

Case C-328/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date received:**

19 April 2019

Referring court:

Korkein hallinto-oikeus (Supreme Administrative Court, Finland)

Date of the decision to refer:

15 April 2019

Appellant:

Porin kaupunki

Other parties to the proceedings:

Porin Linjat OY

Lyttylän liikenne Oy

Subject-matter of the case in the main proceedings

Public contract — cooperation agreement between municipalities — model of the ‘municipality responsible’ — public contracts — transfer of responsibility — horizontal collaboration of public contracting authorities — related entity — competent public authority within the meaning of the Public Passenger Transport Act — transport of persons with disabilities

Subject-matter and legal basis of the reference

In the case pending at the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), the Commission on Basic Social Provisions of Porin kaupunki (city of Pori) decided on 4 May 2015 that the transport of persons with disabilities to work or day care centres, which is to be carried out using low-floor buses, shall be operated as Porin kaupunki’s own transport services. According to the decision, the transports are to be operated by Porin Linjat Oy, which is a public limited company and all shares of which are held by Porin kaupunki.

The decision concerns transports of residents of the area of cooperation formed by Porin kaupunki, the town of Ulvila and the municipality of Merikarvia, which was established by way of a cooperation agreement regarding the organisation and provision of social and health services. This contract is based on the model of the 'municipality responsible', which transferred responsibility for the organisation of these services to Porin kaupunki.

Porin kaupunki did not issue a call for tenders because, according to the city, the contract concerned an award to the company Porin Linjat Oy which is under its control (known as in-house procurement, which is referred to in Finnish law as an award to a related entity).

In the view of the Supreme Administrative Court, according to their main purpose the transports in question are services classified in category 2 of the services ('Land transport services, including armoured car services, and courier services, except transport of mail') of Part A of Annex II to 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 (hereinafter: the 2004 Public Procurement Directive).

On the basis of the offer made by Porin Linjat Oy, the total value of the transport services to be procured is around EUR 600 000 excluding VAT, which exceeds the threshold of Article 7 of the 2004 Public Procurement Directive.

The question before the Supreme Administrative Court is whether the appointment of Porin Linjat Oy to provide transport to people with disabilities was a public procurement contract in the sense of the 2004 Public Procurement Directive, for which a call for tenders should have been issued.

In this case, the first point to be decided is whether, by its nature, the cooperation agreement between Porin kaupunki, the town of Ulvila and the municipality of Merikarvia, which concerns the organisation of social and health services, constitutes an arrangement to transfer responsibilities not covered by the 2004 Directive or whether the cooperation constitutes a collaboration between contracting authorities involving the award of contracts which is not subject to the obligation to tender under the aforementioned Directive or whether it constitutes another case altogether.

If one were to assume that either of the two situations described in the previous paragraph applied, the next decision to take in the case is whether Porin kaupunki can also commission transport services for the town of Ulvila and the municipality of Merikarvia, without giving rise to the assumption that this constitutes a public procurement contract.

In addition, the question is whether such a large part of the turnover of Porin Linjat Oy relates to Porin kaupunki that the company must be regarded as an entity under the dominant influence of Porin kaupunki and that the contracts awarded to it would thus not be affected by the obligation to tender. In this

respect, it is important to determine whether the turnover related to Porin kaupunki also includes the turnover of the company derived from regional transport services, also organised for the towns of Harjavalta, Kokemäki and Ulvila and the municipality of Nakkila by Porin kaupunki as the competent authority under the Public Passenger Transport Act and the cooperation agreement between the municipalities concerned.

Questions referred

1. Must Article 1(2)(a) 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 be interpreted as meaning that the model of the ‘municipality responsible’ in accordance with the cooperation agreement between municipalities in question meets the conditions for a transfer of responsibilities which is not covered by the scope of the Directive (C-51/15, *Remondis*) or a horizontal cooperation which is not covered by an obligation to issue a call for tenders (C-386/11, *Piepenbrock* with further references), or does this constitute another case altogether?

