

Case C-692/23

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:

17 November 2023

Referring court:

Gerechtshof Den Haag (Netherlands)

Date of the decision to refer:

14 November 2023

Applicant:

AVR-Afvalverwerking BV

Defendants:

NV BAR-Afvalbeheer

Gemeente Barendrecht

Gemeente Albrandswaard

Gemeente Ridderkerk

NV Irado

Afvalsturing Friesland NV

Subject matter of the main proceedings

The case in the main proceedings concerns contracts awarded by three municipalities in South Holland and by an intermediary legal person for the treatment of residual household waste from those municipalities for which, according to the applicant, there was wrongly no tendering procedure.

Subject matter and legal basis of the request

The present request based on Article 267 TFEU concerns the question of whether, for the purposes of applying the ‘activity criterion’ of Directive 2014/24, which has the effect that a call for tenders is not mandatory, it is necessary to take into account the turnover of the controlled legal person itself, where it is part of a group, or the turnover of the group, and the manner in which the turnover of the group is to be determined, and, in the former case, whether the turnover of the controlled legal person should include the turnover derived from third-party users of the landfill which it operates.

Questions referred for a preliminary ruling

‘1. Should the activity criterion set out in point (b) of the first subparagraph of Article 12(3) of Directive 2014/24/EU, read in conjunction with Article 12(5) of that directive,

be interpreted as meaning that,

where the percentage of activities referred to in those provisions is determined on the basis of turnover and the controlled legal person is part of a group,

only the turnover of the controlled legal person itself should be taken into consideration, or also the turnover of affiliated or non-affiliated companies within the group, such as:

- (i) the consolidated turnover in which the turnover of the relevant legal person is to be added to that of other group entities pursuant to the national transposition of Articles 22 and 24 of Directive 2013/34/EU; or
- (ii) the turnover of the entities with which the controlled legal person constitutes an economic unit within the meaning of the concept of ‘undertaking’ under EU competition law?

2. If the answer to Question 1 is that only the turnover of the controlled legal person itself should be taken into consideration, should the activity criterion referred to in that question

be interpreted as meaning that

the turnover derived from third-party users who dispose of waste in a landfill which the controlled legal person operates on behalf of controlling contracting authorities is to be regarded as turnover achieved in the performance of tasks entrusted to that legal person by those controlling contracting authorities, having regard to the fact that the controlled legal person competes, inter alia, with private parties in operating the landfill?’

Provisions of European Union law relied on

Article 12(1), (3) and (5) of Directive 2014/24/EU ('Directive 2014/24')

Recital 1, the first sentence of recital 5, recital 31 and the first paragraph of recital 32 of Directive 2014/24

Articles 22 and 24 of Directive 2013/34/EU ('Directive 2013/34')

Provisions of national law relied on

Articles 2.24(1), 2.24a and 2.24b of the Aanbestedingswet van 2012 (Law of 2012 on public procurement; 'the Law on public procurement')

Articles 2:405, 2:406 and 2:410 of the Burgerlijk Wetboek (Civil Code; 'the BW')

Succinct presentation of the facts and procedure in the main proceedings

- 1 AVR ('the applicant') is a commercial waste processing undertaking.
- 2 In 1995, the municipalities of the province of Friesland established Afvalsturing Friesland NV ('AF') as a joint non-profit-making waste processing undertaking. AF heads a group of subsidiaries that are also active in areas other than waste processing. AF prepares consolidated financial statements in which it consolidates its own financial information with that of its subsidiaries, other group companies and other legal persons over which it can exercise dominant control or that it manages on a unified basis.
- 3 The municipalities of Barendrecht, Albrandswaard and Ridderkerk ('the BAR municipalities') are located in the province of South Holland and have established NV BAR-Afvalbeheer ('BAR') as a non-profit-making implementing body for waste management.
- 4 NV Irado ('Irado') was established by three other municipalities in South Holland as a non-profit-making implementing body for waste management and management of public spaces. Irado has had residual household waste processed by AF since 2017 and also became a shareholder in AF in that year.
- 5 On behalf of the municipalities in the province of Friesland, AF itself (that is, not one of its group companies) operates a waste disposal site ('landfill') where non-domestic residual waste is deposited, including industrial waste and waste from soil remediation.
- 6 Landfills in the Netherlands are subject to the capacity planning provided for in the third Landelijke Afvalbeheerplan (national waste management plan; 'the LAP'). As part of that planning, landfills in the Netherlands are operated both by private parties and by public bodies.

- 7 Until 31 December 2019, each BAR municipality had its own agreement with different waste processing companies and the applicant processed the residual household waste from those municipalities under those agreements. In 2019, the BAR municipalities decided to let BAR participate in Irado and to commission Irado to collect and process their residual household waste. On 13 December 2019, Irado and AF concluded an agreement relating, inter alia, to the processing of the residual household waste of the BAR municipalities. On 20 December 2019, BAR and Irado concluded a service agreement relating, inter alia, to the processing of the residual household waste of the BAR municipalities. On 31 December 2019, BAR became a shareholder in Irado.
- 8 The applicant brought actions before the rechtbank Den Haag (District Court, The Hague) seeking the annulment, termination or non-performance of the agreements concluded between Irado and AF, on the one hand, and between Irado and BAR, on the other, for which, according to the applicant, there should have been a call for tenders.
- 9 The District Court, The Hague dismissed those actions.
- 10 The applicant brought an appeal against that decision before the gerechtshof Den Haag (Court of Appeal, The Hague) and sought damages from the defendants.

