Case C-332/20

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:

22 July 2020

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

13 February 2020

Appellants:

Roma Multiservizi SpA

Rekeep SpA

Respondents:

Roma Capitale

Autorità Garante della Concorrenza e del Mercato

Subject of the action in the main proceedings

The dispute concerns the legality of the decision by a contracting authority governed by public law that has excluded a consortium formed of two undertakings from a call for tenders to select the private partner in the future public-private company, because its own indirect shareholding in one of those two undertakings meant that the ceiling on ownership by the contracting authority in the future public-private company – set as 51% – was exceeded.

Subject matter and legal basis of the reference

Interpretation of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU and of Article 107 TFEU with reference to the Italian legislation placing limits on public participation in semi-public companies.

Article 267 TFEU.

Questions referred

1. For the purposes of determining the minimum limit of 30% participation by the private partner in a future semi-public company – the limit deemed appropriate by the Italian legislature in implementation of the principles [of EU law] set in relation to European case-law – is it compatible with [EU] law and the correct interpretation of recitals 14 and 32 and Articles 12 and 18 of Directive 2014/24/EU and of Article 30 of Directive 2014/23/EU, with reference also to Article 107 TFEU, for consideration to be given solely to the legal form/on-paper composition of that partner or may – or in fact must – the authority launching the tender also consider its own indirect participation in the private partner submitting a bid?

2) If the answer to the above question is yes, is it consistent and in line with the principles [of EU law], and in particular with the principles of fair competition, proportionality and appropriateness, for the authority launching the tender to be able to exclude from the tender a private partner submitting a bid, where the effective participation of that private partner in the future semi-public company is in fact less than 30%, on account of the direct or indirect public participation identified?

Provisions of EU law cited

Directive 2014/24/EU, and in particular recitals 14 and 32 and Articles 12 and 18

Directive 23/2014/EC, and in particular Articles 3 and 30

The Court's judgment of 15 October 2009 in Case C-196/08, *Acoset*

The Court's judgment of 22 December 2010 in Case C-215/09, *Mehiläinen Oy*

Commission interpretative communication of 12 April 2008

European Commission Green Paper of 30 April 2004

Article 106 TFEU

Provisions of national law cited

Decreto legislativo del 19 agosto 2016, n. 175, «Testo unico in materia di società a partecipazione pubblica» (Legislative Decree No 175 of 19 August 2016, Consolidated text on publicly owned companies, and in particular the following articles.

Article 4 lays down the objectives that may be pursued by public administrations through the creation of companies in which they have shareholdings: on the one hand, these must be companies intended to undertake activities that are strictly necessary to achieve the institutional objectives of the body concerned. On the other hand, the activities to be undertaken must fall within those expressly indicated by paragraph 2 of that text, namely the following in particular: (a) the generation of a service of general interest, including the establishment and operation of networks and facilities used for those services; (b) the design and construction of public works on the basis of a programme agreement between public administrations; (c) the construction and operation of public works or the organisation and management of a service of general interest by means of a partnership contract.

Article 7(5) lays down that private partners must first be identified through a public and open tendering procedure, under Article 5(9) of decreto legislativo del 18 aprile 2016, n. 50 (Codice dei contratti pubblici) (Legislative Decree No 50 of 18 April 2016 (Public Procurement Code)), while Article 17(2) states that 'The private partner must meet the qualification requirements laid down in the legal or regulatory provisions in relation to the purpose for which the company has been created'. These qualification requirements (general and special, technical and economic/financial) must be specified in the invitation to tender.

Article 17(1) states that 'The participation in the semi-public company by the private partner may not be less than 30% and that partner must be selected using a public and open tendering procedure … That procedure must be intended to cover both the subscription or acquisition of the shareholding by the private partner and the award of the contract or concession that is the sole purpose of the business undertaken by the semi-public company'.

Outline of the facts and the main proceedings

1 The Comune di Roma (Municipality of Rome), referred to as Roma Capitale, launched a tender for the selection of a private partner and for the award of a contract for the Roma Capitale integrated school service to a semi-public company, setting the participation by Roma Capitale as 51% and the participation by the private partner as 49% and laying down that the entire operational risk was to be borne by that latter party.

2 The bidders in the tender included the newly created consortium of Roma Multiservizi SpA and Rekeep SpA, which was, however, excluded, on the basis that Roma Multiservizi SpA is owned 51% by the company AMA SpA, which is wholly owned by the contracting authority, Roma Capitale. The total direct and indirect participation by Roma Capitale would therefore give that body an effective participation of 73.5% in the newly created semi-public company, thus exceeding the ceiling of 51% set for the tender.