2. If the model of the ‘municipality responsible’ in accordance with the cooperation agreement meets the conditions for a transfer of responsibilities: In the event that contracts are awarded after responsibilities have been transferred, is the public entity to which the responsibilities have been transferred the contracting authority and is this public entity entitled, on the basis of the responsibilities transferred to it by the other municipalities, to award contracts for services to one of its related entities without a call for tenders in circumstances where the award of these contracts for services would — without the principle of the ‘municipality responsible’ — have been the responsibility of the municipalities which transferred the responsibility?

3. If, on the other hand, the model of the ‘municipality responsible’ in accordance with the cooperation agreement fulfils the conditions of a horizontal cooperation: Can the municipalities taking part in the cooperation award contracts for services without issuing calls for tenders to a municipality taking part in the cooperation, which awarded these service contracts to one of its related entities without a call for competitive tenders?

4. As part of the assessment whether a company carries out the essential part of its activities for the municipality by which it is controlled, does the calculation of the turnover related to the municipality take into account the turnover of a company owned by the municipality which operates transport services within the meaning of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and (EEC) No 1107/70 (hereinafter: Regulation on Public Passenger Transport Services) to

the extent that the company derives this turnover from transport services organised by the municipality as the competent authority within the meaning of the Regulation on Public Passenger Transport Services?

Provisions of EU law cited

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

Article 2 and 5 of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and (EEC) No 1107/70 of the Council

Court of Justice case-law relied on

Judgment of 21 December 2016, *Remondis*, C-51/15, (ECLI:EU:C:2016:985, paragraph 49, 52 and 55)

Judgment of 9 June 2009, *Commission/Germany*, C-480/06 (ECLI:EU:C:2009:357)

Judgment of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11 (ECLI:EU:C:2012:817)

Judgment of 13 June 2013, *Piepenbrock*, C-386/11 (ECLI:EU:C:2013:385, paragraph 36 and 37)

Judgment of 11 May 2006, *Carbotermo und Consorzio Alisei*, C-340/04 (ECLI:EU:C:2006:308, paragraph 65 and 67)

Judgment of 8 December 2016, *Undis Servizi*, C-553/15 (ECLI:EU:C:2016:935, paragraph 36 and 37)

National legislation cited

Sections 5 and 10 Laki julkisista hankinnoista 348/2007 (Public Procurement Act No 348/2007)

Directive 2004/18/EC was transposed in Finland by Act No 348/2007.

Sections 76 to 77 of Kuntalaki 365/1995 (Local Government Act No 365/1995, repealed by Act No 410/2015)

Under section 76 of the Local Government Act, municipalities can carry out their tasks jointly on the basis of a contract. Municipalities may agree that a certain municipality shall carry out a task on behalf of one or more other municipalities.

Under section 77 of the Local Government Act, if a municipality carries out a task for one or more other municipalities on the basis of a contract, it may be agreed that the other municipalities concerned will appoint some of the members of the body of the first municipality which is responsible for the task in question.

Sections 8 and 49 to 52 of Local Government Act No 410/2015

Pursuant to section 8 of the Local Government Act of 2005, a municipality may organise the tasks assigned to it by law itself or agree that the organisation shall be transferred to another municipality or association of municipalities. In the case of a cooperation required by law, another municipality or an association of municipalities bears the organisational responsibility for the municipality. With regard to the services and other measures to be organised, the municipality or association of municipalities with organisational responsibility for the execution of the tasks are responsible for: (1) equal access, (2) defining need, scope and quality, (3) the nature of the provision, (4) supervising the provision and (5) exercising the powers vested in the public body. The municipality is responsible to finance its tasks even if organisational responsibility has been transferred to another municipality or an association of municipalities.

Under section 49 of the Local Government Act, municipalities and associations of municipalities may carry out their tasks jointly on the basis of a contract. Public cooperation among municipalities may, inter alia, take the form of a joint body.

Pursuant to section 50 of the Local Government Act, if a municipality agrees to transfer the organisational responsibility for a task assigned to it by law to another municipality or association of municipalities pursuant to section 8, the Public Procurement Act does not apply to such transfer. This Act does not apply to a cooperation between municipalities if the cooperation constitutes a transfer of responsibilities by the municipality or the association of municipalities to a related entity within the meaning of section 10 of the Public Procurement Act or if the Act does not apply to the cooperation for any other reason.