The essential arguments of the parties in the main proceedings

Legal context

- 11 In its judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562, paragraph 50) (*‘Teckal’*), the Court of Justice held that the public procurement rules are not applicable where a contracting authority awards a contract to a person distinct from that contracting authority, over which the contracting authority exercises control and where that person carries out the essential part of its activities with the controlling authority. The latter condition is known as the ‘activity criterion’.
- 12 The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of public procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources. On the other hand, it should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators [recital 31 of Directive 2014/24; see also judgment of the Court of Justice of 11 May 2006, *Carbotermo and Consorzio Alisei* (C-340/04, EU:C:2006:308) (*‘Carbotermo’*), paragraph 59].
- 13 It is in that regard that the activity criterion is decisive. That criterion is met where more than 80% of the activities of the controlled legal person are carried out in the

performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority (recital 33 and Article 12(1) of Directive 2014/24). In that case, where the controlled legal person's activities are intended mostly for the contracting authority and any other activities are therefore only of marginal significance, there is no longer any genuine competition (*Carbotermo*, paragraph 62); in the reverse case, however, there is.

- 14 Furthermore, in *Undis Servizi*, the Court held that any exception to the obligation to call for tenders must be interpreted strictly (paragraph 29). Given that a public authority has the possibility of performing the tasks conferred on it in the public interest by using its own resources, the exception for 'in-house' awards is justified where the contractor is almost part of the contracting authority's internal departments (even if the contractor is an entirely separate legal entity), and that authority therefore 'uses its own resources' (paragraph 30). That requires that the contracting authority exercises over the contractor a control similar to that which it exercises over its own departments, and that that contractor performs the essential part of its activities for the benefit of the contracting authority (paragraph 31).

Arguments of the parties

- 15 In the case in the main proceedings, the central question is whether AF fulfils the activity criterion.
- 16 According to the applicant, for the purposes of applying the activity criterion, the consolidated turnover must be taken into account. In the applicant's view, reference should be made to the turnover of the group or undertaking to which the controlled legal person belongs (in the sense of an economic unit, which may consist of several natural or legal persons), since it is only in that way that it is possible to take sufficient account of the factual and economic reality. The applicant observes that AF is economically and organisationally linked to its subsidiaries, so that it is de facto a single undertaking. Taking into account only the turnover of the controlled legal person itself would lead to an unduly large number of exceptions to the applicability of Directive 2014/24 and, therefore, to less competition, which would be contrary to the objective of the public procurement rules. In addition, a controlled legal person could circumvent the 80/20 ratio by operating in a group context and, in that context, itself performing more than 80% of its activities for the benefit of the controlling contracting authorities and allowing one or more group companies to operate on the free market.
- 17 According to the defendants, the calculation of the percentage of turnover attributable to the activities carried out by AF in the performance of tasks entrusted to it by the controlling contracting authorities ('turnover from the performance of tasks') should be based on the turnover of AF itself, given that

point (b) of the first subparagraph of Article 12(3) of Directive 2014/24 refers to the activities of the *legal person* and that, under Article 12(5) of that directive, an alternative activity-based measure, such as costs incurred by the relevant *legal person* with respect to the services in question, may also be taken into account; that turnover exceeds 80%, with the result that the public procurement rules are not applicable. If the consolidated turnover were used, the turnover of other legal persons would also be included, resulting in an application *contra legem* of the activity criterion. Finally, the defendants consider that, if one were to rely on a different turnover from that of the controlled legal person, consolidated turnover would not be a good point of reference, since the consolidation rules are too technical and complex and are also subject to numerous exceptions.

- 18 As regards the second question referred for a preliminary ruling, the applicant submits that the landfill in question does not allow the disposal of residual household waste and that, at that landfill, AF is in competition with private companies, with the result that its turnover from that landfill cannot be taken into account as turnover from the performance of tasks.
- 19 The defendants maintain that the province can grant an exemption for the disposal in landfill of residual flows from the processing of household waste and refer to *Carbotermo*, in which the Court held that the turnover from disposal in landfill (‘landfill turnover’) may be regarded as turnover from the performance of tasks, regardless of whether or not the turnover is achieved with companies. It is apparent from that judgment that the activities carried out by the controlled legal person with the controlling authority or authorities pursuant to decisions to award contracts may benefit not only the controlling contracting authorities themselves, but also ‘third-party users’. Where, as in the present case, those third-party users pay for such activities, that turnover should also be taken into account as turnover from the performance of tasks.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 20 As regards the application of the activity criterion, in view of the divergent positions of the parties in that regard and the fact that the case-law cited above does not provide a solution in the present case, it is not clear to the referring court whether the turnover must be calculated by taking into account the turnover of AF itself or the turnover of the group and how, in the latter case, that group turnover is to be determined. The determination of turnover is decisive for answering the question of whether or not the public procurement rules are applicable and, therefore, for resolving the dispute in the main proceedings.
- 21 If the turnover of AF itself were to be taken into account, the question of whether AF’s turnover from the landfill can be regarded as turnover from the performance of tasks would be decisive for answering the question of whether the activity criterion is satisfied and, therefore, for resolving the dispute in the main proceedings. It follows from *Carbotermo* that the turnover achieved with third

parties may be regarded as turnover from the performance of tasks. The decisive turnover for a controlled undertaking is that achieved pursuant to decisions to award contracts, including the turnover achieved with users in the implementation of those decisions. The activities which must be taken into account are all those activities which the undertaking to which a contract has been awarded carries out as part of that contract, regardless of who the beneficiary is: the contracting authority itself or the user of the services. It is also irrelevant who pays the undertaking in question, whether it be the contracting authority or third-party users of the services (*Carbotermo*, paragraphs 65 to 67). Contrasted with this is the applicant's argument that AF, as a controlled legal person, is in competition with private parties in the context of operating the landfill, with the result that it is not entirely clear whether its landfill turnover may be regarded as turnover from the performance of tasks. The referring court is therefore also obliged to refer the second question for a preliminary ruling.

WORKING DOCUMENT