate position vis-à-vis all other forms of award and establishes it as an exception, particularly vis-à-vis award by means of tender procedure. That restrictive approach is also confirmed by the case-law of the Corte costituzionale (Constitutional Court), which has established that the imposition, under national law, of limitations on the direct award of contracts that are more extensive than those imposed by EU law are lawful (see judgment No 325 of the Constitutional Court, Italy, of 17 November), and has held on numerous occasions that in-house award is an 'exception to the general rule that contracts are to be awarded to third parties by means of a public procurement procedure' (see, for example, judgment No 46 of 20 March 2013).

10 The referring court considers it appropriate to ask whether the restrictive approach under the Italian legal order described above complies with the principles and provisions of EU law. In that regard, the referring court notes that under the EU legal system two principles coexist, but these apparently contradict each other: on the one hand is the principle (set out in Article 2 of Directive 2014/23/EU) that public authorities are free to decide as they see fit how to organise the provision of services relevant to them, and, on the other hand, is the principle of full competition in the public procurement and concessions markets. The second principle is ancillary to the first, since, as the referring court notes, public authorities are first required to choose whether to use their own resources (self-performance) or to make use of external economic operators (outsourcing). Only in the event that outsourcing is chosen are the authorities required to respect the principle of full competition between market operators.

11 In the light of such an analysis, the referring court notes that, in contrast to what occurs under the Italian legal system, in which self-performance of services is placed on a level subordinate to the outsourcing of services, the EU legal system places in-house award (one of the main forms of self-performance) on substantially the same level as award to third parties by means of a public procurement procedure.

12 The difference between national legislation and the provisions and principles of EU law is all the more apparent in view of the fact that, under the EU legal

system, in-house award is not only considered to be on the same level as the award of contracts to third parties by means of a public procurement procedure, but is actually a logical first option prior to the decision by the public authorities to outsource services relevant to them. In fact, according to the provisions of EU law, public authorities may choose to outsource the provision of services only after having ruled out the possibility of using its own resources. That model responds to the basic economic principle that it is not appropriate to have recourse to others when one is capable of meeting one's own needs.

13 The model described above, under which the system of self-performance is fully equal to that of outsourcing (if not indeed the logical first option), is confirmed in the case-law of the Court of Justice, which has clarified that 'a public authority has the possibility of performing the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities not forming part of its own departments, and [may] do so in cooperation with other public authorities' (see judgment of 9 June 2009, *Commission* v *Germany*, C-480/06, EU:C:2009:357, paragraph 45). The European Commission has expressed itself in largely similar terms in the 'Commission interpretative communication of 5 February 2008 on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships' (OJ 2008 C 91, p. 4), in which it stated that 'under Community law, public authorities are free to pursue economic activities themselves or to assign them to third parties, such as mixed capital entities founded in the context of a PPP. However, if public bodies decide to involve third parties in economic activities and if this involvement qualifies as a public contract or a concession, the Community provisions for public procurement and concessions must be complied with.' Lastly, the equal status under the EU legal order of self-performance and outsourcing of services is confirmed in Article 2 of Directive 2014/23/EU and in recital 5 of Directive 2014/24/EU.

The second question referred for a preliminary ruling

14 The referring court notes, first of all, the particular company structure of Rieco SpA, which provides for the participation of two types of member (public authorities): 'contracting' members (which have similar control over the company and may therefore award contracts directly to the company) and 'non-contracting' members (which do not have similar control and may not, as a result, make direct awards).

15 Although, on the one hand, that particular arrangement appears to be permissible in the light of EU law, in particular Article 12(3) of Directive 2014/24/EU, on the other hand it raises serious doubts as to whether national legislation, in particular Article 4(1) of the Consolidated Law concerning companies in which all or a majority of the share capital is in public ownership, is compatible with that provision of EU law. According to Article 4(1): 'public authorities may not, directly or indirectly, set up companies the object of which is to produce goods and provide services not strictly necessary for the pursuit of their own institutional

objectives, or acquire or hold shareholdings, including minority shareholdings, in such companies'.

16 The referring court notes that, in the present case, that provision seems to preclude the possibility of 'non-contracting' authorities subsequently acquiring similar control of Rieco SpA, since that would breach the criterion of 'strict necessity' laid down by the above-cited provision; necessity that must be current and not hypothetical or future.

17 The question therefore arises whether that provision of national law is contrary to the abovementioned provisions of EU law, which allow the acquisition of similar control by 'non-contracting' authorities within an in-house company in which many other public authorities have shareholdings.