Under section 51 of the Local Government Act, a municipality may carry out a task on behalf of one or more municipalities in such a way that the municipalities have a joint body which is responsible for the performance of the task. The municipality carrying out the task is called the municipality responsible. Municipalities may agree that the other municipalities appoint part of the members of the joint body.

Under section 52 of the Local Government Act, the contract regarding the joint body must, as a minimum, contain arrangements regarding: (1) the responsibilities of the joint body and, where necessary, the transfer of organisational responsibility within the meaning of section 8, (2) the composition of the joint

body and the right of the other municipalities to send members to sit on that body, (3) the principles for calculating costs and their distribution, and (4) the duration and termination of the agreement.

Sections 4, 5, 6, 12 and 14 of the Joukkoliikennelaki 1219/2011 (Public Passenger Transport Act No 1219/2011)

According to section 4 of the Public Passenger Transport Act, the public authorities responsible for road transport within the meaning of the Regulation on Public Passenger Transport Services are obliged to define the level of service for public transport in their area of responsibility. The public authorities must cooperate with each other and with local municipal and provincial associations in the preparations for the definition of the level of service.

According to section 5 of the Public Passenger Transport Act, the public authorities responsible for the transport operated in accordance with the Regulation on Public Passenger Transport Services are responsible for the definition of the services. The planning of routes and timetables of such transport services may be the responsibility of the transport operator or the authority, or it may be shared between them.

According to section 6 of the Public Passenger Transport Act, the competent public authorities must plan public transport services as predominantly regional or territorial units in order to achieve a functioning public transport network. In planning public transport, public authorities cooperate with each other and with the other municipalities.

According to section 12 of the Public Passenger Transport Act, the regional municipal authority grants permission for the operation of regular transport services operated within its territory only.

According to section 14 of the Public Passenger Transport Act, the competent authorities decide to organise public transport services in their territory or parts thereof in accordance with the Regulation on Public Passenger Transport Services.

Brief summary of the facts and procedure

Cooperation contract regarding social and health services

- 1 The decisions of the Commission on Basic Social Provisions of Porin kaupunki deal with transport services within the meaning of the Laki vammaisuuden perusteella järjestettävistä palveluista ja tukitoimista 380/1987 (Disability Services and Support Act No 380/1987), for which the municipality is responsible in accordance with section 3 of the aforementioned Act.
- 2 Porin kaupunki, the town of Ulvila and the municipality of Merikarvia entered into a cooperation agreement on the organisation and provision of social and

health services on 18 December 2012, in which they agreed to transfer responsibility for the organisation of health and social care services to Porin kaupunki. In the agreement, Porin kaupunki is defined as the municipality responsible and as the principal municipality, and the town of Ulvila and the municipality of Merikarvia are defined as contracting municipalities.

- 3 Under the cooperation agreement an area of cooperation was formed, the administration of which is organised in accordance with sections 76 and 77 of Local Government Act No 365/1995. Under the terms of the cooperation agreement, the system of services constitutes a single unit developed jointly by the municipality responsible and the contracting municipalities.
- 4 In operational terms and with regard to financial and administrative provisions, the activity covered by the cooperation agreement falls under the organisation and administration of the municipality responsible.
- 5 The responsibility for the organisation of the services within the area of cooperation lies with the Commission on Basic Social Provisions of Porin kaupunki, organised as a joint committee and composed of 18 members, comprising three members from the town of Ulvila, two members from the municipality of Merikarvia and the remaining members from Porin kaupunki.
- 6 The Commission on Basic Social Provisions bears the overall responsibility for the services, the system of services and the budget for the services. Within its field of responsibility, the Commission on Basic Social Provisions approves contracts and adopts decisions regarding services and fees to be levied.
- 7 The costs are distributed in accordance with the use of the services such that each municipality bears the actual costs incurred from the provision of the services used by its respective population and inhabitants for which it is responsible.