3 By two separate actions, Roma Multiservizi SpA and Rekeep SpA requested that the Tribunale amministrativo regionale del Lazio (Lazio Regional Administrative Court, Lazio TAR) overturn the exclusion decision. Both companies also requested, in the alternative, that the matter be referred to the Court for a preliminary ruling, to ensure that the national legislation on the selection of private partners for newly created semi-public companies is interpreted correctly.

4 The Lazio TAR dismissed both actions, holding that they were unfounded. Both companies filed appeals before the referring court, reiterating the request for referral to the Court for a preliminary ruling.

Principal arguments of the parties to the main proceedings

The appellants put forward similar pleas in law. In particular, Roma Multiservizi SpA asserted that:

a) with regard to the private partner, the invitation to tender did not expressly establish that the private partner's 49% share could not be achieved with an indirect public participation;

b) the exclusion decision was, in any case, vitiated by a breach of the principle whereby the exclusion clauses must be exhaustive and final.

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

5 The referring court first explains the abovementioned Italian legislation implementing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, which regulates semi-public companies, among other things. On the basis of that legislation, the public administration may choose to operate certain activities either through 'in-house' management using a company wholly owned by that administration or through the creation of a semi-public company for that purpose. The legislation provides a specific framework for the latter model to ensure that it is compatible with EU law. This therefore ensures consideration of the observations made in the EU case-law in respect of the previous Italian provisions, which laid down that only companies that were predominantly or wholly owned by the government or public bodies, directly or indirectly, were permitted to conclude agreements with public administrations – without tenders – in relation to activities or services. In support of those observations, it was in fact noted that the direct award of the service to a semi-public company could be used as a means of evading the principle of free competition: exemptions to that principle are permitted only where they are appropriately justified by the need to perform a mission of general economic interest, and thus with a view to achieving a fruitful public-private partnership, as indicated in the European Commission's Green Paper of 30 April 2004.

6 On this point, it is necessary to clarify and distinguish the (profit-making) purpose of a semi-public company from that of a public administration, which is undeniably public. This has the consequence that the activities of a semi-public company and the services it offers are subject to accessibility conditions that a completely private enterprise would not consider favourable. The maximum limit of 70% public ownership of a semi-public company therefore identifies the point beyond which the activities of that company would alter competition in the market, because it would not only make that specific sector of the market unattractive, but would make it possible for the private partner in the semi-public company to limit excessively (below 30%) the economic risk associated with the participation in the company. Furthermore, a semi-public company with a private partner identified by means of a dual-purpose tender is the outcome of the interpretation of the case-law of the Consiglio di Stato (Council of State, Italy), the referring court in this case, which has been recognised as correct by the Court (judgment of 15 October 2009, C-196/08, *Acoset*).

7 Moreover, in the light of the applicable EU law, it can be accepted that:

a) the decision by a public administration to create a semi-public company is a typical expression of the discretion conferred by the law on public administrations to enable them to achieve the public interest objectives attributed to them;

b) the private partner, which must be selected through a public tendering procedure, must be operational and not merely a shareholder in the capital, given the specific nature of the role it must assume in implementing the company object: furthermore, the involvement of the private partner in the achievement of general interest objectives is justified specifically by the absence within the public administration of the necessary expertise, which is available to the private partner;

c) the involvement of the operational private partner must be adequate, and thus able to implement the company object. This adequacy has been determined by the national legislature, specifically to ensure compliance with the principles of EU law, as a minimum participation of 30%. Consequently, a participation below that threshold is in itself incapable of effectively achieving the company's object;

d) at the same time, the public participation in a semi-public company must not exceed 70%.

8 To resolve the dispute, the referring court must establish whether, for the purposes of ensuring the correct threshold for participation in the newly created semi-public company (no more than 70% public participation, no less than 30% private participation), reference should be made only to the legal nature of the private partner (which in purely 'formal' terms is a private company limited by shares) or, where that private partner has public participation, whether consideration should

also be given to the 'substantive' aspect of that participation. The former case – as asserted by the appellants – would favour the equal treatment of bidders and the principle of non-discrimination, as well as the more general principle of freedom of private economic enterprise. The latter case, by not taking into account the public participation, could potentially circumvent national law, could create a situation of market inefficiency and would infringe the principle of fair competition, because it would permit a private partner to enjoy unfairly the benefits of public participation. On this second point, the decision by a public administration (in this case, Roma Capitale) which specifically assesses the composition of partners that intend to bid for the selection of the partner in a newly created semi-public company and decides to exclude a bidder where that administration owns a significant portion of its capital, should be considered consistent with national constitutional principles and with the principles under EU law of efficiency, effectiveness, adequacy and proportionality, in relation to the principles of fair competition, equal treatment and non-discrimination. The choice of one or other interpretation will resolve the dispute in one way or in the exact opposite way, and it is therefore important to obtain a preliminary ruling on this matter from the Court of Justice.