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ΔΙΚΑΣΤΗΡΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ  
COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES  
COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES  
CÚIRT BHREITHIÚNAIS NA gCÓMHPHOBAL EORPACH  
CORTE DI GIUSTIZIA DELLE COMUNITÀ EUROPEE  
EIROPAS KOPIENU TIESA



POS BENDRIJŲ TEISINGUMO TEISMAS  
İRÓPAI KÖZÖSSÉGEK BÍRÓSÁGA  
IL-QORTI TAL-GUSTIZZJA TAL-KOMUNITAJIET EWROPEJ  
HOF VAN JUSTITIE VAN DE EUROPESE GEMEENSCHAPPEN  
TRYBUNAŁ SPRAWIEDLIWOŚCI WSPÓLNOT EUROPEJSKICH  
TRIBUNAL DE JUSTIÇA DAS COMUNIDADES EUROPEIAS  
SÚDNY DVOR EURÓPSKÝCH SPOLOČENSTEV  
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EUROOPAN YHTEISÖJEN TUOMIOISTUIN  
EUROPEISKA GEMENSKAPERNAS DOMSTOL

Press and Information

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Judgment of the Court of Justice in Case C-340/04

*Carbotermo SpA, Consorzio Alisei v Comune di Busto Arsizio, AGESP SpA*

**A MUNICIPALITY MAY AWARD A PUBLIC CONTRACT DIRECTLY TO AN  
UNDERTAKING CONTROLLED BY IT IF THE ESSENTIAL PART OF ITS  
ACTIVITIES ARE CARRIED OUT FOR THAT AUTHORITY**

*Account must be taken of all the activities which that undertaking carries out on the basis of an award made by the contracting authority, regardless of who pays for those activities and where they are carried out*

On 18 December 2003, the Comune di Busto Arsizio (Italy) awarded a contract worth EUR 8 450 000 plus VAT for the supply of fuel, maintenance and management of the heating installations in that municipality's buildings, directly to AGESP.

The Comune di Busto Arsizio holds 99.98% of the share capital of AGESP Holding, which in turn holds 100% of the share capital of AGESP. The remaining 0.02% is held by other municipalities.

In its decision, the Comune di Busto Arsizio considered that AGESP met the two conditions laid down in the Community case-law regarding the award of public procurement contracts without calls for tenders. According to the municipality, AGESP is subject to a control similar to that which the municipality exercises over its own departments and carries out the essential part of its activities with the municipality.

Two undertakings, Carbotermo SpA and Consorzio Alisei brought actions against the decisions before the Tribunale amministrativo regionale della Lombardia, which referred questions concerning the interpretation of the Directive on public supply contracts<sup>1</sup> to the Court of Justice of the European Communities for a preliminary ruling.

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<sup>1</sup> Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

*The requirement of similar control*

The Court recalls that the successful tenderer must be subject to a control enabling the contracting authority to influence that company's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions of that company.

The Board of Directors of AGESP and AGESP Holding have broad managerial powers which they may exercise independently and the Comune di Busto Arsizio does not have any particular control with which to restrict their freedom of action.

Accordingly, the Court concludes that the Comune di Busto Arsizio does not exercise over AGESP a control similar to that which it exercises over its own departments, so that **the Directive on public supply contracts precludes the direct award of the public contract in question.**

*The requirement that the successful tenderer must carry out the essential part of its activities with the controlling authority*

The Court notes that the conditions laid down by the case-law for the award of a contract without a call for tenders are aimed at preventing distortions of competition.

The requirement that the undertaking in question must carry out the essential part of its activities with the controlling authority is aimed at ensuring that the directive remains applicable whenever such an undertaking does not limit its activities to the controlling authority or authorities, but is active in the market and therefore likely to be in competition with other undertakings.

The Court holds that **that requirement is fulfilled only if that undertaking's activities are devoted principally to the controlling authority or authorities and any other activities are only of marginal significance.**

In that regard, account must be taken of all the activities which that undertaking carries out on the basis of an award made by the authority, regardless of who pays for those activities, whether it be the authority itself or the user of the services provided. The territory where the activities are carried out is irrelevant in this context.

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

*Languages available: EN, FR, DE, IT, NL, PL*

*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&Submit=rechercher&numaff=C-340/04>*

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

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