Regional transport and related contracts

- 8 Porin kaupunki is the regional municipal authority within the meaning of section 12 of the Public Passenger Transport Act for the area formed by the municipalities of Harjavalta, Kokemäki, Nakkila, Pori and Ulvila.
- 9 In its capacity as the regional municipal authority, Porin kaupunki is the competent authority for road transport within the meaning of the Regulation on Public Passenger Transport Services in accordance with section 14 of the Public Passenger Transport Act.
- 10 Porin kaupunki and the towns of Harjavalta, Kokemäki and Ulvila and the Municipality of Nakkila entered into a cooperation agreement effective 1 July 2012 to agree provisions regarding the tasks assigned to the authority with territorial responsibility in the Regulation on Public Passenger Transport Services and the Public Passenger Transport Act.

- 11 According to the cooperation agreement, the contracting municipalities carry out the above tasks pursuant to sections 76 and 77 of the Local Government Act No 365/1995 by Porin kaupunki setting up a joint body.
- 12 The public transport committee of the Pori region, five members of which are appointed by Porin kaupunki and one member each by the other contracting municipalities, acts as the competent authority for local public transport in Pori and the transport operated exclusively in the territory formed by the contracted municipalities.
- 13 In accordance with the Regulation on Public Passenger Transport Services, the costs of the transport services procured are distributed between the contracting municipalities as decided separately by the public transport committee.
- 14 The public transport committee of the Pori Region operates, in accordance with the cooperation agreement approved by the municipalities, in the area of Porin kaupunki, the towns of Ulvila, Harjavalta and Kokemäki and the municipality of Nakkila as joint competent regional authority for public transport and reports to the municipal assembly and municipal government of Pori. The committee is responsible for the tasks assigned to the authority in charge of public transport in accordance with the Regulation on Public Passenger Transport Services and the Public Passenger Transport Act.

Summary of proceedings and the main arguments of the parties

Markkinaoikeus (Market Court)

- 15 The Markkinaoikeus (Market Court), which dealt with the case at first instance, decided that Porin Linjat Oy should not be regarded as a related entity of Porin kaupunki within the meaning of section 10 of the Public Procurement Act. The court held that insufficient evidence had been adduced in the case to show that there had been another ground for the decision to refrain from putting the contract out to tender as provided for in Public Procurement Act.
- 16 According to the grounds for its decision cited by the Market Court, Porin kaupunki is the regional municipal authority within the meaning of the Public Passenger Transport Act, which authorises the operation of regular transport services exclusively in the territory covering the municipalities of Harjavalta, Kokemäki, Nakkila, Pori and Ulvila. The court held that Porin Linjat Oy operated regular transport services in the territory of the other municipalities in question on the basis of a regular transport services permit granted by the public transport committee of the Pori region. The other municipalities mentioned in the arrangement each had a representative in the public transport committee of the Pori region but did not have any position of control in Porin Linjat Oy. Thus, the court found, the revenue earned by Porin Linjat Oy from public transport of the aforementioned municipalities could not be taken into account in calculating the

turnover, even if the transport operation on the part of Porin Linjat Oy was based on the orders of the committees of Porin kaupunki, which holds a position of control in Porin Linjat Oy.

- 17 According to the grounds for its decision cited by the Market Court, the amount of the turnover related to Porin kaupunki does not amount to a level which the court deems sufficient to find in favour of a related entity. The court held that Porin Linjat Oy did not carry out the essential part of its activities together with a contracting authority that is the sole shareholder of the company.
- 18 On 4 May 2015, the Market Court revoked the decisions of the Commission on Basic Social Provisions of Porin kaupunki as regards the transport services in question to the extent that the option periods referred to therein had not yet expired.

The appeal before the Supreme Administrative Court

- 19 Porin kaupunki appealed to the Supreme Administrative Court and claimed that Porin Linjat Oy was a related entity of Porin kaupunki.
- 20 According to Porin kaupunki, Porin Linjat Oy was a company which was owned and controlled by Porin kaupunki and which neither participated in any road transport-related calls for tenders as a bidder since 2009 nor competed on the markets in any other way. Porin Linjat Oy, as an in-house entity, met the conditions for an internal operator as set out in the Public Passenger Transport Services Act.
- 21 The transport services operated by Porin Linjat Oy constituted ‘transport’ within the meaning of the Regulation on Public Passenger Transport Services, which the public transport authority provided as an in-house service. The company operated routes assigned to it by the public transport committee.
- 22 On the basis of legislation and the cooperation agreement, the towns of Harjavalta, Kokemäki and Ulvila and the municipality of Nakkila transferred the operation of public transport services to Porin kaupunki as the municipality responsible. The transport services provided on the territory of the aforementioned municipalities, operated by Porin Linjat Oy on the instructions of Porin kaupunki as the competent authority, was a service carried out by Porin kaupunki and the resulting turnover constituted turnover of company related to Porin kaupunki. It follows from the above that more than 90% of the turnover of Porin Linjat Oy originated from Porin kaupunki and the users of its public transport services.
- 23 Porin Linjat Oy stated that it approved the pleadings of Porin kaupunki in the appeal proceedings.
- 24 Lyttylän Liikenne Oy, which commenced legal proceedings at the Market Court because of the contract award, argued that Porin Linjat Oy did not carry out the essential part of its activity together with Porin kaupunki, which held all shares in

the company, and that Porin Linjat Oy was therefore not a related entity of the city.

Brief summary of the basis for the reference

- 25 The Supreme Administrative Court states that the cooperation between the municipalities of the Pori region regarding the provision of social, health and public transport services is based on the model of the ‘municipality responsible’.
- 26 It needs to be determined in the case whether it can be assumed that, in the case of cooperation between municipalities based on the model of the ‘municipality responsible’, the contracts awarded by the municipality responsible are not covered by the obligation to tender if the municipality responsible or its related entity acquires services for the local residents of the municipalities within the area of cooperation.
- 27 In the light of the case-law of the Court of Justice of the Union, there are three categories of cases where there is no obligation to put a contract out to tender. The first category involves a transfer of responsibilities between public authorities, the second a horizontal cooperation between contracting authorities and the third an award to a related entity. The present case requires an examination of all these points of view.

Cooperation for purposes of organising social and health services

- 28 The submission of a request for a preliminary ruling is required in this case, firstly because it is not clear whether a cooperation of municipalities for purposes of organising social and health services based on the model of the ‘municipality responsible’ constitutes a transfer of responsibility not governed by the public procurement rules, a horizontal cooperation not subject to the obligation to tender or another case altogether.
- 29 The Supreme Administrative Court takes the view that the question of whether an arrangement based on a cooperation agreement regarding social and health services meets the conditions for a transfer of responsibility not covered by the 2004 Public Procurement Directive is open for interpretation. It is necessary to determine whether the conditions laid down in Case C-51/15 *Remondis*, have been met if the public body to which responsibility has been transferred discharges this responsibility independently and under its own responsibility even if it is an arrangement governed by a contract between municipalities of the type in question here, in which the other municipalities have transferred responsibility for the organisation of legally prescribed services to the municipality responsible.
- 30 Another matter that will arguably have to be determined is whether the social and health services based on a cooperation agreement between the municipalities meet the conditions of a permitted cooperation between contracting authorities. In the view of the Supreme Administrative Court it is possible that the arrangement in

question meets the conditions of such cooperation. The legally prescribed responsibility for the organisation of services — here for the organisation of transport services for persons with disabilities — remains with a contracting municipality even if it is implemented between municipalities following an arrangement based on the model of the ‘municipality responsible’. It constitutes a service for the common good and all municipalities participating in the arrangement have a legal obligation to organise such service.

- 31 If the cooperation agreement in question is considered to be a transfer of responsibility not covered by the scope of the 2004 Public Procurement Directive, it remains unclear whether the public body to which responsibility has been transferred is regarded as the contracting authority and whether, in its position as the municipality responsible, it may award the service contracts in question to its related entity without a call for tenders even if — without the principle of ‘municipality responsible’ — the award of the service contracts would have been the responsibility of the municipalities which transferred the responsibility.
- 32 If one takes the view that this constitutes a horizontal cooperation between contracting authorities which is not subject to an obligation to tender, it is equally necessary to determine whether the municipality holding the position of municipality responsible in this regard may use one of its related entities to organise the services for the other contracting authorities participating in the cooperation or whether that would then amount to an award of public contracts which requires a call for tenders.
- 33 In the view of the Supreme Administrative Court, the judgment in case C-51/15 *Remondis* did not specifically deal with the question whether the measures taken after a transfer of responsibilities were subject to the obligation to tender under the public procurement rules.
- 34 In the view of the Supreme Administrative Court, if this constituted a case of a transfer of responsibilities, the public body to which responsibility has been transferred, i.e. Porin kaupunki, could be regarded as the contracting authority which could award the contracts for transport services to its related entity for the entire area of cooperation without a call for tenders.
- 35 If, on the other hand, this case constituted a valid horizontal cooperation, the Supreme Administrative Court was of the view that the other municipalities in the area of cooperation could grant the aforementioned transport services to Porin kaupunki without a tender process, provided that Porin kaupunki would have put them out for tender for itself and the other municipalities or provided the service itself. On the other hand, it is necessary to determine whether a contracting authority participating in the cooperation may award service contracts to a related entity of another contracting authority involved in the cooperation without a call for tenders, bearing in mind that the cooperation must not favour one private service provider over its competitors.

Cooperation in connection with regional transport and position as a related entity

- 36 Porin kaupunki has not carried out the transport of persons with disabilities itself; instead, the transport services have been carried out by Porin Linjat Oy, which is legally separate from the city, has its own legal personality and is wholly owned by the city.
- 37 Porin kaupunki is the competent authority within the meaning of the Regulation on Public Passenger Transport Services and the Public Passenger Transport Act; the responsibilities assigned to it and its position as the municipality responsible were agreed in the cooperation agreement regarding public transport services entered into between Porin kaupunki, the towns of Harjavalta, Kokemäki and Ulvila and the municipality of Nakkila.
- 38 The other municipalities in the pertinent territory mentioned above do not exercise any control in Porin Linjat Oy because the municipalities in question do not hold any shares in the company and do not have any other means of influencing its decisions. Therefore, there are no grounds to argue that Porin Linjat Oy is a joint related entity of the municipalities in the pertinent territory.
- 39 The position as a related entity in relation to Porin kaupunki has been established with regard to the criterion of control, but it remains unclear whether the criterion of attribution of the activity has been met as well as the question of the extent to which the activity of Porin Linjat Oy can be taken into account when calculating the turnover related to Porin kaupunki.
- 40 The Supreme Administrative Court considered whether, by virtue of its position as competent authority for transport and municipality responsible, Porin kaupunki can be regarded as a contracting authority given that it awards service contracts for the organisation of regional transport in the territory for which it is responsible. Porin kaupunki, however, also awards service contracts on behalf of the other municipalities which bear a share of the cost of the service contracts awarded. If Porin kaupunki was considered to be a contracting authority with regard to the entire regional transport services, the Supreme Administrative Court held that the whole of the turnover of these transport services would have to be taken into account in the calculation of the turnover of Porin Linjat Oy related to Porin kaupunki.
- 41 According to the statement made by Porin kaupunki, Porin Linjat Oy is its internal operator within the meaning of the Regulation on Public Passenger Transport Services, which did not participate in transport-related calls for tender since 2009. If the regional transport services operated by Porin Linjat Oy is not taken into account when calculating the turnover related to Porin kaupunki, this means that Porin Linjat Oy is unlikely to realise a turnover that meets the conditions of a related entity in relation to Porin kaupunki.
- 42 To the knowledge of the Supreme Administrative Court, there is no decision within the body of case-law of the Court of Justice in which the court has given its

view on the attribution of an activity of an entity which is under the control of a contracting authority in the same circumstances as those in the case at hand.

WORKING DOCUMENT